KENTUCKY LAW SUMMARY

A Timely Review of Decisions Rendered by the Kentucky Supreme Court and Court of Appeals

September 30, 2025
72 K.L.S. 9
Louisville, Kentucky

CASE DIGESTS

VERBATIM OPINIONS

COURT OF APPEALS

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TAXATION

REAL PROPERTY

ASSESSMENT OF COMMERCIAL REAL PROPERTY

BURDEN OF PROOF

SUFFICIENCY OF THE EVIDENCE

Lowe's owns and occupies 14.28 acres of land in Mt. Sterling, located in Montgomery County, which includes an approximately 111,196 square foot, free-standing, retail store, along with surrounding improvements — Building and improvements were constructed in 2007 — Lowe's has never leased its owner-occupied, built-to-suit property — Lowe's has always owned property in fee simple — There are no other national, home-improvement stores located in Montgomery County — In 2008, Montgomery County Property Valuation Administrator (PVA) first assessed property at $8,195,000 using Cost Approach with 2006 data; however, PVA continued to use this exact same value for tax purposes with no depreciation for the next 13 years — Lowe's challenged the assessment in 2020 with Montgomery County Board of Assessment Appeals, which affirmed — Lowe's then appealed to Kentucky Claims Commission, Board of Tax Appeals (Board) — Lowe's claimed fair market value of property was $4,000,000 per its expert's opinion — Board conducted evidentiary hearing — Lowe's called its expert, Kelly Fried (Fried) — Board qualified Fried as an expert, noting both her compliance with the Uniform Standards of Professional Appraisal Practice and her decades-long experience and qualifications, including as a Member of the Appraisal Institute — Board classified Fried as competent to provide opinions as to the fair cash value of Lowe's property — Fried prepared a market value of the fee simple interest in the property because Lowe's had owned and occupied it — Fried calculated value based on a Sales Comparison Approach, which is commonly called "comparables" or "comps," and an Income Capitalization Approach — Both of these approaches are statutorily recognized in KRS 132.191(2) — Fried's comparables included four sales of unleased stores and three sales of leased stores — Fried adjusted each sale to account for differences in the location and size of the real property and the conditions of the buildings — Fried adjusted leased properties' values to remove the values of the leases themselves, as there was no lease on Lowe's property — Fried used four large rental properties to derive a market rental rate — Fried's detailed analysis arrived at a final value, as of January 1, 2020, of $4,000,000 — PVA called three witnesses: the elected Montgomery County PVA (Arnold); a manager of Department of Revenue's Office of Property Valuation (Day); and its own expert (May) — Arnold testified that his only, decade-old assessment was based on the Cost Approach, but that he did not renew or update any costs for replacement or reproduction each year for any improvements — Fried testified that this Cost Approach was not relevant because of property's age — Mays later also testified that Cost Approach was not relevant — Day testified that he performed original valuation of property in 2008 using Cost Approach and that he again valued property in 2020, but using the Marshall & Swift valuation service for building costs — Day's 2020 report estimated a replacement cost of the building at $7,276, 629.99, with a depreciated value of $5,992,000 — Thus, Day did not accept PVA's $8,000,000 figure — Day's valuation also only included the building, and not the land — But, Board allowed Day to testify as a PVA witness about a cost calculation that the PVA had not used as part of the basis of its assessment — Day conceded that PVA failed to make the required deductions for depreciation, deterioration, and obsolescence in the assessments each year — Mays testified he used a Sales Comparison Approach and an Income Capitalization Approach — Using the Sales Comparison Approach, Mays valued the property at $10,750,00; however, Mays only compared six properties that Lowe's leased, and did not own, in different states around Kentucky — Mays made no adjustments for these leases; however, Mays did make other adjustments to the numbers without explanation — Using the Income Capitalization Approach, Mays valued the property at $10,550,000 — Mays used seven exclusively leased properties, six of which were built-to-suit and many of which were lease renewals — Mays made no adjustments to account for fact that Lowe's did not lease the property — In reconciling these two approaches, May valued property at $10,550,000 as of January 1, 2020 — Board determined that Lowe's failed to offer competent evidence to rebut PVA's assessment value — Board found that Fried's testimony did not constitute reliable or competent evidence to rebut PVA's valuation — Further, Board found that even if Lowe's had overcome the presumption, PVA's proof was more persuasive — Board concluded that, despite exceeding PVA's assessment by over $2 million, Mays' opinion supported the assessed value — Lowe's appealed to circuit court — Circuit court affirmed — Lowe's appealed — REVERSED and REMANDED — Legal determinations of an agency are afforded no deference on appeal — With respect to factual disputes, an agency's decision will be upheld on appeal if there was substantial evidence of probative value upon which the agency could base its decision, and the agency applied the correct rule of law to the facts before it — KRS 49.220(5) states that the assessed value shall be *prima facie* evidence of the value at which the property should be assessed — Once the taxpayer provides competent evidence to rebut the presumption, PVA has the burden of going forward with sufficient evidence to support the assessment — In instant action, Lowe's produced competent, reliable evidence in rebuttal in the form of Fried's testimony, whom Board found to be an expert qualified to render an opinion on value of the property — Fried's valuations were based on methods authorized by KRS 132.191 — As a matter of law, Board misconstrued the presumption by requiring Lowe's to prove its case during the *prima facie* phase — Under facts, Lowe's met its initial burden to overcome the statutory presumption, thereby shifting burden to PVA to produce substantial evidence to support its assessment — Only at this point should Board have addressed the weight and credibility of Fried's testimony as part of its ultimate determination of the value of the property — Once the burden shifted to PVA, Board should then have allowed PVA to submit evidence — KRS 132.690(1)(a) states, in part, that each parcel of taxable real property subject to assessment by PVA shall be revalued during each year of each term of office by the PVA at its fair cash value — PVA admitted that, in instant action, it did not comply with this duty — Fair cash value means that which a seller would willingly take, and a buyer would willingly pay — Evidence that Board accepted, and trial court affirmed, was not based on any sale — Instead it was based on Mays' use of leased properties in both his Sales Comparison and Income Capitalization Approaches — Mays determined the value of a lease to *Lowe's* in particular where a *Lowe's* building and business was already in place — Instead, Mays should have determined the free market and fair cash value of a lease to a buyer in general in Mt. Sterling — Further, Mays did not make appropriate adjustments for vacancy or collection loss due to creditworthiness of the lessees in his Sales Comparison Approach — In his Income Capitalization Approach, Mays used surveys that occurred substantially after the assessment date to reach a "value" of $10,550,000 — Mays also made lesser adjustments for the Lowe's stores — Court of Appeals noted that Lowe's did not argue, nor does it hold, that leased properties may never be used as comparables for unleased properties — In fact, Income Capitalization Approach anticipates using the value of a potential lease to estimate the present value of future benefits arising from ownership of the property — But in such cases, adjustments must be made in order to render them comparable — Lowe's has burden of proving that Mays' valuation was so flawed that it could not constitute substantial evidence — Evidence offered by PVA, in its totality, did not constitute substantial evidence — Board received relevant, competent, substantial evidence of value from Lowe's expert, Fried — Because Fried's evidence was the only evidence left of that nature, and Board had already accepted it, Board was required to adopt it — Board recognized Fried as an expert and accepted her opinions into evidence —

Lowe's Home Centers, L.L.C. v. Floyd Arnold, Montgomery County Property Valuation Administrator; Kentucky Claims Commission, Board of Tax Appeals; and Montgomery County Board of Assessment and Appeals (2024-CA-0307-MR); Montgomery Cir. Ct., Davis, J.; Opinion by Judge Eckerle, *reversing and remanding*, rendered 8/22/2025. A petition for rehearing was filed on 9/11/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Appellant, Lowe's Home Centers, L.L.C. ("Lowe's"), seeks reversal of a judgment of the Montgomery Circuit Court affirming a final order of the Appellee, the Kentucky Claims Commission, Board of Tax Appeals (the "Board"), which also upheld the assessment of Lowe's property by the Montgomery County Property Valuation Administrator (the "PVA"). We have given the matter a thorough review and careful consideration, both of the briefs and oral argument. We find that as a matter of procedure, the Board conflated the parties' burdens and misapplied the presumption of validity as to the PVA's assessment, failing to account for competent rebuttal evidence, and the Circuit Court failed to address that error. Further, and substantively, we hold that the Board's ultimate decision to uphold the assessment was based upon an incorrect standard and was not supported by substantial, compelling evidence.

Both parties agree that the PVA's continued use of 2008 values of the then-brand-new building for 2020 assessments over a decade later was improper. We further conclude that the Board's rejection of Lowe's evidence of comparable sale values, and the Board's uncritical adoption of the PVA's evidence of hypothetical leased values without any adjustments was not based upon competent or substantial evidence. Rather, because the PVA's expert relied on inapplicable and inaccurate methodologies and assumptions, and Lowe's expert based her opinions on true comparables in the open free market as Kentucky law requires, we conclude that the evidence compelled a finding in Lowe's favor. Hence, we reverse and remand with directions for the Board to adopt the assessment valuation supported by Lowe's expert.

I. Factual and Procedural Background

Lowe's owns and occupies 550 Indian Mound Drive, Mount Sterling, Kentucky (the "Property"), in Montgomery County. The Property consists of 14.28 acres of land and includes an approximately 111,196-square-foot, free-standing, retail store, along with surrounding improvements. The building and improvements were constructed in 2007. As a matter of significant, undisputed fact, Lowe's has never leased its owner-occupied, built-to-suit Property. It has always owned the Property in fee simple. There are no other national, home-improvement stores located in the entire county.

In 2008, the PVA first assessed the Property and arrived at a value of $8,195,000 using the Cost Approach[1] with 2006 data. As the building construction was brand new, the PVA did not depreciate any value. However, the PVA continued to use this exact same value for tax purposes with no depreciation for the next 13 years, when Lowe's challenged the assessment in 2020. Stated differently, and with emphasis, the PVA did not reassess the property for over a decade. It may have re-evaluated it after its expert's appraisal solely after the litigation commenced, but again, it did not re-assess the Property ever. Lowe's sought review of the assessment before the Appellee, Montgomery County Board of Assessment Appeals, which ratified the PVA's assessment.

[1] Kentucky Revised Statute ("KRS") 132.191(2)(a) defines "cost approach" as "a method of appraisal in which the estimated value of the land is combined with the current depreciated reproduction or replacement cost of improvements on the land[.]"

Lowe's then filed a petition of appeal from this decision with the Board on September 21, 2020.[2] Lowe's first asserted that it had provided evidence that the fair market value of the property was no more than $5,000,000. Lowe's later reduced the claimed value to approximately $4,000,000 with an expert's opinion. Lowe's argued that the PVA's valuations were improperly based on the value to a particular user rather than to the general market for unencumbered real property.

[2] On August 31, 2020, Governor Andy Beshear issued Executive Order 2020-708, which abolished the Kentucky Claims Commission and reassigned its review functions. Relevant to this appeal, the Order re-established the Board of Tax Appeals as part of the Office of Claims and Appeals within the Public Protection Cabinet. The General Assembly approved this reorganization through the passage of 2021 *Ky. Laws* Ch. 185, which became effective on June 29, 2021. The Board now has the authority to hear and determine appeals from final rulings, orders, and determinations of any revenue and taxation agency. KRS 49.220(2).

On October 27 and 28, 2021, the Board conducted an evidentiary hearing, noting that the PVA's assessment constitutes *prima facie* evidence of value. KRS 49.220(5). For its case, Lowe's called Kelly Fried ("Fried"). The Board qualified Fried as an expert, noting both her compliance with the Uniform Standards of Professional Appraisal Practice and her decades-long experience and qualifications, including as a Member of the Appraisal Institute. The Board classified her as competent to provide opinions as to the fair cash value of the Property. Fried prepared a market value of the fee simple interest in the Property because Lowe's had owned and occupied it. Fried calculated the value of the property based on a Sales Comparison Approach,[3] using what is commonly called "comparables" or "comps" and an Income Capitalization Approach.[4] Both approaches are statutorily recognized. KRS 132.191(2). Fried's comparables included four sales of unleased stores and three sales of leased stores. She adjusted each sale to account for differences in the location and size of the real property and the conditions of the buildings. Significantly, she adjusted the leased properties' values to remove the values of the leases themselves, as there was no lease on Lowe's Property. She used four large rental properties to derive a market rental rate. Fried's detailed analysis arrived at a final value, as of January 1, 2020, of $4,000,000.

[3] KRS 132.191(2)(c) defines "Sales Comparison Approach" as "a method of appraisal based on a comparison of the property with similar properties sold in the recent past[.]"

[4] KRS 132.191(2)(b) defines "income approach" (or "Income Capitalization Approach," as used by the experts in this case) as "a method of appraisal based on estimating the present value of future benefits arising from the ownership of the property[.]"

The PVA called three witnesses at the hearing: Floyd Arnold, the elected Montgomery County PVA ("Arnold"); Robert Day, a manager of the Department of Revenue's Office of Property Valuation ("Day"); and its own expert, Keith Mays ("Mays"). Arnold testified that since the original assessment of the brand-new building and land in 2008, he and his office had not revalued the property, but had simply left untouched the same assessed value for 13 years. His only, decade-old assessment was based on the Cost Approach, but he did not renew or update any costs for replacement or reproduction each year for any improvements. Fried testified that this Cost Approach was not relevant here because of the Property's age. Mays, the PVA's own expert, would testify to the same.

Day testified that he performed the original valuation of the Property in 2008 using the Cost Approach, and again he valued the Property in 2020, but using the Marshall & Swift valuation service[5] for building costs. Day's 2020 report estimated a replacement cost of the building at $7,276,629.99, with a depreciated value of $5,992,000. Thus, even Day, who was qualified as an expert during the hearing, did not accept the PVA's $8,000,000 figure. Day's valuation also only included the building and not the land. But the Board allowed Day to testify as a PVA witness about a cost calculation that the PVA had not used as part of the basis of its assessment. Finally, Day conceded that the PVA failed to make the required deductions for depreciation, deterioration, and obsolescence in the assessments each year.

[5] The Marshall & Swift Valuation is a commercially-available service provided by CoreLogic, Inc. The service, which employs the Cost Approach, is widely used by governmental agencies, including the Revenue Cabinet, to place a value on real properties for tax-assessment purposes. It is also widely used to value real properties for insurance, accounting, tax, construction, banking, and financial purposes. *See* https://www.cotality.com/products/marshall-swift (last accessed Jun. 24, 2025).

Mays testified that he applied a Sales Comparison Approach and an Income Capitalization Approach to place a value on the Property (as did Fried for Lowe's). Using the Sales Comparison Approach, Mays testified that he arrived at a value of $10,750,000. However, Mays only compared six properties that Lowe's leased – and did not own – in different states around Kentucky. He made no adjustments for these leases; he did make other adjustments to the numbers without explanation. And using the Income Capitalization Approach, Mays reached a value of $10,550,000. He did so by using seven, exclusively leased properties, six of which were built-to-suit and many of which were lease renewals. Again, he made no adjustments to account for the undisputed fact that Lowe's did not lease the Property. In reconciling these two approaches, Mays arrived at a value, as of January 1, 2020, of $10,550,000. In his testimony, Mays had to adjust his figures downward because he had used the wrong square footage in his report.[6]

[6] In his report, Mays arrived at a value of $11,750,000 using the Sales Comparison Approach, $11,400,000 using the Income Capitalization Approach, and $11,400,000 after reconciling these values. But in his testimony, Mays admitted that he based these values on an incorrect calculation of the building's square footage, and he provided the revised values.

In an Order entered on April 27, 2022, the Board accepted Arnold's 13-year-old assessment of the Property at a value of $8,195,000. It thus rejected both experts' valuations, as well as Day's testimony.

The Board first concluded that Lowe's failed to offer competent evidence to rebut the PVA's assessment value. The Board heavily criticized Fried's comparison of the sales of four vacant stores. The Board also took issue with Fried's application of the Income Capitalization Approach. Thus, the Board determined that Fried's testimony did not constitute reliable or competent evidence to rebut the PVA's valuation.

The Board also found that, even if Lowe's had overcome the presumption, the PVA's proof was more persuasive. The Board preferred Mays' comparables, which all contained leases, even though Lowe's Property does not. Most notably, the Board emphasized that none of Mays' comparable properties were vacant as of the valuation date. Thus, the Board concluded that, despite exceeding the PVA's assessment by over $2 million, Mays' opinion supported the assessed value.

Lowe's sought review of the Board's decision in the Montgomery Circuit Court, pursuant to KRS 49.250 and KRS 13B.140. After reviewing the evidence, the Circuit Court concluded that the Board's rejection of Fried's valuation and its acceptance of Mays' valuation was supported by substantial evidence. This appeal followed. Additional facts will be set forth below as necessary.

II. Analysis

KRS 13B.150(2) sets forth the standard of appellate review of factual determinations from a final order of an administrative agency as follows:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Without support of substantial evidence on the whole record;
>
> (d) Arbitrary, capricious, or characterized by abuse of discretion;
>
> (e) Based on an *ex parte* communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
>
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
>
> (g) Deficient as otherwise provided by law.

And by the same statutory authority, in matters of law the Court of Appeals reviews *de novo* the agency's decisions as to purely legal issues. KRS 13B.150(3).

Legal determinations of the agency are thus afforded no deference by this Court. With respect to factual disputes, we will uphold the agency's decision if there was substantial evidence of probative value upon which the agency could base its decision, and the agency applied the correct rule of law to the facts before it. *Kentucky Unemployment Ins. Comm'n v. Murphy*, 539 S.W.2d 293, 294 (Ky. 1976). "'[S]ubstantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) (citations omitted).

On appeal, Lowe's asserts an error of law with regard the statutory presumption of validity of the PVA assessment and the shifting, legal burdens applied to the parties. For its second argument, Lowe's cites an error of fact and law in that the Board's final determination lacked the support of substantial evidence of the whole record. Lowe's is correct on both grounds, and the Board's decision – as well as the Circuit Court's affirmance of it – cannot stand and must be reversed. We will address each in turn.

A. Presumption of Validity and the Parties' Shifting Burdens

In resolving disputes of this nature, KRS 49.220(5) provides that "[t]he assessed value shall be *prima facie* evidence of the value at which the property should be assessed." The Kentucky Supreme Court has interpreted this provision as granting a presumption of validity to the estimated property tax assessment and placing the burden of establishing that the assessment was incorrect upon the taxpayer. *Revenue Cabinet, Commonwealth of Ky. v. Gillig*, 957 S.W.2d 206, 209-10 (Ky. 1997).

This Court has further explained that this presumption of validity is not evidence, but it "serves in place of evidence until the opposing party comes forward with his proof, whereat it disappears. It has no weight as evidence and is never to be considered in weighing evidence." *Kroger Ltd. P'ship I v. Boyle Cnty. Prop. Valuation Adm'r*, 610 S.W.3d 332, 337 (Ky. App. 2020) (quoting *Evans Oil & Gas Co. v. Draughn*, 367 S.W.2d 453, 454 (Ky. 1963), and *People ex rel. Wallington Apartments v. Miller*, 288 N.Y. 31, 33, 41 N.E.2d 445, 446 (1942)). Once the taxpayer provides competent evidence to rebut the presumption, the PVA has the burden of going forward with sufficient evidence to support the assessment. *Id.*

Here, the PVA takes the position that the Board had the discretion to assess the weight and credibility of Fried's testimony and opinions to determine whether Lowe's successfully rebutted the presumption. In response, Lowe's argues that Fried's testimony was sufficient to rebut the presumption that originally existed in favor of the PVA's assessment, and that the Board improperly assessed the weight and credibility of her testimony afterward.

The preliminary inquiry for this Court is to determine what evidence qualifies as "competent" such that it is sufficient to rebut the presumption in favor of the PVA's assessment. In *Boyle*, this Court first looked to the definition of "*prima facie* evidence," which means, "evidence which if unrebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion to support which it has been introduced but it does not shift the general burden of proof, and stands only until the contrary is shown." *Prudential Ins. Co. of Am. v. Tuggle's Adm'r*, 254 Ky. 814, 72 S.W.2d 440, 443 (1934) (citation omitted). *See also* Black's Law Dictionary (11th ed. 2019) (defining "*prima facie evidence*" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced").

In light of this definition, the Court in *Boyle* held that the presumption was rebutted once the taxpayer presented expert testimony supporting a contrary value and evidence that casted doubt upon the sufficiency of the PVA's assessment. 610 S.W.3d at 337. In *Boyle*, the PVA presented no expert testimony either supporting its assessment or challenging the conclusions of the taxpayer's expert. *Id.* at 337-38. Indeed, the PVA there only presented the summary valuation made by an employee of the Revenue Cabinet. Moreover, the PVA did not call that employee to testify regarding his basis for arriving at that valuation. *Id. at 338.* In the absence of any competent evidence, this Court concluded that the Board could not disregard the taxpayer's expert testimony without providing any basis for rejecting his conclusions. *Id.*

Kentucky case law does not delineate the type or amount of proof with exaction that a taxpayer must present to rebut the statutory presumption of an assessment's validity. But considering the nature of *prima facie* evidence, we conclude that, for rebuttal, Lowe's bore the burden of producing competent and reliable evidence to rebut the presumption of the assessment's validity created by KRS 49.220(5). But while Lowe's had the burden of *production* of this evidence, it did not carry the burden of *proof or persuasion* at that point. Rather, precedent is clear that once Lowe's produced the evidence, the burden shifted back to the PVA to produce evidence in support of the assessment. *Boyle*, 610 S.W.3d 337-38.

In this case, Lowe's produced competent, reliable evidence in rebuttal in the form of the testimony of Fried, who the Board found to be an expert qualified to render an opinion regarding the value of the Property. Furthermore, as noted, Fried's valuations were based upon a Sales Comparison Approach and an Income Capitalization Approach, the very methods authorized by KRS 132.191. We find that, as a matter of law, the Board misconstrued the presumption by requiring Lowe's to prove its case during the *prima facie* phase.

Under these circumstances, we conclude that Lowe's met its initial burden under the law of producing, or presenting, expert testimony to rebut the presumption favoring the PVA's assessment. Lowe's production of Fried's detailed testimony, analysis, and report was more than enough to meet its burden and overcome the statutory presumption.

Moreover, every witness maligned the PVA's assessment here, even those that the PVA called on its behalf. Both Day and Mays criticized the Cost Approach that the PVA continued to use for a 13-year-old Property without any depreciation whatsoever. There is no authority for the continued treatment of Property as brand new for over a decade, and the PVA's own witnesses admitted as much. If the PVA's witnesses and Fried's testimony were deemed insufficient to rebut a presumption, as they were here, we question what type of proof could ever be sufficient.

Again, the presumption is not evidence under the law; only the proof in rebuttal is. And Lowe's considerable rebuttal was solid. The PVA's labelling at oral argument of Lowe's proof as "compelling but non substantial" is a distinction without a difference. The Board committed clear error in concluding that Lowe's failed to rebut the presumption, and that the PVA's old assessment was entitled to retain a presumption of correctness. As a matter of law, Lowe's expert analysis in rebuttal alone was sufficient for the case to proceed. Lowe's satisfaction of this duty was imminently apparent, and the Board had no legal basis to determine otherwise. The Circuit Court should not have affirmed this irregularity.

Once Lowe's met its burden, the Board was then required to place the burden on the PVA to produce evidence in support of the assessment. Again, the Board not only conflated the burdens here, but also failed to shift the burden from Lowe's to the PVA.

This failure to recognize which party should be producing what evidence and when contaminated the proceedings and the orderly production of proof. But, if we segregate the evidence – which the Board should have done but did not do – after Lowe's met its burden of rebutting the presumption, the burden then shifted to the PVA to produce substantial evidence in support of its assessment.

Only then should the Board have addressed the weight and credibility of Fried's testimony as part of its ultimate determination of the value of the Property. While the Board did admit the PVA's proof in the form of three witnesses, it did so in an improperly combined fashion. It weighed the evidence submitted by both parties at the outset to determine if one party rebutted the presumption. This weighing of the proof should have only occurred if the Board found that Lowe's rebutted the presumption.

But it found that Lowe's failed to rebut the presumption. If that were true, the PVA should not have been required to submit any evidence. These fundamental, legal errors in the proceedings below warrant reversal.

B. Substantial Evidence

As Lowe's clearly presented sufficient evidence to rebut the presumption, the burden should have shifted to the PVA, which the Board should then have allowed to submit evidence. As the evidence did come in anyway (improperly), Lowe's still retained the ultimate burden of proof and risk of non-persuasion. *Boyle*, 610 S.W.3d at 337. Because the Board allowed all of the convoluted proof into the proceedings, we will address it substantively here.

Unlike in *Boyle*, the PVA in this case responded with evidence, through the testimony of three witnesses, to support a higher valuation than what Lowe's had offered in rebuttal. Mays provided specific challenges to the assumptions that Fried had relied upon in reaching her valuation. However, the PVA's proof brought substantial problems of its own. And Fried substantially and sufficiently, if not conclusively, countered both Day's calculation using the Cost Approach and Mays' calculations using the Sales Comparison and Income-Capitalization approaches, as well as Arnold's entire approach to continued assessments of the Property.

1. The PVA's Cost Approach Valuation

Likely in part because of the erroneous manner in which the proceedings were conducted, the Board and Circuit Court overlooked an initial key point here. Each expert witness agreed that the Cost Approach is not an appropriate method to value a 13-year-old Property. Indeed, we have seen no evidence supporting the conclusion that the PVA can properly carry forward a decade-old valuation for a Property that includes a building and retail with no accounting for applicable depreciation. Even Arnold admitted that he had not updated or re-evaluated the value of the Property at any point during this period since the time that it was brand new. Yet the Board somehow rejected the testimony of all three of the PVA's own witnesses, as well as Lowe's witness, to arrive at a conclusion that the PVA's "value" is correct. There is no evidence, let alone substantial evidence, to support this finding.

Under Kentucky law, the duties of the PVA on reassessments are clear and mandated: "Each parcel of taxable real property or interest therein subject to assessment by the [PVA] shall be revalued during each year of each term of office by the [PVA] at its fair cash value in accordance with standards and procedures prescribed by the department . . . ." KRS 132.690(1)(a). The PVA admitted that he did not comply with this duty. And his was not a one-time neglect. Here, the PVA violated this statute again every single year for 13 years by failing to reassess the Property at all. It still has not done so to this day. The PVA simply carried forward the numbers from 2008 each year without any revaluation whatsoever. This means that he treated a 13-year-old building as if it were brand new. He never depreciated any amount.

Both experts, including the PVA's own, criticized this approach. Both experts agreed that a Cost Approach is thus not appropriate under these circumstances.

The very issue in this case is the Property's Fair Cash Value, which simply means that which a seller would willingly take, and a buyer would willingly pay. This value must of necessity be current and not stale. Both experts panned the use of the outmoded, aged figure. And under Kentucky precedent, the method of the PVA's assessment must be "fairly designed for the purpose of reaching, and reasonably tends to reach, an approximation of the fair voluntary sale price." *Fayette Cnty. Bd. of Supervisors v. O'Rear*, 275 S.W.2d 577 (Ky. 1955).

The statute requires that properties be "revalued" in "each year." KRS 132.690(1)(a). There simply was no revaluation here ever by the PVA. This failure repeated itself year after year. Thus, the figures used in the PVA's Cost Analysis were undisputedly older than 2008. There was no update or adjustment made to the numbers at all. And yet the Board, and the Circuit Court, affirmed the PVA's valuation. This finding is simply not based upon substantial evidence.

2. The PVA's Sale Comparison and Income Capitalization Valuations

Even though the PVA's assessment is unsubstantiated, the Board chose to leave it in place. But it also rejected all of the final valuation figures submitted by both experts using the Sales Comparison and Income Capitalization Approaches and by the Revenue Cabinet employee. It arrived at that point in large part by using Mays' opinion to discredit that espoused by Fried. Nonetheless and curiously, the Board still did not accept Mays' conclusion of value. We must address the Board's remaining findings regarding the evidence as a whole.

This is a significant case involving a lot of money. Both Day's and Mays' calculations and opinions contradicted the PVA's assessment by a substantial degree. Arnold's final figure was approximately $8,000,000. Day's number was approximately $6,000,000. And Mays opined that the value was approximately $10,000,000. These numbers – all offered by the PVA's own witnesses in evidence – are millions of dollars apart. And they are millions of dollars higher than Lowe's sole proof of approximately $4,000,000. These large, divergent numbers and discrepancies are real and significant and should have given both the Board and the Circuit Court pause.[7]

[7] The appointment of a neutral expert might have been preferable, or a mediation between the parties and their experts. At this point, however, we must base our opinion on the record we have.

And the PVA's allegation that it is in a David versus Goliath position due to the financial ability of Lowe's to continue to fight this case is as irrelevant as it is incorrect. The PVA has all the resources of the government to continue this litigation. It has employed experienced Assistant County Attorneys from different parts of the state to argue its case. It should not be heard to complain that it is not fighting an individual homeowner's assessment here.

The PVA stated at oral argument that its expert's far-higher figure shows that the PVA's assessment was not overvalued. But neither the Board nor the Circuit Court questioned how the PVA's value could be presumed correct or valid when none of its own three witnesses found it to be accurate.

Boards and Courts must make decisions as to "the weight of the evidence on questions of fact." KRS 13B.150(2). Lowe's is not asking this Court to re-weigh the evidence, and we are not permitted to do so. However, the evidence itself must obviously be relevant, competent, and reliable. This Court, in appellate review, must "reverse the final order, in whole or in part . . . if it finds the agency's final order is . . . [w]ithout support of substantial evidence on the whole record; [or] [a]rbitrary, capricious, or characterized by abuse of discretion[.]" *Id.*

The Constitution of our Commonwealth clearly mandates the type of evidence required to assess property tax. For purposes of taxation, property is assessed based on its fair cash value, "estimated at the price it would bring at a fair voluntary sale[.]" Ky. Const. § 172.

Here, the evidence that the Board accepted, and the Circuit Court affirmed, was not based on any sale at all. Rather, it was solely derived from Mays' use of leased properties in both his Sales Comparison and Income Capitalization Approaches. In other words, it was not based upon fair and voluntary sales in the free market, as required by our Constitution. And Lowe's does not lease the Property. Worse still, Mays did not make any adjustments to these leases that are not proposed for the Property to account for factors impacting value, such as lease terms and duration.

Mays used widely disparate, leased properties in both his Sales Comparison and Income Capitalization Approaches. For his Sales Comparison approach, Mays used six other Lowe's stores. However, each of those properties was subject to long-term leases to Lowe's. But there is simply no evidence to support his assertion that Lowe's would continue to occupy the Property upon a fair and voluntary sale. In fact, his claim is contrary to the only evidence of record. Thus, Mays' comparisons are of dubious, if any, usefulness because they all rest on the unsupported assumption of a lease.

Mays assumed a fact not in evidence – that any future sale would be subject to a lease to Lowe's or to a similarly creditworthy tenant. Mays took the position that the Property's value would be enhanced if sold subject to a lease agreement to a long-term, creditworthy tenant, like the other stores used in his comparables – a sale with a lease that is not anticipated here. More important, Mays' opinion is simply not based upon a sale at all that is unencumbered by his unilateral creation of a lease where none exists. His resulting attempt to estimate what the market rent for the Property might be, which led him to reach a "value" of $10,750,000, is manufactured and not based upon the evidence. We cannot find, and the Board and the Circuit Court should not have found, substantial evidence to support his numbers.

Mays' entire approach is based upon leases to Lowe's. But this analysis suffers from a critical mistake. Mays determined the value of a lease to *Lowe's* in particular where a *Lowe's* building and business was already in place. Instead, Mays should have determined the free market and fair cash value of a lease to a buyer in general in Mt. Sterling. Our very Constitution requires the assessment to be "estimated at the price it would bring at a fair voluntary sale[.]" Ky. Const. § 172. Nowhere in that requirement is a particular buyer listed or a lease mandated.

Further, the PVA stated at oral argument that Mays valued the Property at its highest and best use by valuing a lease to Lowe's. But Lowe's is using the Property now as it deems to be at its highest and best value: as an owner-occupied, non-leased Property.

Moreover, and importantly, Mays did not make appropriate adjustments for vacancy or collection loss due to the creditworthiness of the lessees in his Sales Comparison Approach. In his Income Capitalization Approach, he used surveys that occurred substantially after the assessment date to reach a "value" of $10,550,000, which he used as his final figure. He also made lesser adjustments for the Lowe's stores.

We are aware that we have previously overturned a Board's acceptance of a PVA expert's opinion of value based upon comparing a property to unadjusted leases because it lacked substantial evidence. *Kroger Ltd. P'ship I v. Jenkins*, No. 2019-CA-001133-MR, 2020 WL 4554866 (Ky. App. Jul. 17, 2020).

Of course, as the Board and the Circuit Court recognized, *Jenkins* is an unpublished opinion and, therefore, it is not binding authority. Rule of Appellate Procedure ("RAP") 41.[8] We may, however, consider the *Jenkins* case for its persuasive value. *See Turner v. Commonwealth*, 538 S.W.3d 305, 313 n.15 (Ky. App. 2017).[9] This is particularly true where, as here, there is a dearth of published, Kentucky case law on point. *Jenkins* is also factually similar to the case *sub judice*. Both parties cited and discussed it in briefing and at oral arguments. Thus, while we are not required to follow it, we will not ignore it. The reasoning in *Jenkins* is sound. And there is no contrary, Kentucky law in existence.

[8] Lowe's cites this unpublished case pursuant to RAP 41(A).

[9] We also note that the Board cited other states' unpublished decisions, which are not as persuasive as our own.

There, the PVA's appraiser used unadjusted sales of leased properties, as well as other properties that were sold as part of an investment portfolio. 2020 WL 4554866, at *10. The case solely involved the Sales Comparison Approach and not the Income Capitalization Approach. This Court did not affirm the Board's or Circuit Court's countenance of the PVA's expert's reliance on the sales of leased properties to buttress the assessment of an unleased property. We specifically criticized the expert's reliance on unadjusted leased properties as comparables. *Id.* at *9. We also explicitly held that leased properties cannot properly and exclusively be used as comparables to set values for unleased properties when determining the propriety of assessments unless adjustments are made to account for the aforementioned variables. *Id.* Our Court concluded that, without making any adjustments accommodating the separate value of the leases, the testimony by the PVA's expert did not constitute substantial evidence upon which to uphold the assessment. *Id.*; *see also Helman v. Kentucky Bd. of Tax Appeals*, 554 S.W.2d 889 (Ky. App. 1977). This Court expressly deemed the Board's reliance on the PVA's expert as "without substantial evidence," and we thus reversed the Circuit Court's affirmance. *Jenkins*, 2020 WL 4554866, at *10.

In *Jenkins*, as is the case here, a PVA exclusively offered evidence of leased property in an attempt to support an assessment of unleased property. And likewise, the taxpayer there and here offered some evidence of unleased property. We recognize, however, that, unlike the appraiser in *Jenkins*, Mays made some adjustments to the valuations to account for the leases. However, he made upward adjustments, making assumptions without foundation that a sale would include a lease, which of course did not exist at the time of valuation. Thus, although the facts of *Jenkins* are not identical, they are substantially similar. And the principles espoused there are applicable to, and resonate with, this case.

To be clear, Lowe's does not argue, and we do not hold, that leased properties may never be used as comparables for unleased properties. In fact, the Income Capitalization Approach anticipates using the value of a potential lease to estimate the present value of future benefits arising from the ownership of the Property. But in such cases, the necessary adjustments must be made in order to render them comparable. *Helman* – a binding case on which the PVA relies – elucidated several necessary factors inherent to making valuations of properties with leases:

> A number of other elements necessarily enter into the value, such as original cost, location, cost and character of improvements, rental history, location as to future growth of the adjacent area,

sales of adjacent property, sales of comparable property, type of building or property, etc.

> Where the income approach is used, all jurisdictions, including Kentucky, require that net income and not gross income be the factor. Other considerations are the terms of the lease, such as requirements for maintenance, alterations or improvements, fixed rent or percentage of sales; prospective earnings as well as past earnings; length or duration of the lease; options at increased or decreased rentals; and, of considerable importance, the type of tenant and his financial stability.

554 S.W.2d at 891. Because the Property here has no lease, we do not have information from the Property itself about market lease rates, rental history, alterations, improvements, lease terms, prospective or past earnings, lease duration, options, types of tenants, creditworthiness, financial stability, or other factors. These complicated and multi-layered elements must be taken into consideration to make the comparisons true. And these calculations are further complicated here because there is simply no leasehold interest to value. Mays himself did not show that the leases he used were made at market rates.

The Board and the PVA cite to another unpublished decision of this Court regarding the appropriateness of comparisons in a build-to-suit lease, noting that such a lease "cannot be disregarded in a fair cash value determination." *Wilgreens, L.L.C. v. O'Neill*, No. 2015-CA-000407-MR, 2016 WL 5319593, at *6 (Ky. App. Sep. 23, 2016).[10] However, *Wilgreens* is not factually similar to the case *sub judice*, and that non-binding holding actually supports the reasons behind using sales and not leases to assess properties without leases.

[10] Again, this unpublished case is cited pursuant to RAP 41(A).

This Court in *Wilgreens* declined to adopt a hard and fast rule that leases do not reflect true market value when assessing properties with build-to-suit leases. *Id.* at *9. The Court in *Wilgreens* further concluded that,

> To interpret the tax assessment statute as requiring valuation of property in a hypothetical unencumbered form ignores the economic realities of commercial real estate transactions and disregards the General Assembly's decision to include consideration of the present value of all future benefits when using the income approach to property valuation.

Id. Thus, *Wilgreens* stands for the proposition that properties with leases may be used as comparisons for a property that contains a build-to-suit lease if the lease is equivalent – *e.g.*, the lease, regardless of being built to suit is located in a "highly desirable location [and] is capable of generating" comparable income. *Id.* at *8. But the property at issue in *Wilgreens* involved a lease, and this case does not. And, nowhere in *Wilgreens* did we suggest that the tax assessment statute requires valuation of *unleased* commercial property to be based upon a hypothetical lease.

Our similar conclusion is that unleased properties are comparable to other unleased properties. Both opinions note the importance of "apples to apples" comparisons. A fair cash value is the method approved by the published, precedential authority of *Boyle*, 610 S.W.3d 337.

Lowe's has the burden of proving that Mays' valuation was so flawed that it could not constitute substantial evidence. *Jefferson Cnty. Prop. Valuation Adm'r v. Ben Schore Co.*, 736 S.W.2d 29, 30 (Ky. App. 1987). Under the circumstances of this case as well as binding precedent, and being cognizant of similar reasoning of our prior, unpublished, and non-binding opinions, we find of our own accord here that the overarching, unsupported assumption of the terms of a legal lease when there was none does not constitute substantial evidence to support the PVA's value where the necessary adjustments are unmade. Mays' testimony is problematic because he failed to value the Property as it actually is and has always been: unleased. His assumptions based upon a non-existent, non-adjusted, assumed lease render his opinions unsubstantiated. He did not make the necessary adjustments for important lease terms, conditions, and considerations, such as length and tenants. Thus, the evidence offered by the PVA, in its totality, does not constitute substantial evidence. The Circuit Court should not have relied upon it to affirm the Board, and its decision must be reversed. The ultimate conclusions reached lacked the support of substantial evidence of the whole record. The Board's decision was thus arbitrary, capricious, and characterized by an abuse of discretion. KRS 13B.150(2).

The Board and Circuit Court did not receive any substantial evidence from Mays or otherwise in support of the PVA's assessment, which was not revalued in over a decade, was stale, contained no depreciation, and constituted an improper use of the Cost Approach, according to even the PVA's own witnesses. Likewise, the Board and Circuit Court did not take any substantial evidence in support of the PVA's assessment from Mays or Day, its own witnesses. Mays opined that the PVA's number was $2 million too low; and Days testified that it was $2 million too high. The Board's and Circuit Court's acceptance of a number that everyone – including the PVA himself – acknowledges violates the Kentucky statute mandating revaluations of fair cash value each year cannot conceivably stand. KRS 132.690(1)(a).

3. Lowe's Sales Comparison and Income Capitalization Valuations

Still remaining is the question of the ultimate disposition of this case. The Board was tasked with determining a fair cash value, "estimated at the price it would bring at a fair voluntary sale[.]" Ky. Const. § 172. It was required to set a value for the Property that was consistent with the Kentucky Constitution, statutes, and case law, as well as generally-accepted principals of appraisal. It received relevant, competent, substantial evidence of that value from Lowe's expert appraiser, Fried. Because Fried's was the only evidence left of that nature, and the Board had already accepted it, the Board was required to adopt it.

The Board recognized that Fried is a well-qualified expert from her training, experience, and accreditation. It accepted her opinions into evidence. Fried followed the Uniform Standards of Professional Appraisal Practice and the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute.

Fried prepared an appraisal of the Property's value as of January 1, 2020, based upon the fair cash value of the Property as a fee-simple estate. As noted, Fried prepared valuations based upon the Sales Comparison and Income Capitalization Approaches, as well as a valuation based upon a reconciliation of these two approaches. In her Sales Comparison Approach, Fried used seven properties. Fried explained that she searched for potential comparables using four primary criteria: (1) freestanding retail versus multi-tenant properties; (2) 50,000 square feet or larger in size; (3) sales dates within five years of January 1, 2020; and (4) location in markets similar to that of the Property.

Three of Fried's seven comparables were leased properties, and the remaining four were unencumbered by lease at the time of appraisal. In addition to standard adjustments to account for differences in location, size, and age or condition, Fried made downward adjustments to remove the value of the three leases. These adjustments were designed to reflect the real market condition that the Property is not, and has never been, leased. Fried also made appropriate adjustments to account for differences in location, condition, or market circumstances. As Lowe's noted at oral argument, Fried also provided upward adjustments for age and condition. These are the adjustments anticipated by *Jenkins* and required under *Helman*.

To arrive at a value under the Sales Comparison Approach, Fried placed greater emphasis on the comparable properties that were similar to the Property in age and condition, as well as properties with more-recent sales. She used the four sales referenced above that were unencumbered by lease and held in fee simple. Based upon her analysis and emphasis, Fried arrived at a value of $35 per square foot, for a rounded value of $3,900,000.

To arrive at a value under the Income Capitalization Approach, Fried chose to use a direct-capitalization analysis instead of a discounted, cash-flow analysis. She reasoned that direct capitalization is more appropriate for properties with relatively-stable operating histories and expectations, and she believed that investors and market participants typically rely more on this method. Under this approach, Fried considered market data in the form of actual, recent leases for comparable spaces and asking rents for competitive properties.

Three of the four properties Fried chose as comparables were parts of larger indoor malls or shopping centers and not free-standing, big-box stores. They consisted of two Targets, one K-Mart, and one Giant Eagle. Fried applied downward adjustments based upon difference in location, arriving at an average adjusted rental rate of $4.27 per square foot. In accordance with the standards for the Income Capitalization approach, Fried projected a net operating income of $374,349 per annum.

Finally, Fried developed a capitalization rate, which reflects the risks inherent in owning property for the purpose of leasing it on the open market. Fried averaged the capitalization rates for the leased properties used in her sales comparison approach and that she found to be comparable from the overall region (Belk's, Sears, At Home, and Walmart). Fried also considered investor surveys for large retail properties and the trends indicated by those surveys. In addition, Fried used the "band of investment method," which uses mortgage and equity data to indicate the required returns on investments. After considering the average capitalization rates under each of these methods, and the positive and negative attributes of the Property and its location, and the property taxes that would be borne by the owner during periods of vacancy, Fried arrived at a final capitalization rate of 8.81%. Fried then divided the income by the capitalization rate, concluding that the value of the Property is $4,248,418, rounded to $4,250,000, under the income approach.

In her reconciliation of these approaches, Fried gave greater weight to the Sales Comparison approach, with secondary weight assigned to the Income Capitalization approach. Fried arrived at a final value of $4,000,000 as of January 1, 2020.

We conclude that Fried's testimony was reliable and competent. Thus, Lowe's offered substantial, compelling evidence to support its proffered $4,000,000 value.

In so doing, we find that the criticisms that the Board and the PVA leveled at her to be invalid and inapposite. The most significant attack is that Fried made no adjustments for the four properties for sale as to their vacant status alone. The Board and the PVA complained of Fried's use of "dark-store" (or vacant) properties in comparison. (Appellees Brief, p. 3, *et seq.*) This argument is a red herring. And the cited source for the PVA's argument is a guidebook, not precedent from Kentucky or persuasive authority from other Courts outside the Commonwealth. It is unsupported both in the law and in practice. Of course, while there is no vacancy requirement, buildings would not continue to be occupied after a sale (unless they were sold pursuant to a lease). The PVA's assertion that empty properties indicate a lack of demand fails to account for the realities of normal sales gaps. The definition of fair cash value presumes a sale of the property. And, in the case of a sale of a big-box, retail property like Lowe's, the calculation of the fair cash value would normally include comparables of unoccupied and unleased property. Fried's opinion, that an occupied and operating big-box store is worth only as much as it could be sold as a vacant store to a different and willing buyer, is precisely what is required under the Kentucky Constitution. Ky. Const. § 172 (basing assessments on values "estimated at the price it would bring at a fair voluntary sale").

At oral argument, the PVA complained that Fried failed to make adjustments to account for vacant sale. This assertion misapprehends the very nature and concept of adjustments, which are to be made for the purpose of rendering properties more and truly comparable. Vacant sales compared to other sales require no adjustments. Adjustments only enter the picture where sales are being compared to leases. The whole point is that adjustments must be made for comparing leases to actual sales or properties that are not leased; they are not needed where the comparisons of sales to sales are true.

In taking the position that sales of operational stores are preferred to vacant or distressed sales for purposes of comparison, the Board also cited cases from other jurisdictions. Importantly, there is no Kentucky precedent to support the argument that occupied, leased stores such as those used by Mays are superior comparables versus the vacant stores for sale used by Fried. Built-to-suit, owner-occupied, non-leased stores are not unicorns. Fried quite properly found such comparables and used them.

Thus, the Board's out-of-hand dismissal is unwarranted. Indeed, this assumption is no better supported than Mays' conclusion that the Property should be valued as if a lease were in place. The Board needed to account for its determination that similar vacant stores are not valid for comparison purposes, but somehow leased stores are where there is no lease of the subject Property. In the absence of any such analysis, the Board's decision to rely on the PVA's value, or Mays' valuation, over Fried's was arbitrary and not supported by substantial evidence.

Moreover, Fried did not solely use sales of vacant properties. She also relied on leased properties for both her Sales Comparison and Income Capitalization Approaches. But unlike Mays, she made the necessary adjustments to make the comparisons valid. As stated above, Fried properly discounted the value of any theorized lease in her adjustments.

The Board also criticized Fried's comparables because it deemed most of them to be in a different investment class and occupied by second-generation users, who the Board declared to be less creditworthy.[11] This argument finds no support in Kentucky law. In *Sears, Roebuck & Co. v. Boone County Board of Assessment Appeals*, 715 S.W.2d 888, 889 (Ky. App. 1986), we specifically held, in binding precedent, that the favorable financing terms of a sale did not render it incomparable. *Id.* at 889. Otherwise, the analysis would value the taxpayer's financing arrangements rather than the property itself, in violation of the Kentucky Constitution § 172. *Id.* at 890. Thus, contrary to the PVA's argument about K-Mart and bankruptcy, otherwise comparable property is not deemed less so because of financing and credit. Moreover, K-Mart was the tenant, and not the owner, in the PVA's oral argument. The vacant property was still possessed by the owner and still subject to a free sale.

[11] But in contrast, Mays relied on comparables using build-to-suit leases, which are also not applicable to the Property as discussed above in *Wilgreens*.

Continuing in its criticism of Fried, the Board also found fault with Fried's choice of comparable properties for her Income Capitalization approach, noting that three of the four properties were parts of larger indoor malls or shopping centers and not free-standing, big-box stores. The Board further derided Fried's net-operating-income analysis, noting that it failed to account for replacement reserves. The Board also took issue with Fried's choice of capitalization rate, which was higher than that of the average of the comparables she used.[12]

[12] The Board also pointed out that both Fried and Mays incorrectly stated that the Property is located within the Lexington Metropolitan Statistical Area ("MSA"). The Board noted that Mount Sterling is actually outside of the Lexington MSA. Curiously, however, the Board weighed this mutual error more heavily against Fried than Mays.

First, no two properties are identical, and there will always be some differences when making comparisons. Second, although these relatively minor points may be valid considerations for applying adjustments, the Board did not explain how these lessor factors could reasonably cause Fried's entire analysis to fail. More important, the Board did not explain how it allowed Mays' substantively flawed analysis – relying solely on a non-existent lease – to triumph over subsidiary issues with Fried's analysis. Rather, the Board appears to have simply and summarily chosen to give weight and credibility to Mays' methods and calculations while disparaging Fried's. While the Board has the authority to make decisions regarding the weight, credibility, and sufficiency of the testimony, it can neither find substantial evidence where there is none nor ignore the substantial evidence presented.

KRS 132.191 sets forth the acceptable valuation methods, including but not limited to, the Cost Approach, and the Sales Comparison and Income Capitalization Approaches used by Fried and Mays. Because all of these methods are generally acceptable, the Board retains the prerogative to choose the most appropriate and reliable approach to valuation under the circumstances. *Jefferson Cnty. Prop. Valuation Adm'r v. Oxford Props., Inc.*, 726 S.W.2d 317, 319 (Ky. App. 1987). Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal becomes whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003).

While the standard of review is deferential, it is nonetheless an existing standard. A rubber stamp it is not. Agencies and Boards, as well as Courts, are to base their decisions upon the relevant, competent, and reliable evidence that is received. When substantial, supporting evidence is lacking, such as with the PVA assessment and Mays' analysis and opinions, Courts cannot affirm. And conversely, when substantial evidence is given, such as Fried's analysis and conclusions, Courts are not free to ignore it or reject it summarily.

Here, as stated above, Lowe's met its burden under the law of showing that the PVA's and Mays' valuations were so flawed, inherently contradictory, and violative of both the statute and the Constitution that they simply cannot qualify as substantial evidence. *Schore Co.*, 736 S.W.2d at 30. That leaves Fried's opinion and analysis as the only evidence that remained. The Board had already accepted it, qualified her as an expert, and found that her analysis was conducted consistently with the accepted appraisal standards. As no reasonable person could have refused the evidence under these circumstances, the Board was required to adopt it.

Further, the evidence in Lowe's favor is so compelling that no one could reasonably have failed to be persuaded by it. *McManus*, 124 S.W.3d at 458. At oral argument, counsel for the PVA acknowledged that Fried's testimony met the "compelling" standard.[13] While we have considered the option of remanding the case to the Circuit Court, with instructions to remand to the Board, for further hearing, we do not find this to be an acceptable alternative. The Board has already had the hearing, and both parties submitted their evidence. Judicial economy would not be served by repeating the entire exercise. And remanding the case to give the PVA another shot at bringing its proof in conformity with authority would be unfair and prejudicial to Lowe's. The PVA has already brought its considerable resources to bear against this taxpayer, and it has lost this battle.

[13] However, she nonetheless claimed that it was not "substantial."

III. Conclusion

In sum, Kentucky law does not mandate that fair cash value always must be based on the hypothetical sale of a vacant and unoccupied property. However, the valuation must be based upon "the price it would bring at a fair voluntary sale[.]" Ky. Const. § 172. This clearly does not mean the value of the Property to Lowe's or the value of special arrangements that are not in existence on the date of valuation.

The Board, and then the Circuit Court, no doubt endeavored to make good decisions. However, they both failed in their task to determine whether substantial, competent evidence was presented to uphold the PVA's valuation.

Mays' assumption is not supported by the evidence and does not comply with the constitutional or statutory requirements. Mays valued the property based upon a hypothetical lease that does not exist. He chose his comparables and applied adjustments based upon this unsupported assumption. The result is an inflated value that does not reflect the fair cash value of the Property either as it exists or as it could have been sold as of the valuation date. Consequently, Mays' report and testimony could not constitute substantial evidence on which the Board could base its decision under the law.

This leaves Fried's report and testimony as the only competent evidence upon which the Board could have reasonably relied. We conclude that Fried's assumptions and analysis are supported by the substantial evidence applicable to this Property and comply with the constitutional requirement that assessments must be based on the fair cash value of the Property, and no reasonable body should have failed to adopt them.

Accordingly, we reverse the judgment of the Montgomery Circuit Court upholding the decision of the Board of Tax Appeals with respect to the PVA's assessment of the Property. We remand the case back to the Circuit Court to remand the matter back to the Board to find the proper value of the Property to be $4,000,000, consistent with the only substantial, compelling evidence of record.

ALL CONCUR.

BEFORE: CALDWELL, ECKERLE, AND MCNEILL, JUDGES

BRIEF FOR APPELLANT:
Machen Picard Bihrle
Minneapolis, Minnesota

ORAL ARGUMENT FOR APPELLANT:
Benjamin A. Blair[14]
Indianapolis, Indiana

Faith Maggard
Washington, DC

[14] At oral argument, and after Lowe's initial argument was complete, the PVA objected to Mr. Blair's appearance as he is not licensed as an attorney in Kentucky, and Ms. Bihrle, a licensed Kentucky attorney, was not present with him. He explained that Ms. Birhle was on maternity leave, and co-counsel Ms. Maggard was licensed in Kentucky. He emphasized that he was part of this case since its inception, through the litigation at the Board and the Circuit Court. He stated that he checked with the Kentucky Bar Association and was assured that his appearance with Ms. Maggard was acceptable. We note that we had granted his motion to appear *pro hac vice*. While we accept the oral explanation of Ms. Birhle's absence and Ms. Maggard's appearance, we note that the better practice would have been to give professional courtesy notice to both the Court and counsel for the PVA of the status of counsel at oral argument in advance of that argument.

BRIEF FOR APPELLEES:
Keith Craycraft
Montgomery County Attorney
Mount Sterling, Kentucky

Erin E. Musgrave
Assistant Montgomery County Attorney
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEES:
Erin E. Musgrave
Lexington, Kentucky

CONTEMPT

CIVIL CONTEMPT v. CRIMINAL CONTEMPT

CIVIL PROCEDURE

CONTEMPT PROCEEDINGS AGAINST A PERSON IN HIS CORPORATE CAPACITY AND/OR IN HIS INDIVIDUAL CAPACITY

In August 2020, bank located in Kentucky entered into contract with USCI, which is incorporated in Florida and has physical locations in both Florida and Massachusetts — Under the contract, USCI agreed to manage, facilitate, and service loan programs for loans that were funded by bank — Bank agreed to fund approximately $5,000,000 per week — A third party, Credit Union, agreed to purchase loans funded by bank for two of the loan programs — In 2022, bank alleged that it stopped receiving payments from USCI and loans that were supposed to be sold were staying on bank's books, which violated contract — Bank filed underlying action against USCI to collect funds it was owed — USCI's president and CEO (president) was not named as a party to this action — Trial court granted bank a temporary restraining order to prevent further dissipation of funds — Bank and USCI attempted to negotiate a settlement; however, on December 7, 2023, bank filed motion to appoint a receiver — At hearing, bank claimed that USCI had not provided sufficient documentation to show USCI was in possession of the funds owed — Trial court ordered that USCI had 24 hours to produce a bank account or escrow statement that proved they possessed funds owed to bank — If USCI failed to produce the information, court ordered that it would conduct a full evidentiary hearing on bank's motion to appoint a receiver — USCI failed to produce the information — Trial court conducted evidentiary hearing — Evidence showed that president was primary point of contact between bank and USCI — Trial court appointed a receiver on December 19, 2023 — USCI appealed this order and also filed a separate action in Massachusetts in an attempt to persuade Massachusetts to enjoin Kentucky receivership order — Bank and Credit Union filed joint motion for USCI to show cause why it should not be held in contempt for refusing to comply with receivership order and for "subverting" trial court's order appointing the receiver — Motion was not served on president individually — During January 4, 2024 hearing, bank announced it was present to schedule a show cause hearing why USCI should not be held in contempt — President was not present at hearing, but USCI counsel was present — No reference was made to president regarding any alleged contempt as concerned the receivership order — Trial court set show cause hearing for January 12 — Bank's attorney tendered an order setting January 12 show cause hearing; however, proposed order included not only alleged contempt by USCI, but also alleged contempt by president, which was not discussed or addressed by court at January 4 hearing — Nevertheless, trial court signed and entered order on January 8 — President was not personally served a copy of show cause order by circuit clerk — At show cause hearing on January 12, no representative for USCI was present, including president or USCI's counsel — At the outset of the hearing, bank's counsel noted that USCI had filed a bankruptcy petition in Massachusetts approximately 20 minutes prior to the hearing — Bank's counsel argued that president could still personally be held in contempt despite USCI's bankruptcy filing, but asked for additional time to research the matter and a continuation of the hearing — Trial court continued show cause hearing for president to January 17 — No order was entered scheduling this hearing nor was president given notice of hearing by trial court — On January 16, bank and Credit Union filed joint supplement to the show cause motion, directed totally at president — Again, president was not personally served a copy of supplement to motion — On January 17, neither president nor counsel were present at hearing — Bank and Credit Union argued that bankruptcy stay applied only to USCI, not its president — Trial court agreed and found president in contempt for failure to appear — No evidence was presented by bank or Credit Union regarding any alleged contemptuous conduct by president, as concerned receivership order — On January 25, trial court ordered president to pay attorney fees for all parties and the receiver from date of entry of receivership order on December 19, 2023, through January 17, 2024 — President was not personally served a copy of this order — Order gratuitously stated that bank and Credit Union had previously established a *prima facie* case of USCI and president being in contempt — Order also stated that president was aware of the court's orders — Order provided that for each day president did not pay fees as ordered, he was to pay an additional $50,000 sanction per day — President entered a limited appearance and filed an objection to order on January 22, but his objection was not addressed by the trial court — On February 8, after parties filed proof of attorney fees, trial court entered order with specific distributions to each party's attorneys — President was ordered to pay as a sanction for contempt $457,001.84, plus $50,000 per day thereafter if sanctions were not paid within five days — This order was not served on president — President appealed — REVERSED — There are two forms of civil contempt: (1) remedial (compensatory) civil contempt, which compensates a party for loss suffered as a result of contemptuous conduct, and (2) coercive civil contempt, which forces a party to comply with a court order — Criminal contempt may be either direct or indirect — Direct criminal contempt is generally defined as conduct committed in the presence of the court — Indirect criminal contempt is conduct committed outside the presence of court — In civil contempt, contemnors carry the keys to their prison in their own pockets — In criminal contempt, central objective is to punish — Instant action began as civil contempt proceeding against USCI on December 29, 2023, regarding USCI's alleged violation of the December 19 receivership order; however, upon USCI filing bankruptcy on January 12, 2024, case morphed into a criminal contempt proceeding against president, individually — Presumably, president is being punished for USCI filing an action in Massachusetts in December 2023 to challenge Kentucky receivership order, USCI filing bankruptcy, and president not appearing at hearing on January 17, 2024 — Since there was no evidence presented at any hearing regarding any contemptuous act by president as concerns the receiver, any sanction for contempt cannot be condoned — Since instant action evolved into one of criminal contempt against president, it was necessary for evidence to be presented that president willfully disobeyed court's receivership order and be proven beyond a reasonable doubt — No evidence was presented at hearings on January 4, January 12 or January 17 — At final hearing on January 17, trial court simply announce that president was in contempt for failure to appear — Without proper evidentiary record, there is no way to determine whether president, in his capacity as a corporate officer or individually, in some way interfered with the receiver — Upon filing of bankruptcy, trial court shifted its emphasis to punishing president, at insistence of bank and Credit Union — President was not a party to the litigation — Based on the limited record, it appears that any actions president took between December 19 and December 29, 2023, were in his corporate capacity — Upon filing of the bankruptcy, both the receivership and the December 19, 2023, order were effectively superseded by applicable bankruptcy law, which had the effect of terminating the receivership — In addition, trial court failed to serve notice on president of contempt proceedings against him, individually — REVERSED order finding president in contempt individually and order assessing money sanctions against president —

Stephen Galvin v. First & People's Bank and Trust Company; American Fiduciary Services, LLC; Georgia's Own Credit Union; and Michael Hill (2024-CA-0235-MR); Greenup Cir. Ct., McCloud, J.; Opinion by Judge Taylor, *reversing*, rendered 8/29/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Stephen Galvin, President and Chief Executive Officer of U.S. Credit, Inc. (USCI), appeals from orders entered on January 25, 2024, and February 8, 2024, by the Greenup Circuit Court finding him in contempt for failure to appear at a show cause hearing. As a sanction, the circuit court ordered Galvin to pay attorney fees and costs to the other parties to the action, including an appointed receiver, within five days of the court's order, and an additional $50,000 per day sanction for each day thereafter that he failed to pay the fees awarded. In total, Galvin was ordered to pay $457,001.84, plus the additional daily sanction.[1] For the reasons stated herein, we reverse the circuit court's orders.

[1] As of the date of this Opinion, the total sanctions that Stephen Galvin has been ordered to pay exceeds $27,000,000.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2020, First & People's Bank and Trust Company (the Bank), located in Russell, Kentucky, entered into a contract with USCI. USCI is a Florida-incorporated entity with physical locations in both Florida and Massachusetts. The agreement of the parties amounted to a market lending platform whereby USCI agreed to manage, facilitate, and service loan programs for loans that were funded by the Bank. The Bank agreed to fund approximately $5,000,000 per week in loans. A third party, Georgia's Own Credit Union (Credit Union), agreed to purchase loans funded by the Bank for two of the loan programs. The Bank contends that, in 2022, it stopped receiving payments from USCI and loans that were supposed to be sold were staying on the Bank's books, contrary to the contract. The record before us contains numerous email communications between officials from the Bank and Galvin that demonstrate the Bank was trying to ascertain the location of the funds owed by USCI. As noted, Galvin is the President and CEO of USCI. Dissatisfied with the information provided by Galvin, in August 2023, the Bank filed the underlying lawsuit against USCI to collect the funds allegedly owed. Galvin was not named a party to this action. The Bank filed a concurrent motion for a temporary restraining order to prevent further dissipation of funds, which was granted by the circuit court after an *ex parte* hearing.

Based on the record before this Court, the Bank and USCI were attempting to negotiate a settlement in the early stages of the litigation. However, on December 7, 2023, the Bank filed a motion to appoint a receiver.[2] The motion was initially heard by the circuit court on December 14, 2023.[3] At the hearing, the Bank insisted that USCI had not provided sufficient documentation to show USCI was in possession of the funds owed. For example, a spreadsheet generated and provided by Galvin allegedly showed that USCI was still taking in money for the loans, but not distributing it to the Bank. The court ordered that USCI had 24 hours to produce a bank account or escrow statement that proved they possessed the funds owed to the Bank. If USCI failed to produce the information, the court ordered that it would conduct a full evidentiary hearing on the Bank's motion to appoint a receiver. USCI failed to produce the information.

[2] The First & People's Bank and Trust Company (the Bank) also filed an amended complaint which joined Georgia's Own Credit Union as a defendant on December 7, 2023.

[3] The Bank had also filed a motion for default judgment and for sanctions against U.S. Credit, Inc. (USCI) for violation of the temporary restraining order.

The circuit court conducted an evidentiary hearing for the appointment of a receiver on December 18, 2023. Robert Sorrell, Vice President of the Bank, testified that USCI owed the Bank $10,000,000 - $12,000,000 at the end of 2022, and that USCI had repeatedly refused to provide an accounting of the funds. The evidence introduced at the hearing indicated that Galvin was the primary point of contact between the Bank and USCI. Christin Hewitt, the Chief Financial Officer for the Credit Union, testified that USCI owed her organization approximately $5,300,000 and the amount was growing monthly. The proposed receiver, Geoffrey Winkler, from Portland Oregon, also testified as to his qualifications. USCI put on no proof at the hearing. While local counsel was present for USCI at the receivership hearing, neither Galvin nor any other representative for USCI was present. On December 19, 2023, the court entered an order appointing Winkler and his company, American Fiduciary Services, LLC, as receiver.

USCI immediately filed an appeal of the December 19 order in this Court on December 21, 2023. *See U.S. Credit, Inc. v. First & People's Bank and Trust Company*, No. 2023-CA-1499-MR.[4] However, not only did USCI file an appeal, on December 26, 2023, USCI filed a separate action in Massachusetts in an attempt to persuade a Massachusetts state court to enjoin the Kentucky receivership order. The complaint filed in Massachusetts was verified by Galvin.[5]

[4] This appeal is currently being held in abeyance pending USCI bankruptcy proceedings.

[5] The current status of the Massachusetts case is unclear. The record before us indicates it was removed to federal court, but whether the case is still pending is unknown.

On December 29, 2023, the Bank and the Credit Union filed a joint motion for USCI to show cause why it should not be held in contempt for refusing to comply with the receivership order and for "subverting" the circuit court's order appointing the receiver.[6] The gist of this motion looked to the lawsuit filed by USCI against the Bank in Massachusetts on December 26, 2023. The motion was not served on Galvin individually. USCI and the Bank filed briefs and a hearing was held on January 4, 2024, to set a show cause hearing.

[6] The motion was styled, "Plaintiff, First & People's Bank and Trust Company's and Defendant, Georgia's Own Credit Union's Motion for Defendant, U.S. Credit, Inc. to Show Cause Why it Should Not be Held in Contempt of This Court for Attempting to Subvert the Receivership Order of This Court Entered on December 19, 2023 by Filing an Action in the Commonwealth of Massachusetts Seeking to Declare the Court's Receivership Order Void and Injunctive Relief." Record at 447. The caption of the motion makes no reference to Stephen Galvin, although the text includes his name as Chief Executive Officer, requesting that he should also appear to show cause why he should not be held in contempt.

During the January 4, 2024, hearing, counsel for the Bank, Robert E. Maclin, III, announced they were present to schedule a "show cause hearing why U.S. Credit should not be held in contempt." Video Record (VR), January 4, 2024, 1:21:29. Galvin was not present at the January 4 hearing but counsel for USCI was in attendance. Counsel for the Credit Union also participated at the hearing. During this eleven-minute hearing, no direct reference was made to Galvin, although it was discussed that the CEO, as the corporate representative of USCI, could appear at the hearing by Zoom. The judge expressly stated near the end of the January 4 hearing that the primary issue before the court at the contempt hearing would be "the contempt of U.S. Credit." VR, January 4, 2024, 1:30:25. Again, no reference was made to Galvin regarding any alleged contempt as concerned the receivership order entered by the court. The court set the show cause hearing for January 12, 2024.

On January 5, 2024, attorney Maclin, on behalf of the Bank, tendered an order to the court setting the January 12, 2024, show cause hearing. However, the proposed order not only included the alleged contempt by USCI, but also included alleged contempt by Galvin, which was not discussed or addressed by the court at the January 4, 2024, hearing. Notwithstanding that the order did not accurately reflect the proceedings in court on January 4, the court signed and entered the order on January 8, 2024. Once again, Galvin was not personally served a copy of the show cause order by the circuit clerk, scheduling the show cause hearing on January 12, 2024. *See* Kentucky Rules of Civil Procedure (CR) 77.04.

At the show cause hearing on January 12, 2024, no representative for USCI appeared, including Galvin or counsel for USCI. At the outset of the hearing, counsel for the Bank pointed out that USCI had filed a bankruptcy petition in the United States Bankruptcy Court for the District of Massachusetts approximately 20 minutes prior to the hearing.[7] Counsel for the Bank then argued that Galvin could still personally be held in contempt despite USCI's bankruptcy filing, but asked for additional time to research the matter and a continuation of the hearing. The circuit court continued the show cause hearing for Galvin to January 17, 2024. No order was entered scheduling the January 17, 2024, hearing nor was Galvin given notice by the court of this hearing.[8] On January 16, 2024, the Bank and Credit Union filed a joint supplement to the show cause motion, directed totally at Galvin. Again, Galvin was not personally served a copy of the supplement to the motion.

[7] USCI filed a Chapter 11 petition in the United States Bankruptcy Court for the District of Massachusetts, Case No. 24-10058. Pursuant to 11 United States Code (U.S.C.) § 362(a)(1), the litigation in this case against USCI was automatically stayed, until such time as ordered by the Bankruptcy Court or by operation of law. This Court takes judicial notice of the bankruptcy petition and schedules, and all pleadings filed in the United States Bankruptcy Court for the District of Massachusetts. *See Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 265 (Ky. App. 2005). This Court specifically takes notice that Galvin did not seek relief from the bankruptcy court pursuant to 11 U.S.C. § 105 during these proceedings. The Court further notes that neither the Bank nor Credit Union filed a motion in the bankruptcy court to terminate the automatic stay pursuant to 11 U.S.C. § 362(d). The Bank, Credit Union, and Receiver have filed proof of claims in the bankruptcy proceeding that presumably include the monetary sanctions awarded in the February 8, 2024, order of the circuit court. Finally, the Court notes that the bankruptcy court confirmed a Plan of Liquidation for USCI by order entered February 4, 2025 (Document No. 842).

[8] Apparently, only those who were present at the January 12, 2024, hearing had knowledge of its continuance to January 17, 2024. There was no notice or order entered by the court or the clerk regarding the continuance of the show cause hearing to January 17, 2024.

On January 17, 2024, neither Galvin nor counsel was present at the hearing. Counsel for the Bank and Credit Union argued that the circuit court did not lose its authority to hold Galvin in contempt despite USCI's pending appeal of the receivership order and subsequent bankruptcy filing. Moreover, they argued that the bankruptcy stay applied only to USCI, not Galvin. The circuit court agreed and found that Galvin was in contempt for failure to appear. The hearing lasted approximately 14 minutes and there was no evidence presented by the Bank or the Credit Union regarding any alleged contemptuous conduct by Galvin, as concerned the receivership order. Presumably, the sanctions were assessed for Galvin's failure to appear at the January 17, 2024, hearing.

Subsequently, by order entered January 25, 2024, the court ordered Galvin to pay attorney fees for all parties and the receiver from the date of entry of the receivership order on December 19, 2023, through January 17, 2024. Like all previous orders and motions filed in this litigation, relevant to this appeal, Galvin was not personally served a copy of the order. The order was prepared and jointly tendered by counsel for the Bank and Credit Union and specifically states that the purpose of the show cause order hearing concerned Galvin's "breaching and subverting the Order Appointing Receiver entered by this Court on December 19, 2023[.]" Record at 851. Notwithstanding, not one shred of evidence was introduced on this issue at the show cause hearing as no witness testified nor was any evidence presented. The order further gratuitously states that the Bank and Credit Union had "previously established a prima facie case of U.S. Credit and Galvin being in Contempt," although this too was not addressed by argument or evidence at the January 17, 2024, hearing. Record at 851.[9]

[9] At the hearing on January 4, 2024, the court stated on the record that based on the evidence presented at the receiver hearing on December 18, 2023, the court believed that USCI had engaged in "gross misconduct or fraud." Video Record, January 4, 2024, 1:27:40. The court made no reference to Galvin and any alleged contemptuous acts that purportedly occurred after entry of the December 19, 2023, order. No evidence of contemptuous conduct by Galvin was presented at the hearings on January 4, January 12, or January 17, 2024.

The court further set out findings and conclusions that Galvin had breached and subverted the receivership order, while again, no evidence supporting the same was presented at the January 17, 2024, hearing. Incredibly, the order further declares that "Galvin was aware of the Court's orders" although he was not personally served with any motions or orders regarding his alleged contempt, including the hearing conducted on January 17, 2024. Record at 853.

As noted, the January 25, 2024, order also provided that for each day Galvin did not pay the fees as ordered, he was to pay an additional $50,000 sanction per day. Galvin entered a limited appearance and filed an objection to the order tendered by the Bank on January 22, 2024, but the objection was not addressed by the court. On February 8, 2024, after the parties filed proof of attorney fees, the circuit court entered another order with specific distributions to each party's attorneys. As previously stated, the total amount Galvin was ordered to pay as a sanction for contempt was $457,001.84, plus $50,000 per day thereafter if the sanctions were not paid within five days. This order also was not served on Galvin. This appeal followed.

STANDARD OF REVIEW

In *Crandell v. Cabinet for Health and Family Services ex rel. Dilke*, 642 S.W.3d 686, 689 (Ky. 2022), the Kentucky Supreme Court recently restated our standard of review of contempt orders on appeal:

> "A trial court . . . has broad authority to enforce its orders, and contempt proceedings are part of that authority." *Commonwealth, Cabinet for Health & Fam. Servs. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011) (citing *Lewis* [*v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993)]). We review contempt orders "for abuse of discretion, but we apply the clear error standard to the underlying findings of fact." *Id.* (citations omitted).

However, based on the disputed facts of this case, our review is not simply limited to the abuse of discretion standard. As will be discussed, the contempt order, on its face, clearly appears to be aimed at punishing Galvin, which constitutes criminal contempt. Our review is thus commensurate with that of criminal appeals based upon the seriousness of the penalties imposed. *Cabinet for Health & Family Servs. v. J.M.G.*, 475 S.W.3d 600, 624 (Ky. 2015). We view the sanctions imposed in this case to be serious.

Additionally, since the circuit court rendered the contempt sanctions by summary proceedings, rather than by an evidentiary hearing, we have conducted a *de novo* review of the entire record in this case. *See Seiller Watterman, LLC v. Bardstown Cap. Corp.*, 643 S.W.3d 68, 74 (Ky. 2022), *abrogated in part on other grounds by Bluegrass Trust for Historical Pres. v. Lexington Fayette Urban Cnty. Gov't Planning Comm'n*, 701 S.W.3d 196, 207-08 (Ky. 2024).

ANALYSIS

This case is an appeal of a contempt order. Our Supreme Court has defined contempt as "the willful disobedience toward, or open disrespect for, the rules or orders of a court." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1997). Generally, contempt may be either civil or criminal:

> Generally, sanctions imposed to benefit an adverse party-coercive sanctions, for example, or compensatory ones—are deemed civil and are sought and imposed through civil proceedings between the original parties, very often as part of the underlying cause. . . .
>
> Punitive sanctions, however—unconditional sanctions not subject to purgation through compliance with an order and imposed principally if not purely to vindicate the authority of the court—are deemed criminal. . . .

J.M.G., 475 S.W.3d at 611. Thus, civil contempt is of two general varieties – (1) remedial (compensatory) civil contempt, which compensates a party for loss suffered as a result of the contemptuous conduct, and (2) coercive civil contempt, which forces a party to comply with a court order. *Id.* And, criminal contempt may be either direct or indirect. Direct criminal conduct is generally defined as conduct committed in the presence of the court, and indirect criminal contempt is conduct committed outside the presence of court. *Burge*, 947 S.W.2d at 808. It has been observed that the "defining characteristic of civil contempt is the fact that contemnors" are said to "carry 'the keys of their prison in their own pockets[.]'" *Campbell v. Schroering*, 763 S.W.2d 145, 148 (Ky. App. 1988) (quoting *Shillitani v. United States*, 384 U.S. 364, 368 (1966)); *see also Kentucky Handbook Series – Trial Handbook for Kentucky Lawyers* § 12:2 (2017 – 2018 ed.). Conversely, in criminal contempt, its central objective is punitive, that is to punish. *Campbell*, 763 S.W.2d at 147.

This case began as a civil contempt proceeding against USCI on December 29, 2023, regarding USCI's alleged violation of the receivership order entered on December 19, 2023. However, upon USCI filing bankruptcy on January 12, 2024, the case morphed into a criminal contempt proceeding against Stephen Galvin, individually. Presumably, Galvin is being punished for USCI filing an action in Massachusetts in December of 2023 to challenge the Kentucky receivership order, USCI filing bankruptcy on January 12, 2024, and Galvin not appearing at the hearing on January 17, 2024. Since there was no evidence presented at any hearing regarding any contemptuous act by Galvin as concerns the receiver, any sanction for contempt cannot be condoned by this Court. As the Supreme Court held in *J.M.G.*, 475 S.W.3d at 624-25, criminal contempt proceedings must be consistent with those required under the federal constitution for criminal trials including the presentation of sufficient evidence to justify the contempt order, which did not occur in this case. Similarly, this Court had held that in order to conduct meaningful appellate review, the circuit court's contempt order must be supported by sufficient evidence. *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 722 (Ky. App. 2010). Given this case evolved into one of criminal contempt against Galvin, it was necessary for evidence to be presented that Galvin willfully disobeyed the court's receivership order and be proven beyond a reasonable doubt. *Id.*

However, after the filing of the joint motion for contempt on December 29, 2023, by the Bank and Credit Union, no evidence was presented at the hearings on January 4, January 12, or January 17, 2024. The gist of the contempt motion looked to alleged contemptuous acts by USCI or Galvin in subverting and breaching the court's December 19, 2023, order appointing the receiver. These issues were not even addressed at the final hearing on January 17, 2024. The court simply announced that Galvin was in contempt for failure to appear. VR, January 17, 2024, 9:53:34-9:55. The court also declined to issue an arrest warrant that was requested by the Bank. VR, January 17, 2024, 9:55:15. Interestingly, this was not addressed in the court's January 25, 2025, order. And, for the first time in the January 25, 2024, order, which was tendered to the court by counsel for the Bank and Credit Union after the January 17, 2024, hearing, reference is made to Galvin in his "individual capacity" as concerns his being held in contempt. Record at 853. We cannot over emphasize that there is absolutely no evidence in the record as concerns any actions taken by Galvin in any capacity that can be construed as defying the December 19 receivership order. This included the filing of the action in state court in Massachusetts on December 26, 2023. Without any evidence being presented on how Galvin interfered with the receivership during the period of December 19, 2023, through December 29, 2023, there can be no legal basis for finding him in contempt and assessing the substantial punishment sanction as levied by the circuit court in this case. On its face, the sanction is unconscionable and constitutes a manifest injustice to Galvin. *See* CR 61.02.

That is not to say that Galvin is a knight in shining armor in this case. Without a proper evidentiary record, we have no way of determining whether Galvin, in his capacity as a corporate officer or individually, in some way interfered with the receiver in the performance of his duties during the period of December 19, 2023, through December 29, 2023, assuming Galvin's alleged contemptuous conduct was properly before the court. As noted, based on the circuit court's directives at the January 4, hearing, the only contemptuous conduct scheduled before the court at the January 12, hearing was USCI as a corporate entity, not Galvin.[10] Yet, the January 12, hearing was continued to January 17, to focus solely on punishing Galvin.

[10] As discussed, counsel for the Bank tendered an order following the January 4, 2024, hearing that did not comport with the court's directives at the hearing. The Bank unilaterally addressed the alleged contempt by Galvin in the order, which the court inexplicably signed. Effectively, by signing the order, the court improperly delegated its decision-making responsibility on the contempt issue to the Bank's counsel, given that neither the Bank nor the court deliberated the contempt of Galvin as an issue at the January 4 hearing. *See Bingham v. Bingham*, 628 S.W.2d 628, 629-30 (Ky. 1982). The same can be said for the January 25, 2024, order that was jointly tendered by counsel for the Bank and Credit Union after the January 17 hearing, that again, did not comport with the proceedings. This case is a primer for all district, circuit, and family court judges in Kentucky who direct attorneys to prepare orders following hearings. To avoid abdicating their decision-making responsibility, the judge must review the proposed order before signing to ensure the order comports to the proceedings and directives of the court.

This Court has previously discussed an officer's liability when acting on behalf of a corporation in *Young v. Vista Homes, Inc.*, 243 S.W.3d 352 (Ky. App. 2007) as follows:

> Generally, an agent is not liable for his own authorized acts, or for the subsequent dealings between the third person and the principal after the principal is disclosed. *Potter v. Chaney*, 290 S.W.2d 44, 46 (Ky. 1956). Likewise, an officer, director, or shareholder, when acting as an agent of the corporation, is also protected from personal liability when acting within his authority to bind the principal. *Smith v. Isaacs*, 777 S.W.2d 912, 913 (Ky. 1989), citing *Restatement (Second) of Agency* § 328 (1958). While an agent or corporate officer is normally not liable for the debts or contractual obligations of the principal, an agent or corporate officer is not immune from liability for his own intentional misconduct or for negligence based upon a breach of his own duty.

Id. at 363 (citing *Isaacs*, 777 S.W.2d at 913) (citations omitted).

Had Galvin been properly noticed and before the court for contempt at the January 17 hearing, the focus of the court's inquiry should have been on what actions, if any, were taken by Galvin in his corporate or individually capacity, that breached or subverted the court's order entered on December 19, 2023. The court heard no testimony or received no evidence during any hearing on this issue and thus any finding regarding the same to hold Galvin in contempt was both an abuse of discretion and clearly erroneous. Without evidence in the record that Galvin personally and willfully defied the court's order, contempt was not warranted in this case. *Buddenberg*, 304 S.W.3d at 722. *See also* 17 C.J.S. *Contempt* § 51 (2025).

Clearly, the circuit court's focus on the pertinent issues was diverted upon USCI's Chapter 11 bankruptcy filing on the morning of January 12, 2024. This Court is most cognizant that bankruptcy can be extremely frustrating to creditors, their attorneys, and state courts alike. However, it is federal law whose genesis is the United States Constitution, whereupon the Supremacy Clause of Article VI of the Constitution is controlling. Therein, judges in every state are bound thereby.

Upon the filing of bankruptcy, the emphasis of the circuit court shifted to punishing Galvin, at the insistence of the Bank and Credit Union. Galvin was not a party to the litigation and based on the limited record before this Court, it appears any actions he took between December 19 and December 29, 2023, were in his corporate capacity as president of USCI. Upon the filing of the bankruptcy, both the receivership and the December 19, 2023, order were effectively superseded by applicable bankruptcy law, which had the effect of terminating the receivership. While we have elected not to address whether the provisions of 11 United States Code § 362(a)(1) were violated by the continuation of contempt proceedings against Galvin, as argued on appeal, we have grave doubt that the bankruptcy court would have condoned these proceedings against Galvin for his purported conduct from December 19, 2023, through December 29, 2023. However, none of the parties sought relief from the bankruptcy court and thus we will defer to the bankruptcy court on whether a violation of the stay occurred in this case, as it is not relevant to our reversal of the contempt sanctions against Galvin.

Finally, and equally disturbing, is the court's failure to serve notice on Galvin of the contempt proceedings against him, individually. As noted previously, Galvin was not a party. He did not appear in Kentucky during any of the proceedings in this case from its inception in August of 2023. He was not present at the receivership hearing on December 18, 2023. The joint contempt motion filed by the Bank and Credit Union on December 29 was not served on Galvin nor were any of the subsequent orders entered by the court served on him by the clerk of the court. On its face, this lack of notice violated Galvin's due process rights given the court ultimately sanctioned him in his individual capacity. Equally disturbing is that the record reflects that there was no order entered or notice given to USCI or Galvin that the January 12, 2024, contempt hearing was continued to January 17, 2024. The focus of the contempt proceeding shifted on January 12, 2024, to punishing Galvin for criminal contempt, which occurred when he failed to appear at the hearing on January 17, 2024, of which he was not properly noticed. Accordingly, the failure to serve notice of the hearings on Galvin also warrants reversal of the contempt order and sanctions that currently exceed $27,000,000.[11]

[11] Arguably, had USCI or Galvin been given appropriate notice of the January 17, 2024, hearing, relief could have been sought from the bankruptcy court pursuant to 11 U.S.C. § 105 of the bankruptcy code.

CONCLUSION

For the reasons stated, we conclude that the circuit court abused its discretion and failed to follow applicable law regarding the conduct of criminal contempt proceedings against Galvin, individually. Accordingly, the January 25, 2024, order finding Galvin in contempt individually and the February 8, 2024, order assessing money sanctions against Galvin are reversed. This renders moot any additional arguments raised by Galvin in this appeal, which we decline to address.

ALL CONCUR.

BEFORE: LAMBERT, MCNEILL, AND TAYLOR, JUDGES.

TORTS

NEGLIGENCE

EDUCATION

ATTORNEYS

FATHER'S *PRO SE* CIVIL SUIT AGAINST PUBLIC SCHOOL DISTRICT ALLEGING INADEQUATE GIFTED SERVICES FOR HIS CHILDREN

FATHER'S ABILITY, AS A NON-ATTORNEY, TO REPRESENT HIS MINOR CHILDREN

CIVIL PROCEDURE

CR 59.05 MOTION

FAILURE TO FILE A TIMELY MOTION TO VACATE UNDER CR 59.05

EQUITABLE TOLLING

CR 60.02 MOTION

Father has two minor daughters who attend school in Fayette County Public Schools (FCPS) — Both children receive gifted and talented education services through school district — In April 2023, father filed instant action against Fayette County Board of Education (Board), various Board officials, FCPS, and various FCPS officials, alleging that gifted services his daughters received were not adequate — Father asserted several negligence *per se* claims, as well as other tort claims, including Intentional Infliction of Emotional Distress (IIED) and false imprisonment by FCPS because his daughter was not permitted to skip first grade — Father filed complaint *pro se*, representing both himself and his minor children without assistance of a licensed attorney — Defendants filed motion to dismiss arguing that father lacked standing to pursue any claim in his own right; that he was unable to legally represent his minor children *pro se*; that defendants had governmental immunity; and that complaint failed to state a claim upon which relief could be granted — Trial court informed father that he needed to obtain counsel to represent his minor children — On May 9, 2023, trial court denied father's motion for leave to file an amended complaint; found that father could not represent his minor children *pro se*; and held matter in abeyance for 30 days to allow father to obtain counsel — Instead of hiring counsel, father filed his first appeal challenging trial court's May 9 order — Court of Appeals dismissed appeal as interlocutory in August 2023 — Trial court then scheduled a hearing in April 2024 on all pending motions — At this hearing, trial court stated its ruling and its reasoning on the record — Trial court determined that father did not have standing to bring a case in his own right because harms alleged were to children; therefore, his claims would be dismissed with prejudice — With respect to children's claims, trial court reiterated that father does not have a right to represent his children *pro se*; therefore, children's claims were dismissed without prejudice — Further, trial court found that individual defendants all had governmental immunity — Judge signed order on May 31, 2024 — Written order was not entered until June 4, 2024 — Father did not receive his copy of order in the mail until Saturday, June 15, 2024 — An email from defense counsel, with a copy of the order attached, was sent to father on Thursday, June 13 — Father did not dispute receiving order through courtesy email from defense counsel on night of June 13, 2024 — Father filed CR 59.05 motion to vacate on June 17, 2024 — Father conceded that his motion was untimely — Under CR 59.05, motion had to be served no later than June 14, 2024 — Trial court denied father's motion — Father then filed CR 60.02 motion for relief from the order denying his CR 59.05 motion — Father asked trial court to find excusable neglect and requested equitable tolling — Trial court denied CR 60.02 motion — Father appealed — AFFIRMED — Court of Appeals limited issues in instant appeal to claims father made on his own behalf — Trial court did not abuse its discretion in failing to grant father's CR 60.02 motion and in failing to apply equitable tolling to his CR 59.05 motion with respect to his own claims — Father was unable to show excusable neglect — Father was aware of the substance of the order since trial court outlined its rulings and reasonings from the bench at the hearing in April — As a parent, father could act as "next friend" or the adult agent to initiate a case for his children under CR 17.03(1) — This does not permit father to act as the attorney for the children by proceeding with prosecution of the case on his own — A "next friend" cannot provide *pro se* representation to the real party in interest — The real parties in interest for claims belonging to the children are the children — While CR 60.02 allows a trial court to reopen a case over which it has lost original jurisdiction, the rule may not be used for arguments which could have been made on appeal — Father's arguments, whether on a direct appeal or under CR 60.02, do not merit relief —

Barry A. Saturday and Barry A. Saturday, On Behalf of His Minor Children, Aurora Saturday and Athena Saturday v. Fayette County Board of Education; Tyler Murphy, In His Official Capacity as Chair of the Fayette County Board of Education, and Individually; Amy Green, In Her Capacity as Vice-Chair of the Fayette County Board of Education, and Individually; Demetrus Liggins, In His Official Capacity as Superintendent of the Fayette County Public Schools; and Julie Gann, In Her Official Capacity as Coordinator of Gifted Education, and Individually (2024-CA-1244-MR); Fayette Cir. Ct., Goodman, J.; Opinion by Judge Easton, *affirming*, rendered 8/28/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Barry A. Saturday ("Saturday"), *pro se*, appeals the denial of his CR[1] 60.02 motion. Saturday argues the circuit court abused its discretion in failing to apply equitable tolling to his untimely CR 59.05 motion. Having reviewed the record and the applicable law, we[2] affirm.

[1] Kentucky Rules of Civil Procedure.

[2] Saturday filed a Motion Requesting Voluntary Recusal on August 11, 2025. Saturday does not identify any specific disqualification of any judge, but he does give "fair notice" making clear his consideration of suing judges, including appellate judges, in the future. None of the judges on this panel is from the judicial district including Fayette County. None of these judges served on the panel which unanimously entered the prior order in this case on January 29, 2025. We find no legitimate basis to recuse and will not be influenced by any implicit threat. We will simply apply the law to this appeal as both sides should expect.

FACTUAL AND PROCEDURAL HISTORY

Saturday has two minor daughters, who attend school in the Fayette County Public Schools ("FCPS"). Both children receive gifted and talented education services through the school district. In April 2023, Saturday filed this lawsuit in which he alleged the gifted services his daughters receive in the FCPS are inadequate. He specifically claimed the assessments FCPS applied in deciding whether to allow his younger daughter to skip a grade were improper. Saturday asserted several negligence *per se* claims, as well as other tort claims in his complaint, including Intentional Infliction of Emotional Distress ("IIED") and False Imprisonment by FCPS because his daughter was not permitted to skip first grade. Saturday filed the complaint *pro se*, representing both himself and his minor children without the assistance of a licensed attorney.

The Appellees filed a motion to dismiss. They argued that Saturday lacked standing to pursue any claim in his own right, that he was unable to legally represent his minor children *pro se*, that the Appellees had governmental immunity, and that the complaint failed to state a claim upon which relief could be granted. The circuit court indicated to Saturday that he needed to obtain counsel to represent his minor children, as a non-attorney does not have the legal right to represent others, even his own minor children. The circuit court entered an order on May 9, 2023, which denied Saturday's motion for leave to file an amended complaint, ruled that Saturday could not represent his minor children *pro se*, and held the matter in abeyance for thirty days to allow Saturday to obtain counsel.

Instead of hiring counsel, Saturday filed his first appeal, challenging the May 9 order. This Court properly dismissed the appeal as interlocutory in August 2023. The case then proceeded again in circuit court. The circuit court scheduled a hearing in April 2024 to hear all pending motions. This included the Appellees' motion to dismiss, as well as Saturday's motion to reconsider, which again requested that the circuit court allow him to represent his minor children; Saturday's motion to disqualify the circuit court judge; Saturday's motion to amend complaint; and Saturday's motion for temporary injunction.

The circuit court held a hearing on April 10, 2024. The Appellees argued that all claims should be dismissed, as Saturday has no standing to assert any of the claims on his own behalf. They also claimed the Board of Education and all the individuals named in their official capacities had governmental immunity. Further, there were no specific allegations against the named individuals that would allow a claim to go forward against them in their individual capacities. Appellees additionally argued Saturday's claims of IIED and False Imprisonment should be dismissed as the alleged stated facts do not support such claims.

The circuit court generally agreed with the Appellees. The circuit court ruled from the bench, stating its reasoning for the conclusion that all claims would be dismissed. The court determined Saturday did not have standing to bring a case in his own right because the harms alleged were to the children, and therefore his claims would be dismissed with prejudice. As for the children's claims, the circuit court reiterated that Saturday does not have a right under the law to represent his children *pro se*. The children's claims were dismissed without prejudice. Further, the circuit court determined the individual Appellees all had governmental immunity.

While the circuit court stated its ruling and its reasoning on the record in April, a written order was not entered until June 4, 2024. The written order confirmed the oral statements made by the circuit court at the April hearing. Despite the order being entered on June 4, Saturday did not receive his copy of the order in the mail until Saturday, June 15, 2024. But an email from Appellees' counsel, with a copy of the order attached, was sent to Saturday on Thursday, June 13.

The reason for the delay in entry of the order by the Clerk is explained by when the judge signed the order, which was on May 31, 2024. We do not know if this delay represents the circuit court again giving Saturday an opportunity to obtain counsel, was the result of the circuit court's again reviewing the merits of the various motions before entering a written order, was due to workload issues, or oversight in submitting the file to the Clerk for entry of the order.

Regardless, the record contains no dispute as to the date of June 4, 2024, as the date when the Clerk entered the order and served the parties with their copy of the order by mail. We do not know precisely when the Appellees' counsel received their copy because the email responding to an earlier email from Saturday does not indicate this, but Saturday does not dispute receipt of the order through the courtesy email from the Appellees' counsel on the night of June 13, 2024.

Saturday filed his CR 59.05 Motion to Vacate on June 17, 2024. Saturday conceded that his motion was untimely. Under CR 59.05, the motion had to be served no later than June 14, 2024. By only one business day, Saturday's motion was filed after this ten-day deadline. The circuit court conducted a hearing on July 19, 2024, and denied Saturday's motion.

Undeterred, Saturday told the circuit court he would file a different motion. Saturday then filed a CR 60.02 Motion for Relief from Order Denying CR 59.05 Motion. He asked the circuit court to find "excusable neglect" and requested equitable tolling. The circuit court denied this motion and entered a written order on September 20, 2024. Saturday then filed his timely Notice of Appeal for the present appeal on October 15, 2024.

This Court issued a Show Cause Order for Saturday to show cause why the claims on behalf of his minor children should not be excluded from the issues to be addressed in this appeal. Saturday filed his response in November 2024, making the same arguments previously made to—and rejected by—the circuit court. On January 29, 2025, this Court entered an Order limiting the issues for this appeal to the claims Saturday made on his own behalf. This Court determined, just as the circuit court did, that parents are unable to represent their children in a *pro se* capacity. This Order also limited the issue on appeal to the circuit court's denial of Saturday's CR 60.02 motion. Saturday had included both the June 4 and July 25 orders in his Notice of Appeal, but the time to file an appeal from either of those orders had expired.

STANDARD OF REVIEW

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

ANALYSIS

Pursuant to the prior Order of this Court on

January 29, 2025, our analysis is limited to the question of whether the circuit court abused its discretion in failing to grant Saturday's CR 60.02 motion and applying equitable tolling to his CR 59.05 motion with respect to his own claims. For the reasons which follow, we hold the circuit court did not abuse its discretion.

"On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect[.]" CR 60.02. Saturday argues "excusable neglect" as the reason he should be relieved from the circuit court's denial of his CR 59.05 motion.

CR 59.05 states: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." Saturday argues the circuit court should apply the doctrine of equitable tolling and allow his CR 59.05 motion to proceed, despite being untimely. "Equitable tolling pauses a limitations period and does not require any wrongdoing, but rather applies when a plaintiff, despite all due diligence . . . is unable to obtain vital information bearing on the existence of his claim." *Williams v. Hawkins*, 594 S.W.3d 189, 193 (Ky. 2020) (internal quotation marks and citation omitted). Saturday cites several cases that lend support to his argument.

First in *Nanny v. Smith*, 260 S.W.3d 815 (Ky. 2008), our Supreme Court determined that equitable tolling should apply when a personal injury complaint was filed within the statute of limitations, but because the clerk did not act promptly, the summons was issued outside the limitations period. The Supreme Court held similarly in *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002), in which Appellants were inadvertently omitted from the distribution list of an order. "The trial judge clearly believed himself or his office staff (not Appellants) to have been culpable in the error that prevented Appellants from learning of entry of the June 29 order, and in our view, CR 60.02 was adopted for such circumstances." *Id.* at 456.

The circuit court determined that Saturday was unable to show excusable neglect under these circumstances. The facts herein are distinguishable from the cases cited by Saturday. While no one disputes that Saturday did not receive his mailed copy of the order until after the ten-day deadline of CR 59.05 had passed, he did have notice of the order prior to the deadline. As pointed out by the Appellees, nothing prevented Saturday from signing up to receive electronic notifications of when an order was entered by the circuit clerk, even if Saturday, as a non-attorney, could not use the electronic system to file documents.

Saturday was aware of the substance of the order, as the circuit court outlined its rulings and reasonings from the bench at the hearing in April. He had at least some time to prepare and file a CR 59.05 motion and thus preserve his opportunity to seek reconsideration before filing an appeal.

But we will not limit ourselves to this observation. One could reasonably argue that the delay between the mailing of the order and its receipt is problematic and that one day was not enough time for the preparation of a proper CR 59.05 motion. Even so, the CR 60.02 motion was still properly denied for the following reasons.

As a parent, Saturday could act as "next friend" or the adult agent to initiate a case for his children under CR 17.03(1). The law uses this next friend process to allow a parent to stand as the party for the child in a case. This avoids the appointment of a legal guardian to handle funds received from litigation until funds might be received. Except for settlements of a small amount, a guardian appointment is required by law to make sure there is oversight of how a child's financial recovery is spent before the child reaches majority. KRS[3] 387.278. *See Jones by and through Jones v. Cowan*, 729 S.W.2d 188 (Ky. App. 1987).

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[3] Kentucky Revised Statutes.

This process provides limited authority. It does not permit Saturday to act as the attorney for the children by proceeding with the prosecution of the case on his own. "[A] 'next friend' cannot provide *pro se* representation to the real party in interest." *Azmat as Next Friend of Azmat v. Bauer*, 588 S.W.3d 441, 452 (Ky. 2018). The real parties in interest for claims belonging to the children are the children.

The justification for this rule is well-illustrated by this case. Saturday made significant mistakes which we would expect a properly trained and experienced attorney not to make. Among these are appealing an interlocutory order and a failure to file an appeal after admittedly missing the deadline for a CR 59.05 motion.

A circuit court loses jurisdiction of a case if a CR 59.05 motion is not filed within the allotted ten days. *See*, *e.g.*, *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 904 (Ky. App. 2009). A CR 59.05 motion does not have to be perfect, but it does have to be filed within the ten days allowed. An untimely CR 59.05 motion does not toll the time within which an appeal may be filed. *Marrs Elec. Co., Inc. v. Rubloff Bashford, LLC*, 190 S.W.3d 363, 367 (Ky. App. 2006). Realizing the CR 59.05 motion was untimely would not have prevented review of the circuit court's decision. An appeal could have been filed. Saturday had until July 5, 2024 (because of the July 4th holiday) to file an appeal of the circuit court's decision. He did not do so, instead proceeding with his untimely CR 59.05 motion.

While CR 60.02 allows a circuit court to reopen a case over which it has lost original jurisdiction, the rule may not be used for arguments which could have been made on appeal. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Regardless of these procedural issues, and as we have briefly illustrated, Saturday's arguments, whether on a direct appeal or under CR 60.02, do not merit relief.

We see from Saturday's actions in this case primarily a desire to protect the rights of his children rather than assert a claim of his own. Yet it remains contrary to law for Saturday instead of an attorney to prosecute the case for his children in court. Fortunately, the circuit court did not harm the children's rights because the dismissal was without prejudice to a proper suit being filed. That proper suit must state actionable claims, something an attorney versed in education law would be trained and have the experience to do.

As presently alleged, the children's claims have issues which must be addressed if a new suit is filed. IIED can be established only if the claims for extreme emotional distress are not recoverable as damages under another tort theory. *See Childers v. Geile*, 367 S.W.3d 576, 581-82 (Ky. 2012). Problematic also is the assertion that false imprisonment occurred because a child did not get to skip a grade. "Our cases define an imprisonment as being any deprivation of the liberty of one person by another or detention for however short a time without such person's consent and against his will, whether done by actual violence, threats or otherwise." *Grayson Variety Store, Inc. v. Shaffer*, 402 S.W.2d 424, 425 (Ky. 1966). We find no authority for the proposition that the circumstances of being assigned to a specific grade at school is an *imprisonment* to satisfy the elements of the tort of false imprisonment as contemplated by Kentucky law. Even so, the children's rights have been preserved if a valid claim may be asserted.

CONCLUSION

For the reasons stated, we conclude that the circuit court did not abuse its discretion in denying Saturday's CR 60.02 motion. We AFFIRM the Order of the Fayette Circuit Court.

ALL CONCUR.

BEFORE: COMBS, EASTON, AND LAMBERT, JUDGES.

DIVORCE

CHILD SUPPORT

SETTLEMENT AGREEMENT

MODIFICATION OF CHILD SUPPORT WHERE THE PARTIES AGREED IN A SETTLEMENT AGREEMENT THAT NEITHER PARTY WOULD PAY CHILD SUPPORT

H and W had one child — W filed for divorce in March 2022 — In April 2022, H and W entered into settlement agreement — Settlement agreement provided that H and W would share joint legal custody of child; established timesharing schedule; and stated that no child support was to be set at that time — In addition, parties agreed to share equally in daycare expenses — Family court incorporated settlement agreement into divorce decree — In October 2023, W moved family court to set child support — H responded that no material change justified modifying child support — W argued that change in support from $0 to guideline-based figure established rebuttable presumption of material change under KRS 403.213(2) and that settlement agreement did not prohibit future petitions for support — At hearing, H and W both testified that they continued to work in the same positions as they did when settlement agreement was executed and that parenting schedule had not changed — Family court entered written order granting W's motion and setting child support retroactive to November 1, 2023 — Family court did not reference a change in the parties' circumstances — H appealed — VACATED and REMANDED — KRS 403.213 addresses modification of child support — Pursuant to KRS 403.213(1), provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing — KRS 403.213(2) provides that when application of Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of child support order results in equal to or greater than a 15% change in the amount of support due per month, that change shall be rebuttably presumed to be a material change in circumstances — In instant action, W was entitled to rely on the presumption set forth in KRS 403.213(2); however, H can rebut this presumption by presenting evidence showing that the change in the calculated support amount does not reflect a true material change in overall circumstances, or that the original deviation remains appropriate when viewed in light of the totality of the circumstances — Application of the guidelines to parties' 2024 income calculations results in a monthly support obligation well in excess of 15% over the prior amount of $0; thereby, triggering the presumption under KRS 403.213(2) — When a prior decree, whether by agreement or judicial determination, addresses child support, any subsequent request for a change must be treated as a motion to modify under KRS 403.213 — On remand, family court must make findings of fact regarding whether H overcame the presumption, considering the totality of the circumstances — This would include consideration of parties' testimony that notwithstanding the 15% discrepancy, their incomes, living situations, division of expenses, and timesharing had not changed since entry of the original decree — Such evidence tends to suggest that parties' circumstances remain unchanged —

Chad Herl v. Haley Herl (2024-CA-0412-MR); Jefferson Cir. Ct., Webb, J.; Opinion by Judge A. Jones, *vacating and remanding*, rendered 9/5/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Chad Herl appeals from an order of the Jefferson Family Court imposing on him a monthly child support obligation of $754.00, retroactive to November 1, 2023. He argues the family court erred by granting his ex-wife Haley Herl's motion for child support without making the statutorily required finding of a material change in circumstances that is substantial and continuing under KRS[1] 403.213(1).

[1] Kentucky Revised Statutes.

Having reviewed the record, we conclude that the family court failed to enter the necessary findings and conclusions to support its ruling. Because the application of the child support guidelines resulted in an increase exceeding 15% over the prior amount of $0, the statutory presumption of material change under KRS 403.213(2) applies. The relevant question on remand is whether that presumption was rebutted. Accordingly, we vacate the family court's order and remand for additional proceedings.

I. Background

Chad and Haley were married on May 27, 2020, in Jefferson County, Kentucky. They are the parents of one child, A.M.H., born in 2017. On March 9, 2022, Haley filed a petition for dissolution of the marriage in Jefferson Family Court. Shortly thereafter, on March 14, 2022, Chad filed a verified response and counter-petition.

On April 19, 2022, the parties filed a Marital Settlement Agreement ("MSA") resolving all matters related to custody, timesharing, child support, and property division. The MSA provided that the parties would share joint legal custody of the child and established a temporary timesharing schedule with a provision for equal parenting time in the future once Chad obtained daytime employment and his own residence. The MSA also addressed the parties' respective obligations for child-related financial responsibilities. Relevant here, Section E of the MSA states:

> **Child Support:** No child support is to be set at this time. The parties agree to share equally in all daycare expenses incurred for the minor child. Each party will be responsible for timely payment of the same—neither party will finance the other party's obligations.

(Record ("R.") at 61.) The agreement also required Chad to provide health, dental, and vision insurance for the child through his employer and obligated both parties to equally divide uncovered medical, educational, and extracurricular expenses. The MSA was signed by both parties and their respective counsel. On July 20, 2022, the family court entered a decree of dissolution incorporating the MSA and expressly finding that it was "not unconscionable."

More than a year later, on October 23, 2023, Haley moved the family court to set child support and schedule a hearing on the matter. In support, she filed a signed affidavit, three recent paystubs, receipts for childcare expenses, and a proposed child support worksheet. Chad responded on October 31, 2023, arguing that the parties had expressly waived child support in the MSA, that Haley's request reflected a mere change of heart, and that no material change in circumstances justified modifying the agreement. Haley filed a reply on November 3, 2023, asserting that a change in support from $0 to a guideline-based figure established a rebuttable presumption of material change under KRS 403.213(2), and that the MSA did not prohibit future petitions for support.

The family court held a hearing on March 1, 2024. Only Haley and Chad testified. Both acknowledged that they continued to work in the same positions as they did when the MSA was executed and that the parenting schedule had not changed. Haley testified that Chad had inconsistently reimbursed her for his share of child-related expenses and had ceased additional voluntary contributions after learning she had a new partner. Chad testified that he continued to pay his share of expenses as required and that no substantial changes had occurred in the parties' lives to justify modifying the MSA.

On March 6, 2024, the family court entered a written order granting Haley's motion and setting child support retroactive to November 1, 2023. In full, the order provides:

> This matter came before the Court for Hearing on March 1, 2024, on [Haley's] Motion to for [sic] Child Support. [Haley] was present with counsel Hon. Jennifer Frederick. [Chad] was present with counsel, Hon. Jason Dattilo. Also a party to this case is Hon. James K. Murphy, Friend of the Court.
>
> Having considered testimony of parties, documents and pleadings filed, and being otherwise duly and sufficiently advised, the Court **HEREBY FINDS, CONCLUDES, AND ORDERS AS FOLLOWS:**
>
> 1. Parties entered into a Marital Settlement Agreement that was filed on April 19, 2022. In that agreement, there was no set child support amount established.
>
> 2. Based upon the worksheets tendered to this Court using 2024 income for both parties, the child support obligation that [Chad] would owe to [Haley] would be $754.00 per month.
>
> 3. [Chad] objects to the child support worksheet submitted as it does not take into account his prior born child. However, [Chad] did not provide any evidence that he has a child support order in effect for the prior born child. As such, no credit for same can be given.
>
> 4. The child support amount $754.00 per month shall be effective November 1, 2023.
>
> 5. Because this Order creates an arrearage due, this Court will add arrearage payment of $46.00 per month until said arrearage is paid in full.

(R. at 155-56.) Notably, the family court's order makes no reference to a change in the parties' circumstances. This appeal by Chad followed.

II. Standard of Review

We review a family court's decisions concerning the establishment or modification of child support for abuse of discretion. *Wilson v. Inglis*, 554 S.W.3d 377, 381 (Ky. App. 2018). "Decisions regarding child support obligations must be fair, reasonable, and supported by sound legal principles." *Seeger v. Lanham*, 542 S.W.3d 286, 298 (Ky. 2018). A court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.*

Additionally, "[f]amily courts must make findings of fact and conclusions of law and must enter the appropriate order or judgment when hearing modification motions." *Anderson v.*

Johnson, 350 S.W.3d 453, 457 (Ky. 2011); *see also* CR[2] 52.01.

[2] Kentucky Rules of Civil Procedure.

III. Analysis

The statutory framework governing modification of child support is set forth in KRS 403.213. Subsection (1) provides:

> The provisions of *any decree respecting child support* may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.

Id. (emphasis added). Thus, a party seeking to modify a decree that addresses child support must demonstrate that a substantial and ongoing material change has occurred since the entry of that decree. The burden of proof rests with the moving party. *Wilson*, 554 S.W.3d at 382. However, KRS 403.213(2) provides that when:

> Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order . . . results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances.

In *Thomas v. Thomas*, No. 2014-CA-002078-ME, 2015 WL 4385685 (Ky. App. Jul. 17, 2015),[3] this Court considered whether the rebuttable presumption in KRS 403.213(2) applied where, as in this case, the parties had agreed in their property settlement agreement that neither would pay child support. Ms. Thomas argued that because she was seeking an increase in child support from $0 per month to a guideline-based amount, the statutory presumption of material change should apply.

[3] Pursuant to Kentucky Rules of Appellate Procedure ("RAP") 41(A), "'Not To Be Published' opinions of the Supreme Court and the Court of Appeals are not binding precedent[.]" We discuss this case only because Chad has relied on it extensively in his Appellant's brief.

We first concluded that, although no formal order setting child support had previously been entered, the separation agreement—incorporated into the final decree—was a "decree respecting child support" within the meaning of KRS 403.213(1). However, we ultimately held that the presumption in subsection (2) did not apply. Specifically, we explained:

> By its express terms, the rebuttable presumption set out KRS 403.213(2) applies solely to "a motion or petition for modification of the child support order." Ms. Thomas did not file a motion to modify child support, and there is no "child support order" to modify. Additionally, in order to establish the rebuttable presumption, the court must find at least a 15% change in child support as measured by the child support table set out in KRS 403.212. Since there was no child support order rendered contemporaneously with the Decree, there is no basis for establishing a 15% change. We do not find persuasive Ms. Thomas's contention that any requested increase in child support from a zero basis necessarily constitutes at least a 15% change, as neither the statutory language nor case law support such a conclusion.

Thomas, 2015 WL 4385685, at *3.

More recently, in *Martin v. Cabinet for Health and Family Services*, 583 S.W.3d 12 (Ky. App. 2019), this Court again addressed a situation involving a previously agreed-upon waiver of child support. In *Martin*, as in the present case, the family court incorporated the parties' settlement agreement providing that the "parties shall not pay any amount of child support to either party" into the final decree of dissolution. *Id.* at 14. Sometime thereafter, the mother assigned her right to child support to the Cabinet for Health and Family Services ("Cabinet"), and the Nelson County Attorney, on behalf of the Cabinet, filed an action against the father seeking temporary and continuing child support under the Kentucky Child Support Guidelines.

On appeal, the father argued that the family court erred by applying KRS 403.211 as though this were the initial entry of a child support order, rather than applying the modification provisions of KRS 403.213. We agreed. Like the court in *Thomas*, we concluded that the decree incorporating the parties' agreement was a "decree respecting child support" and that the modification framework of KRS 403.213 governed the Cabinet's motion. We further held that, because the Cabinet (standing in the shoes of the mother) had failed to present any evidence of a material change in circumstances that was substantial and continuing, the family court should have dismissed the action.

While the holding in *Martin* implicitly rejected the notion that a party can simply bypass the requirements of KRS 403.213 by styling a request as an initial determination, we did not explicitly address whether the rebuttable presumption under subsection (2) applies in such cases. Thus, *Martin* reinforces the applicability of KRS 403.213 to modifications following a waiver, but it leaves open the precise interaction between subsections (1) and (2) when the prior obligation was $0.

This brings us to *Nelson v. Ecklar*, 588 S.W.3d 872, 873 (Ky. App. 2019). The parties in *Nelson* were never married, but as part of a custody action, they entered into an agreed parenting order that provided, in part, that "no child support shall be exchanged between the parents[.]" *Id.* Sometime later, the mother moved the family court for an order requiring the father to pay child support. As grounds for modifying the prior order, she cited the father's increase in income and his failure to comply with their agreement regarding payment of the child's expenses.

On appeal, the father argued that the family court erred in finding a material change in circumstances that was substantial and continuing. *See Nelson*, 588 S.W.3d at 875. In addressing this issue, we concluded that the mother was entitled to the rebuttable presumption under KRS 403.213(2), based on the discrepancy between the prior child support obligation of $0 per month and the amount she was then due pursuant to the guidelines. *Id.* at 876.

In so holding, the *Nelson* Court relied on *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App. 1997). In *Tilley*, the parties' separation agreement provided that the father would pay the mother $250 per month in child support, an amount the mother acknowledged was less than the basic child support obligation mandated by Kentucky's Child Support Guidelines. The mother later filed a motion seeking to increase child support. On appeal, we held that "a party who is able to show a 15% discrepancy between the amount of support being paid at the time the motion is filed and the amount due pursuant to the guidelines is entitled to a rebuttable presumption that a material change in circumstances has occurred." *Id.* at 65.

While it is true that *Tilley* involved a discrepancy between a previously ordered amount of child support and a later request for an increase, the principle it announced remains relevant. There, the Court held that a 15 percent difference between the existing obligation and the guideline amount gives rise to a rebuttable presumption of material change. In *Thomas*, this Court declined to apply the presumption where no child support had ever been ordered and the parties had agreed to waive support. The Court reasoned that, in the absence of a prior child support order, there was no basis for establishing a 15 percent change and therefore the presumption did not apply.

However, *Nelson*, a more recent and published opinion, took a different view. There, despite the existence of an agreed order stating that no child support would be exchanged, we held that the presumption under KRS 403.213(2) was properly applied. In doing so, *Nelson* applied the logic of *Tilley* to cases involving agreed deviations from the guidelines, including those that result in no support being paid. To the extent that *Thomas* suggested otherwise, it is not persuasive. *Nelson* is a more recent, published opinion that directly addresses the applicability of the presumption in the context of a prior agreement to forgo child support. Its reasoning reflects a consistent and evolving line of authority that recognizes child support as a statutory duty rather than a right that may be contracted away. As such, *Nelson* forecloses Chad's argument that a prior waiver of support categorically defeats application of the statutory presumption.

Applying *Nelson*, we agree with Haley that she was entitled to rely on the presumption set forth in KRS 403.213(2). However, this does not mean that she must necessarily prevail. The presumption is not conclusive. It may be rebutted by evidence showing that the change in the calculated support amount does not reflect a true material change in the overall circumstances, or that the original deviation remains appropriate when viewed in light of the totality of the circumstances.

The application of the guidelines to the parties' 2024 income calculations results in a monthly support obligation well in excess of 15% over the prior amount ($0), thereby triggering the presumption under KRS 403.213(2). The family court was therefore required to determine whether Chad rebutted that presumption. At the March 2024 hearing, both parties testified that they remain in the same jobs they held when the agreement was executed and that their incomes have only marginally changed. The parenting schedule also remains as it was at the time of the decree. Haley testified that Chad inconsistently reimburses her for his share of medical and daycare expenses, prompting her request for a formal support obligation. Chad countered that he continues to fulfill the terms of the MSA and that Haley's motion reflects a change in preference, not circumstance.

The family court erred by treating Haley's motion as one governed by KRS 403.212, as though no order respecting child support had ever been entered. As established in *Martin*, when a prior decree, whether by agreement or judicial determination, addresses child support, any subsequent request for a change must be treated as a motion to modify under KRS 403.213. The decree of dissolution in this case expressly incorporated the parties' agreement that no child support would be paid. That agreement constituted a decree respecting child support within the meaning of KRS 403.213. The family court's failure to apply the correct statutory framework requires us to vacate its order and remand for further proceedings.

On remand, Haley is entitled to rely on the presumption of material change under KRS 403.213(2), because the difference between the prior obligation of $0 per month and the calculated support amount exceeds the fifteen percent threshold. However, the presumption is not conclusive. The General Assembly's use of the word "rebuttable" reflects its intent to give family courts discretion to determine whether the increased amount truly represents a substantial and continuing material change.[4] *Wells v. Hamilton*, 645 S.W.2d 353, 355 (Ky. App. 1983) ("The legislature has labeled the presumptions 'rebuttable.' It is therefore clear that the legislature intended the general rules applicable to rebuttable presumptions to apply.").

[4] "[R]ebuttable presumptions are governed by [Kentucky Rules of Evidence] KRE 301." *Ak Steel Corp. v. Adkins*, 253 S.W.3d 59, 63 (Ky. 2008). "The existence of a presumption serves only to require the party against whom it operates to introduce evidence to rebut it." *Rentschler v. Lewis*, 33 S.W.3d 518, 520 (Ky. 2000). "If the presumption is not rebutted, the party with the burden of proof prevails on that issue by virtue of the presumption. If the presumption is rebutted, it is reduced to a permissible inference." *Ak Steel*, 253 S.W.3d at 63. "Because a fact must be proved with substantial evidence, a rebuttable presumption must be met with substantial evidence." *Jefferson Cnty. Public Schools/Jefferson Cnty. Bd. of Educ. v. Stephens*, 208 S.W.3d 862, 866 (Ky. 2006). However, "[th]e countervailing defensive evidence need not be 'substantial' in that it would support a positive conclusion . . .; it need only cast enough doubt on the validity of the initial presumption in the case at hand to justify a reasonable man in disregarding it." *Workman v. Wesley Manor Methodist Home*, 462 S.W.2d 898, 900 (Ky. 1971).

The family court was required to make findings of fact regarding whether Chad overcame the presumption, considering the totality of the circumstances. Certainly, this would include consideration of the parties' testimony that notwithstanding the 15% discrepancy, their incomes, living situations, division of expenses, and timesharing had not changed since entry of the original decree. Such evidence certainly tends to suggest that the parties' circumstances remain unchanged.

However, here, the family court appears to have treated Haley's motion as an initial determination under KRS 403.212 since it did not make any findings regarding a change of circumstances. This was plain error that requires us to vacate and remand this matter for additional findings of fact and conclusions of law.

Additionally, given the lack of any analysis in the family court's written order, the passage of time, and the family court's apparent belief that this was an initial support determination rather than a modification, we conclude that a supplemental evidentiary hearing is warranted.

IV. Conclusion

Accordingly, we vacate the Jefferson Family Court's March 6, 2024 order and remand for the court to conduct a supplemental hearing and enter specific findings of fact and conclusions of law addressing whether Chad rebutted the statutory presumption under KRS 403.213(2). In doing so, the court may consider all relevant evidence, including the parties' prior agreement, the consistency of their respective contributions, and the overall equities of the case, bearing in mind that child support is a duty owed to the child, not a benefit conferred on the custodial parent.

ALL CONCUR.

BEFORE: ACREE, A. JONES, AND MCNEILL, JUDGES.

CRIMINAL LAW

REVOCATION OF SEX OFFENDER POST-INCARCERATION SUPERVISION (SOPIS)

REMEDY FOR FAILURE TO CONDUCT A TIMELY KRS 439.440 HEARING

WRIT OF MANDAMUS

Defendant was convicted of first-degree sexual abuse — Parole Board released defendant on Sex Offender Post-Incarceration Supervision (SOPIS) on March 16, 2023 — Defendant was arrested on August 21, 2023, for violating terms of his SOPIS — Probable cause hearing was held on September 7, 2023 — ALJ found probable cause — Defendant's final hearing was held on October 4, 2023, before a second ALJ — ALJ found by a preponderance of the evidence that defendant had violated the condition of his SOPIS and stated that she would issue a written decision — On November 6, 2023, defendant moved Parole Board to dismiss revocation proceedings and return him to community supervision since written decision had not been entered — Defendant alleged that ALJ failed to issue written decision within 21 days of final revocation hearing pursuant to Kentucky Corrections Policies and Procedures (CPP) 27-19-01 and that Parole Board had not heard his case within 60 days of his being returned to state custody pursuant to KRS 439.440 — ALJ entered written ruling, dated November 3, 2023 — ALJ noted that defendant testified admitting to the alleged violations — Parole Board then issued its final decision on November 16, 2023, finding by a preponderance of the evidence that defendant had violated conditions of his SOPIS based on ALJ's findings of fact in November 3, 2023, order — Parole Board revoked defendant's SOPIS and ordered him to serve out his SOPIS in custody — Defendant then filed complaint in circuit court seeking declaratory and injunctive relief based on motions he had made before Parole Board to dismiss revocation proceedings — In the alternative, defendant stated that trial court had jurisdiction to hear his claim as a mandamus action — Parole Board filed a motion to dismiss under CR 12.02(f), arguing that the only proper remedy was a writ of mandamus directing Parole Board to issue a belated decision — Trial court granted motion to dismiss — Defendant appealed — AFFIRMED — Defendant's remedy was limited to a mandamus action to force Parole Board to act — Because defendant had been afforded two hearings (probable cause hearing and final hearing) and Parole Board had already entered a final decision, although outside of 60-day period, defendant had received the only relief available for any failure of Parole Board to hear his case within 60-day period set forth in KRS 439.440 —

Joseph Holland v. Kentucky Parole Board (2024-CA-0943-MR); Franklin Cir. Ct., Wingate, J.; Opinion by Judge Lambert, *affirming*, rendered 9/5/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Joseph Holland has appealed from the July 3, 2024, order of the Franklin Circuit Court dismissing as moot his declaratory judgment action against the Kentucky Parole Board (the Parole Board). We affirm.

After being convicted of first-degree sexual abuse, the Parole Board released Holland on Sex Offender Post-Incarceration Supervision (SOPIS) on March 16, 2023. He was subsequently arrested on August 21, 2023, for violating the terms of his SOPIS.[1] Holland, while represented by appointed counsel, received his probable cause hearing on September 7, 2023, (after which the Administrative Law Judge (ALJ) found probable cause) and his final hearing before a second ALJ on October 4, 2023. At the conclusion of final hearing, the ALJ stated that she found by a preponderance of the evidence that Holland had violated the condition of his SOPIS and that she would issue a written decision.

[1] The alleged violations included failing to complete treatment for substance abuse, having contact with a person under the age of 18, failing to report an electronic device with access to web browsing, email, and web content, and using a

PLEASE SEE NOTE ON PAGE 86 CONCERNING FINALITY OF DECISIONS DIGESTED.

controlled substance (methamphetamine).

On November 6, 2023, as the promised written decision had not been entered, Holland, through his appointed counsel, moved the Parole Board to dismiss the revocation proceedings and to return him to community supervision. Holland contended that the ALJ failed to issue a written decision within 21 days of the final revocation hearing pursuant to Kentucky Corrections Policies and Procedures (CPP) 27-19-01 (it had been 33 days since the final hearing at the time he filed the motion to dismiss). He also contended that the Parole Board had not heard the case within 60 days of his being returned to state custody pursuant to Kentucky Revised Statutes (KRS) 439.440[2] (he had been incarcerated waiting for a decision by the Parole Board for 77 days at the time the motion was filed). The Parole Board, he asserted, could not make a final decision until the ALJ had issued a written decision.

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[2] "Any prisoner returned to state custody for violation of his or her release shall be heard by the board within sixty (60) days on the propriety of his or her rerelease."

The ALJ entered a written ruling, dated November 3, 2023, memorializing the oral finding that Holland had violated the terms of his SOPIS by a preponderance of the evidence. After making findings related to the alleged violations, the ALJ detailed the mitigating evidence Holland submitted and specifically stated that "Holland testified admitting to the alleged violations." The ALJ referred the matter to the Parole Board for a final decision. Holland then filed an amended motion to dismiss, questioning why the written decision was not issued until four days after the ALJ signed it, and otherwise renewing his claims.

The Parole Board issued its final decision on November 16, 2023, finding by a preponderance of the evidence that Holland had violated the conditions of his SOPIS based upon the ALJ's findings of fact in the November 3, 2023, order, and revoking his SOPIS, and ordering him to serve out his SOPIS in the custody of the Department of Corrections. The Parole Board did not mention Holland's motion or amended motion to dismiss, or any of the issues raised in those motions.

Based upon the above, on April 16, 2024, Holland filed a complaint with the Franklin Circuit Court seeking declaratory and injunctive relief, raising the same issues as in his motion and amended motion to dismiss. Alternatively, Holland stated that the circuit court had jurisdiction to hear his claim as a mandamus action. In his demand for relief, Holland sought a declaration that the Parole Board erred when it failed to dismiss the revocation proceedings due to these violations. He also sought injunctive relief directing the Parole Board to vacate its order revoking his SOPIS, dismiss the revocation proceedings, and reinstate his SOPIS.[3]

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[3] Holland mentioned in a footnote that the Supreme Court of Kentucky was considering two cases (*Hodge v. Kentucky Parole Bd.*, No. 2023-SC-0091-DG, and *Kentucky Parole Bd. v. Shane*, No. 2023-SC-0364-DG), that addressed whether the Parole Board's policy in delegating to an ALJ the task of conducting the final revocation hearing was appropriate. The Supreme Court heard oral argument in those cases on June 11, 2025. Although an ALJ conducted the final hearing in the present case, Holland did not raise that issue below, and he has not raised that issue on appeal.

In lieu of filing an answer, the Parole Board filed a motion to dismiss the complaint pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), arguing that the only proper remedy was a writ of mandamus directing the Parole Board to issue a belated decision. It argued, however, that if such a hearing or decision has already been provided, as was the case here, there is no relief to be granted, and dismissal is appropriate. The Parole Board pointed out that Holland had not alleged a due process violation and had admitted to the violations alleged in the notice; his complaint was solely based upon his allegation that the revocation decision was issued outside of regulatory and statutory deadlines. Any alleged lateness of the hearing or decision was moot, as the decision had been issued. In addition, the Parole Board argued that KRS 439.440 only requires that the parolee be heard within 60 days from his return to custody; it does not require that the hearing process be completed in that time.

In response, Holland contended that a declaratory judgment petition was the appropriate remedy available to him and that his complaint was not moot. Holland also disputed the Parole Board's reliance on a 2022 depublished opinion of this Court[4] as well as two older cases[5] that were decided prior to the United States Supreme Court's establishment of minimal due process in parole revocation proceedings in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and the Supreme Court of Kentucky's analysis of that process in conjunction with Kentucky's procedures in *Jones v. Bailey*, 576 S.W.3d 128 (Ky. 2019).

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[4] *Johns v. Kentucky Parole Bd.*, No. 2020-CA-1151-MR, 2022 WL 22628847 (Ky. App. Mar. 18, 2022), *review denied and ordered depublished* (August 10, 2022).

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[5] *Mahan v. Buchanan*, 310 Ky. 832, 221 S.W.2d 945 (1949), and *Allen v. Wingo*, 472 S.W.2d 688 (Ky. 1971).

In reply, the Parole Board argued that the decisions in *Morrissey* and *Jones* did not alter the earlier decisions in *Mahan* and *Wingo*; the former cases concerned the minimal due process owed to an offender in the parole revocation process, while the latter cases concerned the remedy the courts could provide in challenges to the actions of the Parole Board.

The circuit court heard arguments from the parties on July 1, 2024. The Parole Board, through counsel, stated that while Holland had received his two hearings within 60 days, he had not received his written findings from the final hearing or the final revocation decision until after the 60-day period had elapsed. The only remedy available was to provide him with "those things that are delayed," and because the written findings and final decision had already been provided to Holland, his petition was moot.

Holland, through counsel, argued that he had only been heard by two ALJs, but not the Parole Board, within 60 days. Being heard by an ALJ was not what the statute called for, although it was how the Parole Board had decided to go forward with revocation proceedings. The final decision from the Parole Board was received 87 days after he was taken into custody. Holland argued that the remedy was to dismiss the proceedings and release him, as he argued in the motion to dismiss below that the Parole Board did not address. Holland went on to argue that the Parole Board had been ignoring the statutory time limitations by utilizing ALJs to conduct the hearings.

The Parole Board responded that KRS 439.341 provides that it can delegate, to an ALJ, hearings on probable cause and any other duties as assigned. The Parole Board asserted that there had not been any due process violation in the present case, and the remedy had already been provided.

On July 3, 2024, the circuit court entered an order granting the Parole Board's motion to dismiss, concluding that Holland's petition was moot. His only remedy was to seek a writ of mandamus for the circuit court to order the Parole Board to issue a final decision pursuant to the applicable caselaw, but he had already received his final revocation decision. The court did not find any statutory or caselaw support for Holland's argument that he was entitled to release and to be returned to community supervision because the revocation proceeding was not completed in 60 days. The court also concluded that the slight delay in Holland's case was not a violation of due process based upon *Morrissey*. Because there was no other remedy the court could provide, the court dismissed the complaint. This appeal now follows.

On appeal, Holland continues to argue that the Parole Board's violation of the 60-day time limitation in KRS 439.440 supports his release from custody. In addition, he argues that his petition seeking declaratory and injunctive relief was the only way he could seek an adequate remedy; a writ of mandamus could not provide him with the appropriate relief. The Parole Board disputes these arguments and argues that the circuit court properly dismissed Holland's petition.

The appropriate standard of review for a dismissal pursuant to CR 12.02(f) is as follows:

> "It is well settled in this jurisdiction when considering a motion to dismiss under [Kentucky Rules of Civil Procedure (CR) 12.02], that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)). "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)).

Littleton v. Plybon, 395 S.W.3d 505, 507 (Ky. App. 2012) (footnote omitted). *See also Saint Joseph Hosp. v. Frye*, 415 S.W.3d 631, 632 (Ky.

2013) ("The issue presented concerns statutory interpretation, which is purely a question of law, which we review *de novo*.").

We have reviewed the applicable caselaw, and we are constrained to agree with the Parole Board that Holland's remedy was limited to a mandamus action (which he included as an alternative basis for jurisdiction in his petition) to force the Parole Board to act. "Our law has long provided that a mandamus action against the Parole Board (but not an action for habeas corpus) will lie to challenge a parole revocation." *Muhammad v. Kentucky Parole Bd.*, 468 S.W.3d 331, 345 (Ky. 2015) (citations and footnote omitted). Because Holland had been afforded two hearings (a probable cause hearing and a final hearing) and the Parole Board had already entered a final decision, albeit outside of the 60-day period, Holland has received the only relief available for any failure of the Parole Board to hear his case within the 60-day period set forth in KRS 439.440.

In its brief, the Parole Board relied heavily on this Court's recent but depublished opinion of *Johns*, *supra*, to argue that a mandamus action was the only avenue of relief available to Holland for the Parole Board's failure to comply with the time requirements of KRS 439.440 and that, because the Parole Board had already entered a final decision, there was no other remedy available to him.

The Supreme Court of Kentucky very recently addressed the use of depublished opinions in *Normandy Farm, LLC v. Kenneth McPeek Racing Stable, Inc.*, 701 S.W.3d 129, 137 (Ky. 2024):

> [W]e take this opportunity to make clear to bench and bar that depublished opinions—as opposed to ordinary not-to-be-published opinions, the citation of which is governed by RAP[6] 41[7]—have zero precedential value. The reasons why this Court may exercise its authority to depublish an opinion of the Court of Appeals are various and, more importantly, known only to this Court; and even then, imperfect. All that is known from such an order is that this Court does not want a particular opinion to be binding on trial courts or other Courts of Appeal panels. This Court has seen something in them that did not merit discretionary review but may work mischief if followed by other courts. The rule of thumb is that the entire opinion should be limited strictly to the parties concerned and not cited as persuasive authority in other cases. *That being said, McPeek relies heavily upon* [*a depublished opinion*] *for support so we will consider its reasoning but reliance upon depublished opinions is discouraged.*

(Emphasis added.)

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[6] Kentucky Rules of Appellate Procedure.

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[7] RAP 41(A) addresses the citation to not-to-be-published Kentucky opinions:

> "Not To Be Published" opinions of the Supreme Court and the Court of Appeals are not binding precedent and citation of these opinions is disfavored. A party may cite to and rely on a "Not To Be Published" opinion for consideration if:
>
> (1) it was rendered after January 1, 2003,
>
> (2) it is final under RAP 40(G),
>
> (3) there is no published opinion of the Supreme Court or the Court of Appeals that would adequately address the point of law argued by the party, and
>
> (4) the party clearly states that the opinion is not binding authority.

Our review of *Johns* reflects that the panel carefully considered and analyzed the few reported cases and provided an excellent history of this issue; the Court did not create any new law as a result. Therefore, we have opted to consider and rely upon the following portion of the Court's reasoning in *Johns*, as the Supreme Court did in *Normandy Farm*, with the acknowledgement that reliance upon depublished opinions is discouraged and a last resort.

> ***Mandamus is sole remedy for failure to conduct timely KRS 439.440 hearing.***
>
> Long ago, a parolee, reincarcerated for violating terms of his parole, brought a *habeas corpus* action claiming he was "illegally restrained by the . . . Parole Board, because his parole from the prison was revoked and he was reincarcerated without any hearing . . . ." *Shepherd v. Wingo*, 471 S.W.2d 718, 719 (Ky. 1971). Rejecting *habeas corpus* as his remedy, the *Shepherd* Court cited the now century old case of *Board of Prison Commissioners v. Crumbaugh*, which says:
>
>> If the [Parole B]oard should *in any case* abuse its authority in rearresting a convict, the remedy is by a proceeding in the circuit court . . . to obtain a writ of mandamus requiring the board to proceed properly, and in that judicial proceeding the facts may all be shown, and either party aggrieved by the decision may appeal to this court.
>
> 161 Ky. 540, 170 S.W. 1187, 1188 (1914) (emphasis added).
>
> In a subsequent opinion a few years later, the former Court of Appeals laid out the reasoning more clearly. "A prisoner . . . at liberty under the parole . . . is subject to the control of the board as he was before the parole was granted." *Commonwealth v. Crumbaugh*, 176 Ky. 720, 197 S.W. 401, 402 (1917); *Muhammad v. Kentucky Parole Bd.*, 468 S.W.3d 331, 345 n.15 (Ky. 2015) (parolee in revocation hearing is not seeking release from custody, "but the exchange of one form of custody for another."). Hence, once convicted, and until he serves out his sentence, a parolee is lawfully in state custody whether incarcerated or not. *See* KRS 439.346; KRS 439.348. *Habeas* is not his remedy.
>
> Thirty or so years after the *Crumbaugh* cases, our highest Court reiterated this most consistent ruling that if "the [Parole B]oard should abuse its authority . . . , the remedy is . . . to obtain a writ of mandamus requiring the [B]oard to proceed properly." *Mahan v. Buchanan*, 310 Ky. 832, 836, 221 S.W.2d 945, 947 (1949). That is the sole remedy the circuit court identified in the instant case.
>
> The bottom line is that each Appellant's complaint and concomitant remedy is indistinguishable from those in *Allen v. Wingo*, 472 S.W.2d 688 (Ky. 1971). In that case, the parolee claimed "revocation of parole . . . was invalid because he had not been given a hearing as required by KRS 439.440 until 40 days after his return to prison, whereas the statute directs that the hearing be had within 30 days . . . ." *Id.* at 688. Chief Justice Palmore, writing for Kentucky's highest Court said: "For the reasons set forth in *Mahan v. Buchanan* . . . and its supporting authorities, mandamus is the only proper remedy for an abuse of authority by the parole board . . . ." *Id.*
>
> Reading *Mahan* and *Allen* together makes it clear—Appellants were entitled to no relief other than a writ of mandamus compelling the Parole Board to conduct the KRS 439.440 hearing. The record shows each Appellant has had the benefit of such a hearing and they are entitled to no further relief.

Johns, 2022 WL 22628847, at *4-5.[8]

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[8] We note that the *Johns* case addressed the 1956 version of KRS 439.440, which provided that a parolee had to be heard within 30 days. The statute was amended to provide the Parole Board with 60 days effective July 15, 2020.

There is no dispute in this case that Holland was afforded both a probable cause hearing and a final hearing, and that the Parole Board has entered a final decision revoking his SOPIS and ordering him to serve out his remaining time. Holland has already received the only relief to which he is entitled. For this reason, the circuit court did not commit any error in dismissing Holland's petition as moot.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BEFORE: CETRULO, COMBS, AND LAMBERT, JUDGES.

REAL PROPERTY

CONSERVATION EASEMENT

CIVIL PROCEDURE

DECLARATORY JUDGMENT ACTION

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION UNDER CR 19

A NECESSARY PARTY v. AN INDISPENSABLE PARTY

In 2011, Joe M. Davis and Mary C. Davis Family Limited Partnership (DFLP) conveyed conservation easement over approximately

151.7 acres in Scott County via Deed of Conservation Easement to Scott County Rural Land Management Board, Inc. (Board) — Conveyance names DFLP as Grantor, in favor of Board as Grantee, and United States, acting by and through Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS), on behalf of the Commodity Credit Corporation (collectively "United States"), "as its interest appears herein" — United States is not named as a Grantee — Conveyance states that Grantee shall have primary responsibility for management and enforcement of terms of easement and its obligation is "subject to the rights of the United States" — Conveyance's paragraphs and mutual covenants show that United States' "rights" under easement encompass the right to enforce the terms therein if certain conditions precedent occur — Specifically, easement provides United States with same rights of enforcement as Grantee; however, United States will only exercise those rights as set forth in Section 7.11, although easement does not include any provision labeled "Section 7.11" — Other provisions indicate that Grantee shall act as primary steward of easement, until such time as United States exercises its rights of enforcement, if ever — Easement's purpose is to protect and preserve property's agricultural viability — Easement contains list of prohibited uses, which includes that subdivision of the property is prohibited, although easement does not define "subdivision" — Easement grants United States a right of enforcement in order to protect the public investment — Further, Secretary of USDA may exercise this right of enforcement if Grantee (or the fiscal court, which is named as the "Backup Grantee"), fails to enforce any terms of the easement, as determined in the sole discretion of Secretary — Easement provides that it is to be governed by Kentucky law — In 2019, LLC purchased instant property from DFLP in fee simple — LLC acknowledges that it is bound by terms of easement as successor Grantor — In March 2021, LLC decided to sell one of servient parcels and notified United States of its intention — United States informed LLC that selling individual parcels violated easement's subdivision restriction — Board and fiscal court informed LLC that they opposed any sale of individual parcels — LLC alleged that under Kentucky law, sale of any one of the servient parcels is not a subdivision of the property because the parcels existed individually prior to creation of the easement; parcels will remain subject to easement upon any sale or transfer; and such transaction will not frustrate or impair purposes of easement — In February 2023, LLC filed suit in federal district court seeking declaratory judgment that potential sale(s) of individual servient parcels to one or more purchasers does not violate easement — LLC named Board and United States as defendants — Board and United States filed joint motion to dismiss — Federal district court dismissed complaint without prejudice stating that it lacked subject matter jurisdiction under Federal Quiet Title Act — In September 2023, LLC filed a nearly-identical declaratory judgment action in Scott Circuit Court pursuant to Kentucky Declaratory Judgment Act (KDJA) naming Board and United States as defendants — United States summarily filed a notice of removal to federal court — LLC, expecting federal district court to dismiss the action once again on jurisdictional grounds, voluntarily dismissed its complaint — On September 8, 2023, LLC again pursued declaratory relief by filing instant action — LLC's complaint is substantively the same as its two prior complaints; however, LLC only named Board as a party defendant — Board filed motion to dismiss complaint due to its failure to name United States as a party defendant pursuant to CR 19 and KDJA — Trial court dismissed complaint without prejudice finding that omission of United States as a defendant required dismissal — LLC appealed — HELD that the United States is not a necessary party under KDJA or CR 19.01; therefore, REVERSED dismissal of LLC's complaint and REMANDED for additional proceedings on the merits — KDJA, specifically KRS 418.075, requires that all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding — CR 19.01 discusses persons to be joined if feasible — When joinder under CR 19.01 is not feasible, CR 19.02 discusses if dismissal is warranted — Generally, a moving party must demonstrate the following to obtain dismissal based on non-joinder of an absent party pursuant to CR 19.01 and 19.02: (1) the absent party is necessary to the action pursuant to CR 19.01; (2) the trial court cannot feasibly join the necessary party under CR 19.01 because the party is not subject to service of process; and (3) the necessary party is indispensable to the action so as to prevent the case from proceeding in the party's absence pursuant to CR 19.02 — First inquiry determines whether the party is necessary to the action under CR 19.01; and, if so, third inquiry evaluates if the absent party is indispensable requiring dismissal under CR 19.02 — Under CR 19.01, a necessary party is a party who should be joined in an action — Under CR 19.02, an indispensable party is a party who must be joined in an action, and in such party's absence, the action may be dismissed — Under CR 19.01(a), a necessary party is a party whose absence prevents a court from providing the already-named parties with complete relief — Under CR 19.01(b), the absent, unnamed party is a necessary party if he has an interest in the action and adjudication of the action will either (i) hinder his ability to protect that interest or (ii) subject the already-named parties to inconsistent obligations due to that interest — If the absent party is necessary, trial court's second step is to join the party if feasible pursuant to CR 19.01 — If the absent, necessary party cannot be joined, a court must proceed to the third inquiry set forth in CR 19.02, which considers "in equity and good conscience" whether the necessary party is indispensable to the action, thereby requiring dismissal — CR 19.02 provides four factors for court to consider when determining whether equity required dismissal — In instant action, Court of Appeals evaluated dismissal for non-joinder under KDJA separately from CR 19 — Under KDJA analysis, LLC requested judicial declaration interpreting an easement restriction, *i.e.*, whether sale or transfer of subservient parcels that remain subject to deed of easement qualifies as a subdivision — LLC is not seeking to quiet title or petitioning for a declaration regarding any party's right to enforce terms of easement — Judicial interpretation of term "subdivision" under Kentucky law does not affect United States' enforcement right under easement, a right that has not even been triggered — There are no allegations that United States is seeking or will seek to possess a present, primary right of enforcement — Board remains the sole Grantee, with the lone right of enforcement — Absent a showing that United States' interest will be affected by judicial declaration, dismissal for non-joinder under KDJA is not appropriate — A declaratory judgment shall be *res judicata* between LLC and Board — Court of Appeals did not opine on United States' enforcement of the subdivision restriction before, during, or after any sale or transfer — Under CR 19.01 analysis, there is no tenable argument that CR 19.01(a) is implicated because a judicial declaration interpreting "subdivision" will provide complete relief to LLC and Board — Trial court is not required to settle rights of United States in order to interpret "subdivision" within context of easement and under Kentucky law — Similarly, CR 19.01(b)(i) does not render United States a necessary party as the requested declaration will not impair or impede United States' prospective right of enforcement — Given nature of relief LLC seeks and lack of explanation concerning how the requested declaration would subject parties to inconsistent obligations, it is a misapplication of CR 19(b)(ii) to provide United States with necessary party status under instant facts — Court of Appeals noted Board's apparent incentive to pursue joinder of United States — Both federal and state courts have dismissed this litigation, providing no forum for the dispute — Court of Appeals will not condone procedural gamesmanship — Court of Appeals and instant parties must aim for adjudication on the merits — Since United States is not a necessary party under CR 19.01, Court of Appeals did not need to address whether United States is an indispensable party requiring dismissal under CR 19.02 —

Worick Land Holdings, L.L.C. v. Scott County Rural Land Management Board, Inc. (2024-CA-0951-MR); Scott Cir. Ct., Gabhart, J.; Opinion by

Judge Eckerle, *reversing and remanding*, rendered 9/5/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Appellant, Worick Land Holdings, L.L.C. ("Worick"), challenges the Scott Circuit Court's Order dismissing its Complaint pursuant to Kentucky Rules of Civil Procedure ("CR") 12.02 and 19.01, and the Kentucky Declaratory Judgment Act ("KDJA"), Kentucky Revised Statutes ("KRS") 418.040 *et seq*. After careful consideration, we reverse and remand for additional proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from a Deed of Conservation Easement (the "Easement") over approximately 151.7 acres of land in Scott County, Kentucky (the "Property"). In 2011, the Joe M. Davis and Mary C. Davis Family Limited Partnership ("DFLP") conveyed the Easement to Appellee, the Scott County Rural Land Management Board, Inc. (the "Board"), in consideration for $574,000.

The Easement's conveyance names the DFLP as the "Grantor," in favor of the Board as "Grantee," and the United States, acting by and through the Department of Agriculture ("USDA"), Natural Resources Conservation Service ("NRCS"), on behalf of the Commodity Credit Corporation (collectively referred to as the "United States"), "as its interest appears herein." Trial Record ("TR"), p. 9. Notably, the United States is not named as a Grantee. Also significant is the Easement's conveyance language that the Grantee "shall have the *primary* responsibility for management and enforcement of the terms of this [Easement]," and its obligation is "subject to the rights of the United States." TR, p. 9 (emphasis added).

The conveyance's paragraphs and mutual covenants reveal the United States' "rights" under the Easement encompass the right to enforce the terms therein if certain conditions precedent occur. To be specific, the Easement provides the United States with the "same rights of enforcement as the Grantee under this Easement." TR, p. 12. However, the subsequent sentence clarifies that the "United States will only exercise those rights of enforcement as set forth in section 7.11." TR, p. 12. Oddly, the Easement does not include any provision labeled "section 7.11." The parties' exchange of promises further elucidates the interplay between the United States' right of enforcement and the Board's status as Grantee, stating as follows: "Grantee shall act as primary steward of this Easement, *until such time* as the United States exercises its rights of enforcement, *if ever*. In the event that such rights of enforcement *are triggered*, the references [herein] to 'Grantee' shall be read to mean to the United States as well." TR, p. 12 (emphasis added).

Moving through the pertinent language in order of the Easement's numbered Sections, we commence with Section 1, which delineates the Easement's purpose as protecting the "prime, unique, [Property land] in order to preserve agricultural viability." TR, p. 12. Section 2 of the Easement describes the rights of the Grantee, including the right to protect the conservation values of the Property, to enter the Property "to monitor compliance with and otherwise enforce the terms of this Easement in accordance with Section 7; . . . [and] to prevent . . . use of the Protected Property that is inconsistent with the [p]urpose of this Easement . . . by exercise of the remedies set forth in Section 7." TR, p. 13.

Turning to Section 3 of the Easement, the Grantor's affirmative obligations include, *inter alia*, compliance with the terms of the Easement and any conservation plans as formulated by the NRCS. If the Grantor does not comply with its affirmative obligations under the conservation plan, "the NRCS will inform the Grantee of the Grantor's noncompliance. The Grantee shall take all reasonable steps (including efforts at securing voluntary compliance and, if necessary, appropriate legal action) to secure compliance with the conservation plan . . . ." TR, p. 13.

Section 4 of the Easement contains a list of "Prohibited Uses" of the Property. Central to the appeal before us is Subsection 4(j), which states "Subdivision of the Protected Property is prohibited." TR, p. 16. The Easement does not define the term "subdivision." Equally relevant is Section 6, titled "Enforcement/Management," and states that the Grantee is charged with investigating violations of the Easement, informing the NRCS of the same, and taking "appropriate enforcement action." TR, p. 20. Section 6 provides that *if* the Grantee fails to resolve violations of the Easement within 60 days from discovery it "may result in enforcement of the terms of the Easement by the United States." TR, p. 21.

Section 5 of the Easement, titled "Permitted Uses," delineates a list of allowable activities and uses of the Property. TR, p. 17. Section 6 describes the initial baseline report and the responsibilities of the Grantee to ensure that the Property is maintained in accordance with the report. Subsection (a) states that the Grantee shall provide annual monitoring of the report and must resolve any violation within 60 days of discovery. "Failure to cure the violation *may* result in enforcement of the terms of the Easement by the United States." TR, p. 21 (emphasis added).

While mentioned in relation to the United States' enforcement rights, Section 7, is titled "Notice and Approval," and details the notice and approval requirements for permitted activities on the Property as designated in Section 5. TR, p. 21-22. Section 7 does not refer to the United States or any of its agencies. As mentioned above, there is no section labeled "section 7.11."

Moving on to Section 8 of the Easement, should the Grantee find "that a violation of the terms of the Easement has occurred or is threatened, Grantee shall give written notice to Grantor of such violation and demand corrective action . . . ." TR, p. 22. If corrective action is not taken, the Grantee may seek relief in equity or in law. In the event the parties fail to fulfill their duties under the Easement, Section 8.10 provides the Scott County Fiscal Court (the "Fiscal Court") with the mandatory duty to bring suit to enforce the terms of the Easement against the Grantor or the Grantee.

Progressing to a critical section of the Easement, we turn to Section 10, titled "General or Standard Provisions." In Section 10.13, titled "Right of Enforcement," the Easement grants the United States a right of enforcement as follows: "Under this Easement, the United States is granted the rights of enforcement in order to protect the public investment. The Secretary of [the USDA] . . . *may* exercise this right of enforcement . . . *if* the Grantee, or the [Fiscal Court], fail to enforce any of the terms of this Easement, as determined in the sole discretion of the [USDA] Secretary." TR, p. 27 (emphasis added). Next, Section 10.14, permits the transfer or assignment of the Property subject to the Easement, which runs with the Property in perpetuity.

With the limited exception of Sections 13.2 and 18.1, the remaining provisions of the Easement are not relevant to our review. Section 13.2 names the Fiscal Court as the "Backup Grantee." TR, p. 31. Section 18.1 of the Easement provides that the "interpretation and performance of this Easement shall be governed by the law of the Commonwealth of Kentucky." TR, p. 32.

A plain reading of the Easement indicates that the United States has a right to enforce the terms of the Easement if, and only if, the right of enforcement is "triggered." The triggering event derives from the Grantee's failure to fulfill its primary duty to enforce the terms of the Easement. Relating to the subdivision restriction, if the Grantee (or Fiscal Court) fails to enforce the Easement terms, the United States may elect to assert its enforcement rights. Thus, the right is not automatic and is contingent on the USDA Secretary's determination that the Grantee has failed to enforce the Easement restrictions.

With these relevant Easement provisions in mind, we turn to the facts alleged in Worick's Complaint, which is the operative pleading for purposes of this Court's review. In 2019, Worick purchased the Property from DFLP in fee simple. Worick acknowledges that it is bound by the terms of Easement as the successor "Grantor." Accordingly, Worick has an affirmative obligation to comply with the terms of the Easement, including selling or transferring the Property in a manner consistent with the subdivision prohibition contained within Section 4(j).

In March of 2021, Worick desired to sell one of the servient parcels and notified the United States of its intention. In response, the United States informed Worick that selling individual parcels violated Section 4(j) of the Easement's subdivision restriction. On October 31, 2022, Worick, with the assistance of counsel, provided the Board and the United States with written notice of its intent to sell one or more servient parcels to one or more buyers no earlier than 30 days from the date of notice. The Scott County Attorney, Cameron Culbertson, informed Worick, by letter dated November 23, 2022, that the Board and the Fiscal Court oppose any sale of individual parcels to one or more buyers as such action constitutes an impermissible subdivision of the Property.

Worick alleges that under the governing laws of this Commonwealth, the sale of any one of the servient parcels is not a subdivision of the property because the parcels existed individually prior to the creation of the Easement, the parcels will remain subject to the Easement upon any sale or transfer, and such transaction will not frustrate or impair the purpose of the Easement.

The jurisprudential development of this appeal began in February of 2023 when Worick filed suit in the Federal District Court seeking a declaratory judgment that the potential sale(s) of individual servient parcels to one or more purchasers does not violate Section 4(j) of the Easement.[1] Worick named the Board and the United States as party defendants.

[1] *Worick Land Holdings, L.L.C. v. Scott Cnty. Rural Land Mgmt. Bd., Inc.*, United States District Court, Eastern District of Kentucky, Case No. 5:23-cv-49-DCR.

In June of 2023, upon the Board and the United States' joint motion, the Federal District Court dismissed Worick's complaint without prejudice on the basis that it lacked subject matter jurisdiction. That Court concluded that the Federal Quiet Title Act, 28 United States Code ("U.S.C.") § 2409a, did not permit declaratory relief in the form of construing the language of an easement because the cause of action does not concern title to property.

In September of 2023, Worick filed a nearly-identical, declaratory action in the Scott Circuit Court pursuant to the KDJA, again naming the Board and the United States as party defendants.[2] Worick pointed out that the United States has "tertiary rights to enforce the terms of the [Easement] if and to the extent others fail to do so and, thus, [is] being included as [a party defendant] for notice purposes." TR, p. 82. The United States summarily filed a notice of removal to Federal Court pursuant to 28 U.S.C. § 1442(a)(1). Worick, expecting the Federal District Court to dismiss the action once again on jurisdictional grounds, voluntarily dismissed its complaint.

[2] *Worick Land Holdings, L.L.C. v. Scott Cnty. Rural Land Mgmt. Bd., Inc.*, Scott Circuit Court, Civil Action No. 23-CI-00567.

On September 8, 2023, Worick pursued declaratory relief for a third time, filing the underlying Complaint in the Scott Circuit Court. Worick's Complaint is substantively the same as its prior two complaints. However, in this third Complaint, Worick only named the Board as party defendant. The allegations of Worick's Complaint clarified that the Board is the sole Grantee under the Easement, has taken action to enforce Section 4(j) of the Easement, and is therefore the only party with the present right of enforcement. Worick also attached and incorporated by reference the Easement and the correspondence discussed *supra*.

On October 6, 2023, citing CR 12.02, the Board filed a Motion to Dismiss Worick's Complaint due to its failure to name the United States as a party defendant pursuant to CR 19 and the KDJA. The crux of the Board's argument was that the United States is a necessary party based on its right to enforce the terms of the Easement. In response, Worick argued that neither CR 19.01 nor the KDJA renders the United States as a "necessary" or "interested" party to the action because the United States is not a Grantee and has taken no steps to perfect its right of enforcement. Considering the Board's affirmative opposition to Worick's proposed sale of individual parcels of the Property to one or more buyers, Worick argued that the United States is without a present enforcement interest to assert. Worick also contended that even if the United States qualified as a necessary party, dismissal is unwarranted because the United States does not qualify as an indispensable party pursuant to CR 19.02.

On June 18, 2024, following written and oral arguments on the Board's motion, the Trial Court dismissed Worick's Complaint without prejudice. The Trial Court's five-page Order recited the relevant facts, standard of review, applicable law, and provided a one-paragraph application of the law to the facts. The Trial Court's analysis is as follows: "Plaintiff acknowledged [the United States'] interest by naming [the United States] in [Worick's] first two lawsuits. [The United States is a] part[y] to the Easement and ha[s] final authority to enforce it even if the [Board] does not. [The United States'] omission requires dismissal of the complaint." TR, p. 237. Worick appeals from this Order.

STANDARD OF REVIEW

CR 12.02(g) permits a defendant to request dismissal of an action for "failure to join a party under Rule 19." The KDJA also requires dismissal for failure to join necessary parties who are described as those who have an interest that will be affected by the requested declaratory relief. *See* KRS 418.075. Under both CR 19 and the KDJA, dismissal for non-joinder is subject to an abuse of discretion standard of review. *See Commonwealth, Dep't of Fish & Wildlife Resources v. Garner*, 896 S.W.2d 10, 14 (Ky. 1995) (applying an abuse of discretion standard when reviewing joinder under CR 19 and the KDJA); *Sherrard v. Jefferson Cnty. Bd. Of Educ.*, 171 S.W.2d 963, 965 (Ky. 1942) (in an appeal concerning non-joinder in an action for declaratory judgment, the Court stated that "[d]eclining to declare the rights was within the discretion of the circuit court").

An abuse of discretion occurs when "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). As applied to the issue of joinder, an abuse of discretion occurs where the order on appeal "is clearly erroneous [or] affects the substantial rights of the parties." *West v. Goldstein*, 830 S.W.2d 379, 385 (Ky. 1992). In deciding whether findings are clearly erroneous, we endeavor to determine if they are without adequate evidentiary support or occasioned by erroneous application of the law. *See Rogers v. Lexington-Fayette Urban Cnty. Gov't*, 175 S.W.3d 569, 571 (Ky. 2005) (citation omitted). The issues presented in this appeal do not involve issues of fact, but only the application of law. We also underscore that a Trial Court should utilize its discretion in a manner consistent with effectuating the goals of the rule. *See Garner*, 896 S.W.2d at 14 ("The decision as to necessary or indispensable parties rests within the sound authority of the trial judge in order to effectuate the objectives of the rule.").

ANALYSIS

The KDJA, CR 19.01, and CR 19.02 comprise the legal framework within which we conduct our review. The Order on appeal does not distinguish between the KDJA and CR 19.01, and it fails to mention CR 19.02 in any respect. Nonetheless, we will review the KDJA and CR 19 in turn.

To begin, the KDJA, specifically KRS 418.075, titled in part, "Necessary parties," requires that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." As applied to the appeal *sub judice*, Worick is mandated to name any party that has an interest that will be affected by the requested judicial declaration. *See Commonwealth ex rel. Meredith v. Reeves*, 157 S.W.2d 751, 753 (Ky. 1941) (stating that naming necessary parties in a declaratory judgment action is mandatory).

Similarly, CR 19.01, titled "Persons to be joined if feasible[,]" provides as follows:

> A person who is subject to service of process, either personal or constructive, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

When joinder under CR 19.01 is not feasible, we must determine if dismissal is warranted under CR 19.02, which states, in part, the following:

> If a person as described in Rule 19.01 cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispens[a]ble.

CR 19.01 and 19.02 are virtually identical to Rule 19 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). *See Jones by and through Jones v. IC Bus, L.L.C.*, 626 S.W.3d 661, 670 (Ky. App. 2020) ("The only significant difference between the two concerns federal jurisdiction."). As a result, this Court regards "cases analyzing the federal rule [as] highly relevant in determining the proper interpretation and application [of CR 19] . . . ." *Id.* This Court has further adopted the three-step analysis espoused by the Sixth Circuit Court of Appeals in *American Express Travel Related Services, Co., Inc. v. Bank One-Dearborn, N.A*, 195 F. App'x 458, 460 (6th Cir. 2006). *Jones*, 626 S.W.3d at 671. To summarize broadly, a moving party must demonstrate the following to obtain dismissal based on non-joinder of an absent party pursuant to CR 19.01 and 19.02: (1) the absent party is necessary to the action pursuant to CR 19.01; (2) the Trial Court cannot feasibly join the necessary party under CR 19.01 because the party is not subject to service of process; and (3) the necessary party is indispensable to the action so as prevent the case from proceeding in the party's absence pursuant to CR 19.02.

For the sake of clarity, we refer to the first inquiry as determining whether the party is necessary to the action under CR 19.01; and, if so, the third inquiry evaluates if the absent party is indispensable requiring dismissal under CR 19.02. *See Baker v. Weinberg*, 266 S.W.3d 827, 832 (Ky. App. 2008) ("[U]nder CR 19.01, a necessary party is a party who should be joined in an action, and under CR 19.02, an indispensable party is a party who must be joined in an action, and in such party's absence, the action may be dismissed."). Thus, "necessary" and "indispensable" are distinct terms with different meanings, and they are not interchangeable.

On a more granular level, the necessary party analysis considers two broad categories promulgated in CR 19.01(a) and (b). Under CR 19.01(a), a necessary party is a party whose absence prevents a Court from providing the already-named parties with complete relief. Under CR 19.01(b), the absent, unnamed party is a necessary party if he has an interest in the action and adjudication of the action will either (i) hinder his ability to protect that interest or (ii) subject the already-named parties to inconsistent obligations due to that interest. If the absent party is necessary, the Trial Court's second step is to join the party if feasible pursuant to CR 19.01. Unlike its federal counterpart, CR 19.01 makes clear that feasibility is only dependent on whether the party is subject to service of process. *Cf.* Fed. R. Civ. P. 19(a)(1) ("A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined . . . .").

If the absent, necessary party cannot be joined, a Court must proceed to the third inquiry delineated in CR 19.02, which considers, "in equity and good conscience[,]" whether the necessary party is indispensable to the action, thereby requiring dismissal. CR 19.02 provides four factors for a Court's consideration when determining whether equity requires dismissal. The indispensability analysis guides the Trial Court to weigh pragmatic and equitable factors considering whether the case can proceed in the absence of the non-joined party. *Id.*; *Liquor Outlet, L.L.C. v. Alcoholic Beverage Control Board*, 141 S.W.3d 378, 387 (Ky. App. 2004) (citations omitted).

I. <u>KDJA</u>

The language of the KDJA demonstrates an overarching objective, which is undoubtably harmonious with the equitable principle "that no Court can adjudicate directly upon a person's right, without the party being either actually or [constructively] before the court." *Mallow v. Hinde*, 25 U.S. 193, 198 (1827). While similar to CR 19, our authoritative case law has referred to the KDJA as "provid[ing] an additional basis for dismissal for failure to join indispensable parties." *Gilland v. Dougherty*, 500 S.W.3d 217, 223 (Ky. 2016). Indeed, our Supreme Court has reviewed dismissal pursuant to the KDJA separately from CR 19.01 and 19.02. *See Garner*, 896 S.W.2d at 14-15. Therefore, despite the overlapping language and considerations at play, it is incumbent upon this Court to evaluate dismissal for non-joinder under the KDJA separately from CR 19.

To determine whether the KDJA necessitates dismissal, we first identify the United States' interest and if Worick's requested judicial declaration affects said interest. The Trial Court's Order provided limited analysis and simply supplied two legal conclusions supporting dismissal due to Worick's failure to name the United States as a party defendant. First, the Trial Court relied on *Adamson v. Adamson*, 635 S.W.3d 72 (Ky. 2021), for the proposition that "in real estate controversies, 'all persons who are interested under the title are necessary parties.'" TR, p. 246. Second, the Trial Court found that Worick's naming of the United States in its preceding two lawsuits sufficiently demonstrates the United States' interest and requires dismissal.

Regarding *Adamson*, the Trial Court did not accurately quote the proposition upon which it relied. The correct quotation is as follows: "Because of our ruling on the Statute of Frauds this issue is not controlling upon us, but we would remind the lower courts that in 'controversies *concerning title to real estate* all of the persons who are interested under the title in litigation are necessary parties.'" *Id.* at 81 (emphasis added) (quoting *Lunsford v. Witt*, 309 S.W.2d 348, 349 (Ky. 1958)).

Notwithstanding the language in the quotation, *Adamson* is inapposite to the issue because the Kentucky Supreme Court decided the appeal on other grounds and did not apply the KDJA (or CR 19, for that matter). Moreover, the *Adamson* Court was confronted with title to property. Here, however, Worick seeks the interpretation of a negative restriction on the Easement. Thus, the Trial Court's reliance on incorrect language in a distinguishable case is misplaced and not supported by sound legal principles. *Cf. Gilland*, 500 S.W.3d 217 (dismissal required where record landowners subject to quiet title action were not made parties to the action even though surrounding landowners were included).

Furthermore, even if we accept the Trial Court's implicit ruling that a contingent right to enforce a negative easement of which the party is not a grantee qualifies as an "interest" under *Adamson*, the Trial Court did not provide any law or reasoning to support the conclusion that such an interest is also affected by the requested judicial declaration. The same holds true with respect to the Trial Court's finding that Worick's naming of the United States in its prior two lawsuits equates to an admission of the United States' interest. While the Trial Court's conclusion regarding the existence of an interest may be true, it simply failed to address the critical inquiry as to whether the United States' interest is affected by the requested declaratory judgment. *See* KRS 418.075 ("[A]ll persons shall be made parties who have or claim any interest *which would be affected* by the declaration . . . .") (emphasis added).

Despite these salient errors, we must still evaluate whether affirmance of the Trial Court's dismissal is nevertheless appropriate. Focusing first on the requested declaration, Worick is not seeking to quiet title, and it is not petitioning for a declaration regarding *any* party's right to enforce the terms of the Easement. Worick is requesting a judicial declaration interpreting an Easement restriction. Particularly, Worick seeks a judicial determination regarding whether "the sale or transfer . . . of the Subservient Parcels [that] remain subject to the Deed of Easement" qualifies as a subdivision. TR, p. 6. This Court has not observed any explanation or example illustrating how a judicial declaration interpreting the term "subdivision" under Kentucky law affects the United States' enforcement right under the Easement – a right that has not even been triggered.

The Easement expressly provides the Board with "the primary responsibility for management and enforcement," subject to the United States' right of enforcement. TR, p. 9. The United States' right to enforce the Easement occurs only "*if* the [Board], or Scott County Fiscal Court, fail [sic] to enforce any of the terms of this Easement, as determined in the sole discretion of the Secretary." TR, p. 27 (emphasis added). As such, the United States has a right of enforcement contingent on the Board or Fiscal Court first failing to prohibit Worick from conveying the property in violation of the subdivision restriction. Whether the United States desires to oppose in litigation a judicial declaration on the merits of the term "subdivision" or challenge a subsequent sale of individual parcels is certainly within the USDA Secretary's discretion. Yet, we have seen no allegations that the United States is seeking or will seek to possess a present, primary right of enforcement. As the allegations stand to date, the Board remains the sole Grantee, with the lone right of enforcement.

The Board argues that nothing in the Easement precludes the United States from enforcing the Easement "under other circumstances." Appellee Brief, p. 6. The Board does not elucidate as to these "other circumstances." Instead, the Board cites *Perry v. Perry*, 143 S.W.3d 632, 633 (Ky. App. 2004), to support its contention that this Court "cannot read words into the contract which it does not contain." In *Perry*, a predecessor panel of this Court interpreted a marital dissolution settlement agreement to determine the valuation date of pension benefits. 143 S.W.3d at 633. The *Perry* opinion has no bearing on the appeal before us; rather, *Perry* restates well-established legal tenets of contract interpretation, which we apply to all issues concerning the same. *Id.* (quoting *Goff v. Blackburn*, 299 S.W. 164, 165 (Ky. 1927)).

Again, as it relates to the appeal before this Court, the Easement is clear that the Board holds the "primary" duty to enforce the Easement, and the United States has the right to enforce the Easement upon the fulfillment of specific contingencies. While those contingencies are discretionary on the part of the United States, it does not negate the Easement's clear language that its right of enforcement does not convert to a present right of enforcement unless, and until, the Secretary of the USDA determines that the Board or the Fiscal Court failed to enforce the terms of the Easement. There is no legitimate argument that our conclusion is reading "words into the [Easement] which it does not contain."

Further, while no party has pointed to this fact, the Easement does not reveal a specific process or standard governing the USDA Secretary's determination. Nonetheless, absent allegations or assertions that the United States has met the conditions requisite to enforce the Easement presently – *e.g.*, the Board has failed to enforce the Easement, and the USDA Secretary has decided the United States must step in to enforce the Easement – we cannot speculate as to the actions of the USDA Secretary. Our review is confined to the allegations of the Complaint and the attachments thereto.

In sum, we recognize the United States' interest in enforcing the terms of the Easement. However, the Trial Court and the Board fail to articulate the reasons or manner by which Worick's requested judicial declaration would affect the United States' enforcement rights in light of the relevant Easement language and in the context of the Easement as a whole. Absent a showing that the United States' interest will be affected by judicial declaration, dismissal for non-joinder under the KDJA is not appropriate. Our holding is bolstered by the fact that the United States' enforcement right is contingent, and it has not taken action to render said right to make it presently enforceable despite having notice of Worick's intent to sell.

This Court is cognizant of the lack of precedential authority on the issue. We find Worick's submission of *Garner*, 896 S.W.2d 10, as persuasive support for our holding. In that case, Garner obtained declaratory relief and a permanent injunction preventing the Kentucky Department of Fish & Wildlife Resources (the "Department") from erecting and maintaining a locked gate to a cemetery where his relatives are buried. *Id.* at 12. The cemetery is located on property within Lake Cumberland and owned by the United States in fee simple. *Id.* at 12. The United States provided the Department with a license to manage the fish and wildlife thereon. *Id.* On appeal, the Department challenged Garner's failure to include the United States as a necessary party under CR 19 and the KDJA. *Id.* The Kentucky Supreme Court held that Garner enjoyed an easement to visit the cemetery by operation of law. *Id.* The Kentucky Supreme Court also held that the United States is not an indispensable party pursuant to CR 19 or the KDJA. *Id.* at 14. Specific to the KDJA analysis, the Kentucky Supreme Court reasoned that the United States' interest, as fee simple record owners of the property, was not affected by the declaratory relief. *Id.* Our highest Court reasoned that irrespective of Garner's requested declaration, the United States has the same interest as it always has enjoyed. *Id.* at 15.

Garner is by no means squarely on point. However, *Garner* demonstrates that merely having an interest or right under the easement does not mandate dismissal under the KDJA if the absent party's interest is not affected. Moreover, the United States' interest in *Garner* was arguably more affected than in the case *sub judice*, as it was the owner of the servient land in fee simple there, but not here.

In applying the principles of the KDJA and *Garner*, we find a judicial interpretation of the scope of the Easement will not affect the United States' interest should it elect to utilize its right of enforcement. *Cf. Reeves*, 157 S.W.2d at 753 (parties to contracts are necessary where the contract's validity is challenged). At this time, the United States has not stepped in to assert enforcement of the Easement. To the contrary, it filed a motion in Federal Court actively seeking (and receiving) dismissal from the litigation. Furthermore, its interest thusly will remain unchanged by a judicial declaration interpreting the legal meaning of an undefined term therein. *See West*, 830 S.W.2d 379 (absentee beneficiaries to an action contesting a will are not necessary parties because their interest is not affected by the outcome); *Sherrard*, 171 S.W.2d at 965 (in declaratory judgment regarding the constitutionality of a law providing transportation to private school pupils, the Court declined dismissal for failure to name the State Board of Education because "an adjudication will not adversely affect the [parties'] rights").

As a last point on this issue, we underscore that a declaratory judgment shall be *res judicata* between Worick and the Board. The United States' enforcement of the subdivision restriction before, during, or after any sale or transfer is a matter on which we do not opine. *See De Charette v. St. Matthews Bank & Trust Co.*, 283 S.W. 410 (Ky. 1926).

To conclude, in the absence of legal authority or articulated reasoning that Worick's requested judicial declaration will affect the United States' prospective enforcement rights, we hold that the Trial Court abused its discretion in finding the United States is a necessary party under the KDJA, and it was reversible error for the Trial Court to dismiss Worick's Complaint pursuant thereto.

II. <u>CR 19.01</u>

Having made this determination of the impropriety of the dismissal of the action under the KDJA, we briefly analyze whether the United States is a necessary party pursuant to CR 19.01. The Trial Court did not identify which portion of CR 19.01 it used to support compelling the United States' joinder. We will address both subsections (a) and (b). First, we find no tenable argument that CR 19.01(a) is implicated because a judicial declaration interpreting the term "subdivision" will provide complete relief to Worick and the Board – *i.e.*, the sale of individual parcels is either a subdivision under Kentucky law or it is not. A Trial Court is unable to provide complete relief where a "determination of the controversy" requires it as an initial matter to ascertain and settle the rights of the absentee party "before the rights of the parties to the suit can be determined." 67A C.J.S. *Parties* § 3 (2020). Here, the Trial Court is not required to settle the rights of the United States in order to interpret the meaning of the term "subdivision" within the context of the Easement and under Kentucky law.

Similarly, CR 19.01(b)(i) does not render the United States a necessary party as the requested declaration will not impair or impede the United States' prospective right of enforcement. We will not belabor this point. Instead, we refer to our analysis *supra*, which provides a detailed basis for the conclusion that the United States' interest will not be affected, let alone hampered or impaired, by a judicial declaration.

Regarding CR 19.01(b)(ii), the Board and Worick merely assert conclusory statements that a judicial declaration will (or in the case of Worick, will not) leave the parties subject to a substantial risk of incurring inconsistent obligations. Worick and the Board fail to cite to case law on this issue, including opinions from other state or federal jurisdictions. In an unpublished opinion of this Court, we addressed this element in detail, explaining that inconsistent obligations are distinguishable from inconsistent adjudications or results. *Sears v. Clark*, No. 2022-CA-0852-MR, 2023 WL 5312888, at *5-6 (Ky. App. Aug. 18, 2023). Perhaps the United States may at some point seek judicial interpretation of "subdivision." However, we have no practical description or example to evaluate substantively whether such action will expose Worick or the Board to inconsistent obligations. Given the nature of the relief Worick seeks and the lack of explanation concerning how the requested declaration would subject the parties to inconsistent obligations, it is a misapplication of CR 19(b)(ii) to provide the United States with necessary party status under the circumstances of this case.

Additionally, we would be remiss to overlook the Board's apparent incentive to pursue joinder of the United States. Based on the history of Worick's pursuit of declaratory judgment, the Board and the United States placed Worick in a procedural quagmire. As it now stands, both federal and state Courts have dismissed this litigation, providing no forum for the dispute. This Court will not condone procedural gamesmanship. The Trial Court's discretion is not boundless and must be exercised to "effectuate the objectives of the rules." *Id.* (citations removed). This Court and the parties herein must aim for adjudication on the merits. *See West*, 830 S.W.2d 379, 384 (discussing "the long-standing policy that the Civil Rules should be construed broadly to facilitate deciding issues on their merits and to secure a just result rather than strictly or narrowly to defeat the cause of action on technical grounds").

III. <u>CR 19.02</u>

Finally, having now held that the United States is not a necessary party pursuant to CR 19.01, we need not address whether the United States is an indispensable party requiring dismissal pursuant to CR 19.02.

<u>CONCLUSION</u>

To conclude, we hold that the United States is not a necessary party under the KDJA or CR 19.01. For these reasons, the Scott Circuit Court's Order dismissing Worick's Complaint is reversed, and this matter is remanded for additional proceedings on the merits.

ALL CONCUR.

BEFORE: COMBS, ECKERLE, AND L. JONES, JUDGES

DIVORCE

DIVISION OF PROPERTY

CIVIL PROCEDURE

PERSONAL JURISDICTION

PERSONAL JURISDICTION PURSUANT TO KRS 454.220

H and W married in 1993 in Pennsylvania — H and W later moved to Kentucky and resided together in Kentucky until their separation on February 1, 2022 — On April 1, 2022, H moved back to Pennsylvania — W filed instant action for divorce on September 24, 2023 — W attempted to serve petition for dissolution on H at his last known address in Pennsylvania via Kentucky Secretary of State, but mailing was returned as "undelivered" — W then attempted to serve him via warning order attorney at same address — Return receipt was signed by a woman whose relationship to instant parties was not noted in record — On May 28, 2024, family court held final hearing — H did not participate or make himself otherwise known before family court — Next day, family court entered dissolution decree which divorced parties and divided marital assets — W was awarded marital home, any bank account in her name, and a vehicle — H was awarded any bank account in his name, a vehicle, an annuity, a fishing boat, fishing equipment, various guns, and gun related equipment — W was also credited with paying $11,000 of marital debt — On August 7, 2024, H moved to set aside judgment based on lack of personal jurisdiction — H entered a special appearance to contest jurisdiction — H cited KRS 454.220 — KRS 454.220 states, in part, that a court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards, or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he/she no longer is a resident or domiciliary of Kentucky, if the party seeking support is a resident of or domiciled in Kentucky at the time the demand is made; if Kentucky was the matrimonial domicile of the parties before their separation; the defendant abandoned the plaintiff in Kentucky; or the claim for support, alimony, maintenance, distributive awards, or special relief accrued under Kentucky laws; however, the action must be filed within one year of the date the respondent or defendant became a nonresident of, or moved his/her domicile from, Kentucky — In instant action, H claimed that he moved from Kentucky in April 2022, but divorce action was not filed until September 2023; therefore, one-year limitation period applied and family court did not have personal jurisdiction over him in order to divide marital property — H did not claim that the dissolution of parties' marriage was error — W argued that KRS 454.220 did not apply, and that Kentucky's general long-arm statute applied — Specifically, W argued that KRS 454.210(2)(f), which allows for jurisdiction if real property is involved, applied — Family court found that it had personal jurisdiction over H under KRS 454.210(2)(f) and that KRS 454.220 did not apply — H appealed — REVERSED and REMANDED — KRS 454.220 applies in instant action — "Distributive award," as used in KRS 454.220, includes the division of marital property — KRS 454.220 is a long-arm statute specifically for matrimonial actions and family court proceedings dealing with distribution of marital property — Under statutory principles of construction, a specific long-arm statute (KRS 454.220) applies over a general long-arm statute (KRS 454.210) — KRS 403.190 provides additional support for Court of Appeals' interpretation — Pursuant to KRS 403.190(1), in a proceeding for disposition of property following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him/her —

Lance Richard Motter v. Victoria Cruse Motter (2024-CA-1369-MR); Marshall Cir. Ct., Fam. Ct. Div., Perlow, J.; Opinion by Chief Judge Thompson, *reversing and remanding*, rendered 9/12/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Lance Richard Motter appeals from an order which denied his motion to set aside a judgment which divided marital property in a divorce action. Appellant argues that the trial court did not have personal jurisdiction over him at the time the marital property was divided; therefore, the motion to set aside should have been granted. We agree and reverse and remand.

FACTS AND PROCEDURAL HISTORY

Appellant and Victoria Cruse Motter were married in 1993 in Lock Haven, Pennsylvania. They later moved to Kentucky and resided together in this state until their separation on February 1, 2022. Appellant moved back to Pennsylvania on April 1, 2022. Appellee filed a petition for dissolution of marriage on September 24, 2023. She attempted to serve the petition upon Appellant at his last known address in Pennsylvania via the Kentucky Secretary of State, but the mailing was returned as "undelivered." Appellee was then allowed to attempt to serve him via a warning order attorney at the same address. The return receipt for that mailing was signed by Jane Motter.[1]

[1] Jane Motter's relationship to the parties is not revealed in the record before us.

A final hearing on the dissolution action was held on May 28, 2024. Appellant did not participate or make himself otherwise known before the court. A decree of dissolution was entered the next day which divorced the parties and divided the marital assets. Appellee was awarded the marital home, any bank account in her name, and a vehicle. Appellant was awarded any bank account in his name, a vehicle, an annuity fund worth over $12,000, a fishing boat, fishing equipment, various guns, and gun related equipment. Appellee was also credited with paying $11,000 worth of marital debt.

On August 7, 2024, Appellant moved to set aside the judgment based on lack of personal jurisdiction. He entered a special appearance in this matter specifically to contest the jurisdiction issue. Appellant cited to Kentucky Revised Statutes (KRS) 454.220 in support of his argument. KRS 454.220 states:

> A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards, or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time the demand is made, if this state was the matrimonial domicile of the parties before their separation; the defendant abandoned the plaintiff in this state; or the claim for support, alimony, maintenance, distributive awards, or special relief in matrimonial actions accrued under the laws of this state. The action shall be filed within one (1) year of the date the respondent or defendant became a nonresident of, or moved his domicile from, this state. Service of process may be made by personal service if the defendant or respondent is found within the state or by service through the use of KRS 454.210(3).

Appellant claimed that he moved from Kentucky in April of 2022, but the divorce action was not filed until September of 2023, which is more than one year after he began residing in Pennsylvania. Appellant argued that the one-year limitation period in KRS 454.220 applied, and the trial court did not have personal jurisdiction over him in order to divide the marital property.[2]

[2] Appellant does not claim that the dissolution of the parties' marriage was error, only the division of marital property.

Appellee argued that KRS 454.220 did not apply in this case because the court made no ruling regarding a "demand for support, alimony, maintenance, distributive awards, or special relief." Appellee further argued that the court had jurisdiction over Appellant based on KRS 454.210(2)(f), which states:

> (2) A court may exercise personal jurisdiction over a person who is a party to a civil action on any basis consistent with the Constitution of Kentucky and the Constitution of the United States, including but not limited to the person's:
>
> . . .
>
> (f) Having an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself or herself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated[.]

Appellee claimed that because the parties had a marital residence, KRS 454.210(2)(f) applied.

The trial court agreed with Appellee's arguments and held that it did have personal jurisdiction over Appellant pursuant to KRS 454.210(2)(f) and that KRS 454.220 did not apply. The court found that it divided marital property and did not make an award regarding a "demand for support, alimony, maintenance, distributive awards, or special relief[.]" The court did indicate that "distributive award" could potentially describe a division of marital assets; however, the court found no definition for the term in Kentucky jurisprudence and looked to neighboring states for a definition. The court examined a definition from Ohio found in Ohio Rev. Code Ann. § 3105.171(A)(1) which defines a distributive award as "any payment or payments, in real or personal property, that are payable in a lump sum or over time, in fixed amounts, that are made from separate property or income, and that are not made from marital property and do not constitute payments of spousal support[.]" The court held that it only divided marital assets and debts and did not require Appellant to make any payment to Appellee out of separate, nonmarital property; therefore, the division of marital assets and debts was not a distributive award. This appeal followed.

STANDARD OF REVIEW

As the proper interpretation of a statute is purely a legal issue, our review is *de novo*. *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003) (citations omitted). When engaging in statutory interpretation,

> our main goal is "to give effect to the intent of the General Assembly." The clearest indicator of that intent is the "language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration." And "[w]here the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as written."

Bell v. Bell, 423 S.W.3d 219, 223 (Ky. 2014) (footnotes and citations omitted).

> When particular words need interpretation, we should look to the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions. This is in accordance with KRS 446.080(4), which states: "All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." We recognize, however, that dictionary definitions are not necessarily conclusive and legislative intent reigns supreme.
>
> Sometimes a review of the words in a statute will reveal a latent ambiguity, in which a particular word or words is subject to more than one reasonable interpretation. In such a situation, we must consider all of the relevant accompanying facts, circumstances, and laws, including time-honored cannons of construction[.] This may include considering the general purpose of the statute.
>
> We have repeatedly stated that we must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy. A particular word, sentence or subsection under review should not be viewed in a vacuum. Instead, the entire statute should be considered in context with other parts of the law with any key language interpreted by considering the whole act in which it appears.

Erie Insurance Exchange v. Johnson, 713 S.W.3d 149, 156 (Ky. 2025) (internal quotation marks and citations omitted).

ANALYSIS

On appeal, Appellant argues that KRS 454.220 applies. We agree. We believe the term "distributive award" includes the division of marital property. Appellee and the trial court cite to statutes in other jurisdictions that define distributive awards generally as a payment to another out of nonmarital property; however, our legislature has not defined the term. As there is no definition for us to refer to in our statutes, we look to the common usage of the term. Distribute is defined as "1. To apportion; to divide among several.[;] 2. To arrange by class or order.[;] 3. To deliver.[;] 4. To spread out; to disperse." *Distribute*, Black's Law Dictionary (12th ed. 2024). Distributive is defined as "[o]f, relating to, or involving the apportionment, division, or assignment of separate items or shares; pertaining to distribution." *Distributive*, Black's Law Dictionary (12th ed. 2024). We believe these definitions support our conclusion that a distributive award includes the division of marital property. To distribute means to divide.

In addition, KRS 454.210, which was relied upon by the trial court to confer personal jurisdiction, is the general long-arm statute in Kentucky. KRS 454.210(2)(f) allows for jurisdiction if there is real property involved. On the other hand, KRS 454.220 is a long-arm statute specifically for matrimonial actions and family court proceedings dealing with the distribution of marital property. "When there appears to be a conflict between two statutes . . . a general rule of statutory construction mandates that the specific provision take[s] precedence over the general." *Commonwealth v. Phon*, 17 S.W.3d 106, 107 (Ky. 2000), *as corrected* (Apr. 20, 2000) (footnote and citations omitted). Here we have a general long-arm statute, KRS 454.210, and a specific one, KRS 454.220. Based on this tenet of statutory construction and interpretation, KRS 454.220, along with its one-year limitation period, applies in this case.

We find support for our conclusion in the case of *Jeffrey v. Jeffrey*, 153 S.W.3d 849 (Ky. App. 2004). In *Jeffrey*, Naomi and Clifford Jeffrey were married in West Virginia and later resided in Kentucky. They separated on September 26, 2001, and Clifford permanently moved to West Virginia. In October of 2001, Naomi filed a petition for dissolution in Bell Circuit Court, and eventually served Clifford via the Kentucky Secretary of State. Clifford filed his own dissolution action in the Family Court of Cabell County, West Virginia in November of 2001.

Clifford did not appear in the Bell Circuit Court action. After a hearing, the court granted Naomi's petition for dissolution and divided the marital property and awarded Naomi maintenance. Clifford appealed that judgment.

On appeal, one issue raised by Clifford was that the Bell Circuit Court did not have personal jurisdiction over him. Citing to KRS 454.220, a previous panel of this Court disagreed and held that "[a] divorce court in Kentucky may assert long-arm jurisdiction to distribute marital property, whether that property is located in Kentucky or elsewhere, if the nonresident respondent committed one of the predicate acts establishing grounds for personal jurisdiction in Kentucky within the statutory time limits set out in KRS 454.220." *Jeffrey*, 153 S.W.3d at 852 (citation omitted). While the *Jeffrey* case did not involve a dispute regarding the definition of "distributive award," the Court did use the phrase "distribute marital property" and specifically cited to KRS 454.220 as justification for the division of marital property. We believe this holding supports our conclusion that the division of marital property is a distributive award.

We also believe that additional support can be found in KRS 403.190, the disposition of marital property statute. KRS 403.190(1) states in relevant part:

> In a proceeding for dissolution of the marriage or for legal separation, or *in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property*, the court shall assign each spouse's property to him.

(Emphasis added.) KRS 403.190 specifically references a situation like we have now, where there has been a dissolution of the marriage, but there was insufficient personal jurisdiction over one spouse to allow for a division of marital property.

We conclude that KRS 454.220 applies in this case. Appellee failed to file her division of marital property action within one year after Appellant left the state; therefore, the trial court did not have personal jurisdiction over Appellant for the purposes of dividing marital property.

In the alternative, even if KRS 454.220 did not apply, we would still be obligated to reverse and remand. We have previously cited to KRS 454.210, the general long-arm statute. The version of KRS 454.210 that we cited to, and which was relied upon by the trial court in denying Appellant's motion to set aside, is the current version of the statute that became effective on July 15, 2024. The version of that statute which was in effect when Appellee first petitioned for dissolution, and which was in effect when the judgment dividing the marital property was entered, is different. The previous version of KRS 454.210 states in relevant part:

> (2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> . . .
>
> > 6. Having an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated[.]
>
> . . .
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him.

If the trial court relied on the current version of the long-arm statute regarding real property when it denied the motion to set aside, then it had to have relied on the previous version's provision regarding real property when it entered the order dividing or distributing the marital property. We believe this would have also been in error. KRS 454.210(2)(b), which has been removed from the current version of the statute, states that only those claims arising from the KRS 454.210(2)(a) provisions could be raised. That would mean Appellee could have only raised a claim regarding the marital home. The court would not have been able to rule on the division of debts, vehicles, bank accounts, the annuity, and the other marital property because they were not related to the real property. The court would not have had personal jurisdiction over Appellant based on the previous version of KRS 454.210 as it regarded these other marital property issues. This would have precluded a full and equitable division of marital property.

Again, this would also support our conclusion that KRS 454.220, the specific family court long-arm statute, applies. Unlike the previous version of KRS 454.210, KRS 454.220 would allow the court to have personal jurisdiction over both spouses and allow claims for all marital property issues to be determined, so long as the limitation period is adhered to.

CONCLUSION

Based on the foregoing, we reverse and remand. The trial court did not have personal jurisdiction over Appellant as it pertains to the division or distribution of marital property. The court erred in determining that KRS 454.220 and its one-year limitation period did not apply.

ALL CONCUR.

BEFORE: THOMPSON, CHIEF JUDGE; ACREE AND MCNEILL, JUDGES.

CRIMINAL LAW

COMPLICITY TO FIRST-DEGREE ASSAULT

ADMISSIBILITY OF EVIDENCE

POLICE OFFICER'S NARRATION OF A SURVEILLANCE VIDEO DEPICTING THE ASSAULT

MOTION FOR DIRECTED VERDICT

Three men, including defendant, assaulted victim in parking lot of a convenience store — Victim was robbed and shot several times, and suffered severe injuries — Police responded — Officers found defendant's cell phone in parking lot — Officers found defendant slumped on a bench at a bus stop a few blocks away from convenience store with gunshot wounds — Officers found another cell phone in parking lot, but were unable to identify its owner or the other two assailants — Police cameras across the street from convenience store captured images of the incident; however, video recording lacked audio and was not of sufficient quality to confirm the identity of the victim or the assailants — Jury indicted defendant for assault in the first degree by complicity and robbery in the first degree by complicity — At trial Commonwealth called detective to testify about her investigation and to provide context for video recording — Defendant objected arguing that detective's testimony violated KRE 602 and KRE 701 by providing narrative testimony concerning the video recording about which she lacked personal knowledge — Trial court overruled objection — Commonwealth then played silent video footage for jury without any comment from detective — Video showed victim sitting on a curb in front of the store with a man, who was wearing a red shirt and who was later identified as defendant — Two other men approached from behind — Defendant then punched victim — Two other men immediately joined in the assault — They robbed victim and took his guns — One of the assailants shot victim several times — Defendant also sustained gunshot injuries — After video was played, Commonwealth asked detective about her observations on the night of the assault, both at the convenience store and at the bus stop where defendant was found — Detective stated that despite defendant's injuries, defendant was able to ride his bicycle from the scene — The other two men escaped and have not been identified — Commonwealth asked detective how she used video in her investigation — Detective noted that defendant was found wearing same type of red shirt as the initial assailant in the video — On re-direct, Commonwealth played video again — As the video played, detective identified defendant's actions during the assault, including being shot and ending with his escape on a bicycle — Detective testified that defendant's cell phone was found at scene of assault — Further, detective testified that defendant had sent a text message to a woman whose name was also on another cell phone that she believed belonged to one of the other assailants — Detective did not opine that defendant shot victim, but concluded that defendant had acted in concert with the other men to commit the assault — Defendant testified and admitted that he was present at the scene and punched victim as the two other men were approaching — Defendant stated that he started a conversation with victim and requested a cigarette — Defendant stated that victim became increasingly agitated — Defendant became concerned when he saw that victim had two guns and then saw the other two men approach — Defendant stated that he believed victim was going to shoot him — Defendant believed that victim shot him — Defense moved for directed verdict at close of Commonwealth's case-in-chief and again at close of all of the proof — Trial court denied motions — Jury found defendant guilty of complicity to first-degree assault — Trial court denied defendant's motion for jnov, or in the alternative, for a new trial — Defendant appealed — AFFIRMED — KRE 602 and KRE 701 govern the admissibility of narrative testimony — Under these rules, a lay witness may not interpret audio or video evidence, as such testimony invades the province of the jury; however, narration of video-taped footage is permissible under certain circumstances — In instant action, detective did not have personal knowledge of the events depicted on the video; however, neither Commonwealth nor defense asked detective to interpret video — Rather, detective only described the relation of the video to her investigation of the case — Detective testified from her personal knowledge that defendant was found wearing the same type of red shirt as the individual shown in the video and that, when defendant was arrested, defendant had bullet wounds that were consistent with the gunfire depicted in the video — Thus, detective's testimony did not implicate KRE 602 and KRE 701 — Detective's identification was based upon her independent, personal knowledge of defendant's physical appearance at the time of his arrest — In addition, an officer may explain the relationship of different items in the context of her investigation — Commonwealth and detective also possessed other evidence, such as, defendant's cell phone and his injuries, that was sufficient to place him at the scene — Jury was able to view the video at the outset in its entirety without commentary — Only on re-direct, and only after defendant's questioning, did Commonwealth ask detective to comment upon the events that had been shown on the video — Even then, detective merely described the timing when defendant first struck victim, the proximity of the other assailants when he did so, and when the other assailants joined in the altercation — Because detective's testimony was only responsive to Commonwealth's questions, it did not constitute narrative testimony — To the extent that detective testified about events which she was not personally familiar, her testimony did not progress into the realm of offering opinions or interpretation — Trial court did not abuse its discretion in allowing detective's testimony — Key difference between complicity as to the act (KRS 502.020(1)) and as to the result (KRS 502.020(2)) is the required mental state — To be complicit in the act, a person must have intended to help commit the crime (specific intent to promote or facilitate the offense) — To be complicit in the result, the law does not require intent — Rather, a defendant is criminally liable when he acts with the same degree of culpability with respect to the result that would be sufficient for the commission of the offense — Factfinder has wide latitude in inferring intent from evidence of the defendant's conduct and knowledge, and/or the surrounding circumstances — Although intent that a victim be harmed may be inferred from conduct or knowledge, such intent may not be predicated on the mere intent to participate in the underlying felony — A defendant's liability for the acts of a co-conspirator must be determined by the defendant's own mental state, not that of the co-conspirator — In instant action, surrounding circumstances, which were captured on surveillance video and supported by defendant's own testimony, reasonably support jury's conclusion that defendant was complicit in either the act of first-degree assault or the resulting injuries, or both; therefore, no directed verdict of acquittal was warranted — In addition to defendant's own statements and conduct, sequence of events permits reasonable inference that defendant anticipated the involvement of the two other men in the assault — Trial court did not abuse its discretion by denying defendant's motions for directed verdict or jnov —

Eric E. Taylor v. Com. (2024-CA-0823-MR); Jefferson Cir. Ct., Green, J.; Opinion by Judge Eckerle, *affirming*, rendered 9/12/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Appellant, Eric E. Taylor ("Taylor"), challenges a jury verdict and judgment of the Jefferson Circuit Court convicting him of complicity to assault in the first degree. He argues that the Trial Court improperly allowed a police officer to narrate a surveillance video depicting the assault, and that he was entitled to a directed verdict on the charge. After careful consideration, we conclude that the officer's testimony was not improper, and there was substantial evidence for the jury to find Taylor guilty of the crime of complicity to first-degree assault. Hence, we affirm.

I. Factual and Procedural History

On the evening of August 3, 2022, three men assaulted John DeFrank ("DeFrank") in the parking lot of a Circle K convenience store, located at 219 West Florence Avenue in Louisville, Jefferson County, Kentucky. They robbed DeFrank and shot him several times, hitting his head and chest. DeFrank suffered severe injuries from the assault, including the loss of his left eye and part of his brain.

Louisville Metro Police Department ("LMPD") responded to the scene and tended to DeFrank's extensive injuries. They found Taylor's cell phone in the parking lot. They then found Taylor himself slumped on a bench at a bus stop a few blocks away with gunshot wounds to his torso and leg. The police found another cell phone at the scene but were unable to identify its owner or the other two assailants.

LMPD cameras, located across the street from the store, captured images of the incident. However, the video recording lacked audio, and it was not of sufficient quality to confirm the identity of the victim or the assailants.

On January 24, 2023, a Jefferson County grand jury indicted Taylor for assault in the first degree by complicity and robbery in the first degree by complicity of DeFrank. The matter proceeded to a three-day jury trial, beginning March 19, 2024.

The Commonwealth called DeFrank as a witness at trial. He had required extensive hospitalizations and multiple surgeries, and he suffered permanent impairment. Due to his severe injuries, DeFrank could not remember what had happened the night of the alleged crimes. DeFrank testified at trial that his normal routine when he left home was to bring with him his wallet, pocketknife, phone, cigarettes, lighter, and two pistols – a Sig Sauer 9 mm and a Ruger LCP .380. These guns were stolen from DeFrank during the assault and never recovered.

On the second day of trial, the Commonwealth called Detective Abigail Christman ("Christman") to testify about her investigation and to provide context for the videotaped footage. Taylor's counsel objected, arguing, *inter alia*, that Christman's testimony violated Kentucky Rules of Evidence ("KRE") 602 and KRE 701 by providing narrative testimony concerning the video recording about which she lacked personal knowledge. The Trial Court overruled Taylor's objection in general, but it cautioned that it may sustain future objections to specific portions of Christman's testimony.

The Commonwealth then played the silent video footage for the jury without any comment from Christman. It showed DeFrank sitting on a curb in front of the store with a man, who was wearing a red shirt and who was later identified as Taylor. Two other men approached from behind. Taylor then punched DeFrank, and the two other men immediately joined in the assault. They robbed DeFrank and took his guns. One of the assailants shot DeFrank several times. Taylor also sustained gunshot injuries to his torso and leg during the assault.

After the video played, the Commonwealth asked Christman about her observations on the night of the assault, both at the convenience store and at the bus stop where Taylor was found. She commented that despite Taylor's injuries, he managed to ride his bicycle from the scene. LMPD would later find him a short distance away where he had collapsed on the bench. The other two men escaped into the night, and they have still not been identified.

The Commonwealth also asked Christman about how she used the video in her investigation. Christman noted that Taylor was found wearing the same type of red shirt as the initial assailant in the video.

On re-direct, the Commonwealth played the video again. During the first 26 seconds of uninterrupted playback, the footage showed Taylor and DeFrank standing next to each other. The Commonwealth paused playback and asked Christman:

> **Commonwealth**: At this point in the video, do you observe any altercation between the person you identified as the defendant and the person you identified as the victim?
>
> **Christman**: No, Ma'am.

Video Record ("VR") 3/20/24, at 11:55:00-11:55:26.

During the next 38 seconds of uninterrupted playback, the footage showed two men approach DeFrank from behind, but in full view of Taylor. As soon as the two men came near, Taylor punched DeFrank. While playback continued the Commonwealth asked Christman:

> **Commonwealth**: Is what we just observed what you believe to be the first strike?
>
> **Christman**: Yes, Ma'am.
>
> **Commonwealth**: How close are the other two unidentified individuals when that punch was thrown?
>
> **Christman**: Very close.
>
> **Commonwealth**: And how quickly did they, based on what you're observing in the video, join that altercation?
>
> **Christman**: Within seconds.

Id. at 11:55:26-11:56:23.

As the video played, Christman identified Taylor's actions during the assault, including being shot and ending with his escape on a bicycle. Christman further testified that Taylor's cell phone was found at the scene of the assault. Although Christman could not identify the two other people involved with certainty, she further testified that Taylor had sent a text message to a woman whose name was also on another cell phone that she believed belonged to one of the other assailants. Christman did not opine that Taylor had shot DeFrank but concluded that Taylor had acted in concert with the other men to commit the assault.

Taylor testified in his own defense but admitted that he was present at the scene and punched DeFrank as the other two men were approaching. Taylor testified that he started a conversation with DeFrank and requested a cigarette. Taylor testified that DeFrank appeared increasingly agitated as the conversation continued. Taylor stated that he became concerned when he saw that DeFrank was armed and then saw the other two men approach. Taylor, who had been shot before by someone else, testified that he believed that DeFrank was going to shoot him. After the other two men attacked DeFrank, Taylor heard gunshots and realized that he had also been struck. He believed that DeFrank shot him. He then fled the scene on his bicycle.

The defense had moved for a directed verdict at the close of the Commonwealth's case-in-chief, and it renewed the motion at the close of all of the proof, arguing that the Commonwealth had failed to prove all elements of the assault-in-the-first-degree charge by complicity. The defense cited the poor quality of the video evidence and Taylor's testimony that he did not know the other two assailants and that he believed that he was going to be shot by DeFrank. The Trial Court ruled that these were questions of fact for the jury. It also ruled that a reasonable jury, viewing the evidence as a whole in the light most favorable to the Commonwealth as required, could find that Taylor acted in complicity to commit the assault and robbery.

After deliberating, the jury acquitted Taylor of complicity to first-degree robbery. However, the jury convicted Taylor of complicity to first-degree assault and recommended a sentence of 12 years in prison. Prior to final sentencing, Taylor moved for a judgment notwithstanding the verdict, or in the alternative, for a new trial. The Trial Court denied both motions. After the Trial Court issued its final judgment and sentence, this appeal followed. Additional facts will be set forth below as necessary.

II. Claims of Error on Appeal

a. Admission of Christman's testimony

Taylor raises two grounds of error. First, he argues that Christman improperly narrated and interpreted the video evidence. We review the Trial Court's evidentiary rulings for abuse of discretion. *Boyd v. Commonwealth*, 439 S.W.3d 126, 129 (Ky. 2014). Abuse of discretion occurs when the Trial Court's decision in allowing or disallowing the introduction of evidence was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)). Additionally, "[a] non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009).

KRE 602 and KRE 701 govern the admissibility of narrative testimony. *Morgan v. Commonwealth*, 421 S.W.3d 388, 391-92 (Ky. 2014). KRE 602 limits testimony to matters within the personal knowledge of the witness; while KRE 701, in pertinent part, further limits testimony by a lay witness to matters: "(a) [r]ationally based on the perception of the witness; [and] (b) [h]elpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue[.]" Under these rules, a lay witness "may not 'interpret' audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265-66 (Ky. 2009) (internal quotation marks in original). Generally, "[i]t 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).

However, narration of video-taped footage is permissible under certain circumstances. *Morgan*, 421 S.W.3d at 388. For instance, narration is allowed where it is comprised of opinions and inferences that are rationally based on the witness's own perceptions of matters of which she had personal knowledge and that are helpful to the jury. *Id.* Nonetheless, witness narration is not unlimited, but rather contained to a description of events, and Trial Courts must not allow narration to veer into improper interpretation of the footage. *Cuzick*, 276 S.W.3d at 266.

In the above-cited cases, the Kentucky Supreme Court set forth the permissible bounds of narrative testimony under these rules. In *Gordon*, *supra*, the Commonwealth called an informant to testify regarding his interpretation of a substantially inaudible recording. *Id.* at 179-80. The Supreme Court held that the informant was entitled to testify as to his recollection of what was said. However, the witness could not interpret the tape to describe the inaudible sections. *Id.* at 180. Similarly, in *Cuzick*, *supra*, the Commonwealth called two officers to narrate a dash-cam video of a high-speed vehicle chase. But both officers merely described the images on the video from their perspectives as the chase occurred. *Id.* at 265. The Supreme Court held that the narrative testimony was not improper. *Id.* at 266.

Likewise, in *Morgan*, *supra*, the Commonwealth called three witnesses to identify the defendant as the person shown on a store surveillance video and in photos. *Id.* at 391. The Supreme Court held that their testimony did not implicate "narrative-style testimony" because they identified the defendant based upon their personal knowledge of the defendant's appearance. *Id.* at 392. And in *Boyd*, *supra*, two witnesses narrated security camera footage of a burglary. *Id.* at 131. The Supreme Court held that the witnesses' testimonials were proper to the extent that they merely narrated the events as they occurred and made an identification based upon personal knowledge of the individuals involved. *Id.* at 131-32. However, the testimony was improper to the extent that it exceeded their personal knowledge of events. *Id.* at 132. Nevertheless, the Supreme Court concluded that the error was harmless "because the jurors were watching the video and were in a position to interpret the security footage independently from the testimony, which provides fair assurance that the judgment was not substantially swayed by the error." *Id.* (internal quotation marks omitted).

Turning back to the current case, Christman did not have personal knowledge of the events depicted on the video. However, neither side asked her to interpret the video. Rather, Christman only described the relation of the video to her investigation of the case. Christman testified from her personal knowledge that Taylor was found wearing the same type of red shirt as the individual shown in the video recording. And when he was arrested, Taylor had bullet wounds that were consistent with the gunfire depicted.

We conclude that Christman's testimony did not implicate KRE 602 and KRE 701 because her identification was based upon her independent, personal knowledge of Taylor's physical appearance at the time of his arrest. In addition, an officer may explain the relationship of different items in the context of her investigation. *McRae v. Commonwealth*, 635 S.W.3d 60, 70 (Ky. 2021). Moreover, the Commonwealth and Christman possessed other evidence, such as Taylor's cell phone and his injuries, that was sufficient to place him at the scene.

We further conclude that the other cited portions of Christman's testimony did not constitute improper narrative testimony. As noted above, the jury was able to view the video at the outset in its entirety without any commentary. This is the exact type of independent videotape viewing by a jury that the Supreme Court has countenanced. *Morgan*, 421 S.W.3d at 388.

Only on re-direct, and only after Taylor's questioning, did the Commonwealth ask Christman to comment upon the events that had been shown on the videotape. Even then, Christman merely described the timing when Taylor first struck DeFrank, the proximity of the other assailants when he did so, and when the other assailants joined in the altercation. Because Christman's testimony was only responsive to the Commonwealth's questions, it did not constitute narrative testimony. *Cuzick*, 276 S.W.3d at 266. And to the extent that Christman testified about events with which she was not personally familiar, her testimony did not progress into the realm of offering opinions or interpretation. *McRae*, 635 S.W.3d at 61. Therefore, the Trial Court did not abuse its discretion in allowing Christman's testimony.

b. Directed Verdict

Second, Taylor challenges both of the Trial Court's denials of his motions for directed verdict. On appellate review, the test for a directed verdict, and a judgment notwithstanding the verdict, has been succinctly described as follows: "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991); *see also Commonwealth v. Nourse*, 177 S.W.3d 691, 699 (Ky. 2005) (applying the *Benham* standard to review the grant or denial of a judgment notwithstanding the verdict). Our review is confined to the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011).

As a corollary, the Trial Court must grant a directed verdict when, taking the evidence as a whole and in the light most favorable to the Commonwealth, it would be clearly unreasonable for the jury to find him guilty. *Birdsong v. Commonwealth*, 347 S.W.3d 47, 49 (Ky. 2011). That determination turns on the specific evidence presented at trial. *Southworth v. Commonwealth*, 435 S.W.3d 32, 45 (Ky. 2014) ("Nothing suggests that the inferences the jury . . . [made] to find guilt in this case [were] outside common experience, common sense, or reasonableness.").

The Kentucky Supreme Court has recognized that, "directed verdict issues are distinct for purposes of appeal." *Sutton v. Commonwealth*, 627 S.W.3d 836, 847 (Ky. 2021). "The directed-verdict question is not controlled by the law as described in the jury instructions, but by the statutes creating the offense." *Smith v. Commonwealth*, 636 S.W.3d 421, 434 (Ky. 2021) (citing *Ray v. Commonwealth*, 611 S.W.3d 250, 266 (Ky. 2020)). Fundamentally, "the question on a directed verdict motion is not necessarily what evidence supporting the defendant was solicited, but rather what evidence the Commonwealth produced in support of its burden of proof." *Sutton*, 627 S.W.3d at 848. Additionally, "[i]t is also axiomatic that the jury is not required to believe self-serving statements from the defendant or any of his witnesses." *Pollini v. Commonwealth*, 172 S.W.3d 418, 426 (Ky. 2005).

In this case, the specific issue is whether Taylor's initiation of the assault supports liability under the intentional or wanton theories of complicity. The jury instructions, which are not at issue, for both the intentional and wanton theories of first-degree assault contained a "complicity" element based upon Kentucky Revised Statute ("KRS") 502.020, which states:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> > (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
> >
> > (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
> >
> > (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.
>
> (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
>
> > (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

Because both theories included a complicity element, the jury was instructed that a person is guilty of an offense committed by another if, with intent to promote or facilitate the offense, he aided, conspired with, or otherwise assisted the other person in committing the act (complicity as to the act), or if he acted wantonly with respect to the result and aided or conspired with the other person in engaging in the conduct (complicity as to the result). In relevant part, KRS 501.020(3) defines wanton conduct as follows:

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Our Supreme Court has interpreted the language of KRS 502.020(1) to be "broad enough to embrace acts . . . and every form of participation in concerted criminal activity." *Young v. Commonwealth*, 426 S.W.3d 577, 582 (Ky. 2014) (quoting George G. Seelig, Kentucky Criminal Law § 3-3(b)(4) at 107 (2d. ed. 2008)). The Kentucky Supreme Court has also recognized the long-established rule that "[t]he degree of an accomplice's liability was determined by his or her own *mens rea* and not that of the principal." *Tharp v. Commonwealth*, 40 S.W.3d 356, 365 (Ky. 2000) (citing *Fuson v. Commonwealth*, 199 Ky. 804, 251 S.W. 995, 997 (1923)).

In *Harper v. Commonwealth*, 43 S.W.3d 261 (Ky. 2001), that high Court explained further that:

> [U]nder subsection (2) of KRS 502.020, an accomplice's liability and the principal actor's liability can be at different levels. [Also,] under subsection (2), proof of the principal actor's mental state is not even necessary. As to the principal actor, proof that another caused the prohibited result is all that is required. Under subsection (2), only the defendant/accomplice's mental state is at issue, *i.e.*, the Commonwealth must prove the accomplice's culpability toward the prohibited result.

Id. at 267.

Thus, the key difference between complicity as to the act (KRS 502.020(1)) and as to the result (KRS 502.020(2)) is the required mental state. To be complicit in the act, a person must have intended to help commit the crime (specific intent to promote or facilitate the offense). *Marshall v. Commonwealth*, 60 S.W.3d 513, 518 (Ky. 2001). But to be complicit in the result, the law does not require intent. Rather, a defendant is criminally liable when he acts with the same degree of culpability with respect to the *result* that would be sufficient for the commission of the offense. *Id.* (citing *Tharp*, 40 S.W.3d at 361) (emphasis in original). Additionally, "the factfinder has wide latitude in inferring intent from evidence of the defendant's conduct and knowledge, and/or the surrounding circumstances." *Id.*

However, "although intent that a victim be [harmed] may be inferred from conduct or knowledge, such intent may not be predicated on the mere intent to participate in the underlying felony." *Id.* (citing *Kruse v. Commonwealth*, 704 S.W.2d 192, 194 (Ky. 1985)). And a defendant's liability for the acts of a co-conspirator must be determined by the defendant's own mental state, not that of the co-conspirator. *Kruse*, 704 S.W.2d at 194.

In *Stieritz v. Commonwealth*, 671 S.W.3d 353 (Ky. 2023), the Kentucky Supreme Court further expounded that a defendant's culpability for complicity can be based upon the entirety of the circumstances as a whole, including his conduct before and/or after the crime, and even upon the victim's injury alone:

> A jury may infer a defendant's intent to commit a criminal offense from the surrounding circumstances. *Commonwealth v. Wolford*, 4 S.W.3d 534, 539 (Ky. 1999). Indeed, intent may be properly "inferred from the character and extent of the victim's injuries." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 275 (Ky. 2006) (quoting *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997)). Moreover, "[i]ntent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense." *Id.*

Id. at 361. In *Stieritz*, the victims, McVey and Johnson, stopped at a gas station, where Johnson and another man, Lane, became embroiled in an argument. *Id.* at 357. As McVey drove away from the store with Johnson in the front passenger seat, they noticed that they were being followed by another vehicle. *Id.* at 357-58. Stieritz admitted that he was driving the vehicle with Lane as his occupant and following McVey and Johnson. *Id.* at 358. Lane shot at the victim's car, striking the other vehicle several times, and hitting McVey. *Id.* Stieritz was charged and convicted of complicity to attempted murder and complicity to second-degree assault. *Id*. at 358-59.

After analyzing the directed-verdict standard and the elements of complicity, the Kentucky Supreme Court concluded that Stieritz was not entitled to a directed verdict on complicity, either to attempted murder or second-degree assault. With regard to the attempted murder, the Supreme Court pointed to the evidence that Stieritz knowingly drove the vehicle in pursuit of the victims, thereby facilitating Lane's ability to shoot. *Id.* at 362. Indeed, Stieritz gave Lane the loaded handgun. *Id.* Furthermore, Stieritz admitted that he knew Lane intended to shoot at the other vehicle. *Id.* "From these facts, the jury could reasonably determine [that Lane] possessed the requisite intent to commit attempted murder as the principal[,] and Stieritz likewise possessed the requisite intent to be convicted as [Lane's] accomplice." *Id.* Based on these same facts, the Supreme Court concluded that there was sufficient evidence of Stieritz's intent to be transferred to the second-degree assault of McVey as an unintended victim. *Id.* at 363.

With these delineations in mind, we turn to whether the facts presented at trial in this case sufficiently supported both theories of complicity in totality such that it would not be "clearly unreasonable for a jury to find guilt." *Benham*, 816 S.W.2d at 187. We find that the surrounding circumstances – captured on surveillance video and supported by Taylor's own testimony – reasonably support the jury's conclusion that Taylor was complicit in either the act of first-degree assault or the resulting injuries, or both. Thus, no directed verdict of acquittal was warranted.

In the current case, as in *Stieritz*, there was no evidence that Taylor fired the weapon used to commit the underlying felony of first-degree assault. However, it is undisputed that Taylor threw the first punch – an act that felled DeFrank and objectively facilitated the ensuing assault. Surveillance video further showed that just before Taylor landed the blow, two unidentified men approached and flanked the victim. According to Christman, these men joined the assault "within seconds," culminating in one of them shooting DeFrank at point-blank range. Christman's observations were supported by both the video and by Taylor's own testimony.

Unlike in *Stieritz*, Taylor claimed that he did not know the other attackers. He also declined to identify himself at the scene. But Taylor unquestionably knew the victim was armed and that others were approaching when he hit DeFrank first. Consequently, Taylor either anticipated or ignored the substantial risk of escalating brutality – violence he initiated. By physically assaulting an armed person amid other potential aggressors, Taylor could reasonably foresee that his actions could lead to injury, gun-related or otherwise. DeFrank's severe injuries – being beaten and then shot – show that serious harm or death was a probable outcome of Taylor's conduct. Accordingly, the jury could reasonably infer both Taylor's intent to promote the assault and his culpability for the life-threatening harm that resulted, consistent with *Marshall* and *Stieritz*.

Additionally, our Supreme Court has recognized that a defendant may be found complicit based on lawful acts done in furtherance of a criminal scheme. *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995). In *Webb*, the defendant's act of providing transportation – a lawful activity – was sufficient to establish complicity in a drug trafficking offense. *Id.* Similarly, Taylor's acts of initiating conversation and requesting a cigarette, while lawful in isolation, could be construed as part of a coordinated assault and properly considered as evidence of complicity. Given that one of DeFrank's two firearms was visibly holstered, Taylor would have immediately noticed it. His otherwise lawful acts could reasonably be interpreted by the jury as efforts either to put the victim at ease or to divert his attention, thereby facilitating the coordinated approach of the two other men to attack and rob him. Such conduct supports the theory that Taylor's intentional objective was to aid in the commission of the crime, and the jury's consistent verdict was not unreasonable under these circumstances.

Taylor argues that, because the jury acquitted him of first-degree robbery, it would be contradictory to find that he was complicit with the other men in the assault on the victim. (Appellant's Brief, p. 20.) Taylor's interpretation reflects an incomplete reading of the complicity statute by asserting that it requires a "common plan or scheme with the uncharged individuals." (Appellant's Brief, p. 14.) This interpretation reflects only the first prong of the complicity statute, which speaks solely to intent. In contrast, the second prong of KRS 502.020 permits a finding of complicity in the result – where the defendant acted with a lower mental state, such as wantonness or recklessness – neither of which requires proof of intent.

We again note Taylor's admission that he saw DeFrank was armed but maintained proximity to a weapon instead of walking away. VR 3/20/24, at 2:12:15. Taylor is a convicted felon, and thus he knows that he is not permitted to remain in proximity to a handgun or firearm. Aware that DeFrank was armed, he made the decision to approach DeFrank intentionally, asked for a cigarette, and started talking. He remained there, alone with DeFrank, even though he says he believed that DeFrank was becoming agitated. Taylor claims that it was later reasonable to start a fight even though he knew DeFrank was armed.

Taylor further contends that his injuries could only have come from DeFrank shooting him intentionally. Because he asserts that the other men did not shoot him, Taylor believes that he cannot be found liable for being complicit with them when they shot DeFrank. He does not consider that DeFrank may have fired a few shots during the "seconds" it took the other two men to join the assault. Those men ultimately overcame DeFrank, took his weapons, and used them against him. Taylor's own account is consistent with the inference that DeFrank shot Taylor after Taylor's initial assault but before the other assailants took his guns.

Taylor's other admissions also align with the jury's verdict. Taylor repeatedly claimed that he did not know the two men who attacked the visibly armed victim. But the surveillance footage showed Taylor watching them as they approached and flanked the victim before Taylor threw the first punch. Taylor was unarmed and outnumbered by two unknown men that may have been armed, as well as DeFrank, who Taylor knew was carrying at least one firearm. Even so, he waited until the other men were within striking distance before starting the assault on DeFrank. More important, under cross-examination, Taylor admitted to continuing the attack alongside the others. VR 3/20/24, at 2:28:32. In addition, Taylor's cell phone had a contact in common with one of the unknown assailant's phone, and Taylor had sent a text message to that person. A core function of a jury that determines the facts is the judging of a witness's credibility, and Taylor gave this jury plenty to doubt about his veracity.

In addition to Taylor's own statements and conduct, the sequence of events permits the reasonable inference that Taylor anticipated the involvement of the two other men in the assault – undermining his claim that he had no connection to them and providing a basis for the jury's finding of complicity. As stated, the jury has the job of determining what is to be believed, and the jurors here simply and clearly did not believe Taylor's story. But even if the jury had doubted Taylor's particular claim that he did not know the other assailants, it could still have reasonably found that the timing of his punch, thrown just as the men flanked the victim, undermines the credence of Taylor's claim that he acted alone. A jury could reasonably find it implausible that Taylor would initiate a violent assault while in the presence of two unknown, potentially armed individuals unless he had reason to believe they were aligned with him and would not intervene on the victim's behalf. The coordination of these actions can support a reasonable inference that Taylor acted either in concert with the men or, at minimum, with the awareness that his conduct would facilitate their assault. Thus, the Trial Court properly found sufficient evidence to send the case to the jury and let these 12 jurors ultimately decide unanimously that Taylor was guilty of complicity to assault in the first degree, but not guilty of complicity to robbery in the first degree. In light of all of the evidence, the Trial Court did not abuse its discretion by denying Taylor's motions for directed verdict or judgment notwithstanding the verdict.

III. Conclusion

Accordingly, we affirm the judgment of conviction of the Jefferson Circuit Court.

ALL CONCUR.

BEFORE: CALDWELL, CETRULO, AND ECKERLE, JUDGES.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

AUGUST 8, 2025 AT 10:00 A.M.

AND SEPTEMBER 12, 2025 AT 10:00 A.M.

(Cases previously digested in K.L.S.)

PETITIONS:

ISCO Indus., Inc. v. O'Neill, 72 K.L.S. 8, p. 10; Petition for rehearing was filed on 8/28/2025.

MOTIONS for extension of time to file petitions: None.

FINALITY ENDORSEMENTS:

During the period from August 8, 2025, through September 12, 2025, the following finality endorsements were issued on opinions which were designated to be published. The following opinions are final and may be cited as authority in all the courts of the Commonwealth of Kentucky. RAP 40(G).

Barrett v. Administrative Office of the Courts, 72 K.L.S. 7, p. 26, on 8/20/2025.

Dixon v. Com., 72 K.L.S. 7, p. 28, on 9/18/2025.

Estate of Grisez v. Erie Ins. Co., 71 K.L.S. 8, p. 18, on 8/15/2025. The Kentucky Supreme Court denied discretionary review on 6/11/2025.

Parr v. Com., 72 K.L.S. 8, p. 1, on 9/2/2025.

Pennie v. Mohamed, 72 K.L.S. 8, p. 14, on 9/15/2025.

White v. Fowler, 72 K.L.S. 5, p. 25, on 7/14/2025. The case was reopened and a publication letter was issued on 8/15/2025. The Court of Appeals denied a petition for rehearing on 6/10/2025.

RULINGS on petitions previously filed:

Fayette Cty. Bd. of Educ. v. Mitchell, 72 K.L.S. 7, p. 1; Petition for rehearing was denied on 8/11/2025.

Kentucky Bluegrass Experience Resort v. City of Midway, 72 K.L.S. 7, p. 17; Petition for rehearing was denied on 8/11/2025.

OTHER: None.

WEST Official Cites on Court of Appeals opinions upon which Finality Endorsements have been issued:

Bessinger v. Com., 72 K.L.S. 5, p. 30—714 S.W.3d 416.

Clark v. Com., 71 K.L.S. 12, p. 10—716 S.W.3d 233.

Collins v. Com., 72 K.L.S. 5, p. 32—715 S.W.3d 14.

Gore v. Com., 72 K.L.S. 5, p. 14—712 S.W.3d 808.

Hawkins v. Bd. of Educ. of Scott Cty., 72 K.L.S. 5, p. 34—716 S.W.3d 1.

Johnson v. Kearney, 72 K.L.S. 6, p. 1—716 S.W.3d 227.

Kentucky Pub. Pensions Auth. v. Swint, 72 K.L.S. 5, p. 18—714 S.W.3d 398.

Rehkamp v. Drees Co., 72 K.L.S. 5, p. 52—715 S.W.3d 551.

Whitley v. Shelton, 72 K.L.S. 5, p. 37—714 S.W.3d 411.

—END OF COURT OF APPEALS—

SUPREME COURT

CRIMINAL LAW

RAPE

SODOMY

DISTRIBUTION OF OBSCENE MATERIAL TO A MINOR

USE OF A MINOR IN A SEXUAL PERFORMANCE

POSSESSION OF MATTER PORTRAYING A SEXUAL PERFORMANCE BY A MINOR

ADMISSIBILITY OF EVIDENCE

RAW, MACHINE EXTRACTED DATA FROM A CELL PHONE

CONFRONTATION CLAUSE

PROSECUTORIAL MISCONDUCT

DOUBLE JEOPARDY

Defendant appealed as a matter of right his convictions on one count each of first-degree rape; first-degree sodomy; distribution of obscene material to a minor; use of a minor in a sexual performance; and first-degree sexual abuse, and on 68 counts of possession of matter portraying a sexual performance by a minor — AFFIRMED convictions — Defendant lived with his girlfriend and girlfriend's nine-year-old grandson "John" — Defendant and girlfriend often babysat their neighbor's children, four-year-old "Jane" and eight-year-old "Adam" — January 6, 2019 was the first time defendant babysat Jane and Adam without girlfriend present — Defendant was alone with John, Adam, and Jane — Defendant took Jane to his bedroom under guise of getting her a Band-Aid after she was scratched by one of defendant's dogs — Jane, who was eight years old when she testified at defendant's trial, said that she laid down on defendant's bed and that he told her to take off her pants and underwear — Defendant then showed her a picture on his phone of "someone licking someone's private parts" — After he showed her this picture, he "touched and licked [her] private part" — Jane testified that it was the "front part" and that he touched her on the "inside" — When her parents returned, Jane told her mother what had occurred — Jane's parents contacted police — Detective (Det.) Friend spoke to Jane's parents and then went to defendant's home — Defendant admitted officers into his home — Det. Friend read defendant his *Miranda* rights before speaking to him — Det. Friend informed defendant of Jane's allegations and asked him to go to police department to be interviewed — Defendant invoked his right to counsel and declined — Because Jane had alleged that defendant used his cell phone during the sexual abuse, officers seized defendant's cell phone and left — On January 8, 2019, Det. Friend obtained search warrant for defendant's cell phone and examined its external memory card — Det. Friend found video of defendant's girlfriend performing oral sex on defendant that he believed could have been the image defendant showed to Jane — Det. Friend also found several files that had been deleted, which had titles indicating that they may have been from a subscription service for child pornography — Det. Friend obtained a data extraction from cell phone — Data extraction demonstrated that there were several innocuous items on cell phone that connected defendant to that data; such as, his social media accounts and pictures of himself, his family, his home, and his truck — It also contained 68 images of child pornography that had creation dates between October 7, 2018, and January 6, 2019 — The final image was placed on defendant's phone approximately one hour before Det. Friend seized it — In addition to images of unknown children, there were images of John nude from the waist down — At trial, John testified that he was unsure how many times defendant had touched his genitals over a two year period, but that abuse stopped after Jane's disclosure — John did not tell anyone of the abuse because defendant told him that he would hurt girlfriend (John's grandmother) if he did — Defendant denied abusing John and Jane — Defendant claimed he did not know that any child pornography was on his cell phone, and implied that someone else, perhaps law enforcement, had either put images on his phone or allowed someone else to put images on his phone — Regardless, no new child pornography was placed on phone after it had been seized — At trial, defendant alleged that admission of images of child pornography found on his phone violated Confrontation Clause because he was unable to cross-examine the Cellebrite forensic analyst who extracted data that led officers to discover images on his phone — Cellebrite is a for-profit, digital forensics company that specializes in the creation and manufacturing of programs that can perform forensic extractions on digital devices — Law enforcement is not privy to how Cellebrite's proprietary technology works, but they can be trained to use it — Cellebrite's extraction equipment allows law enforcement to perform an extraction of all the data that exists on a device — In essence, it creates a "clone" of all the information on a particular device and uploads it to a computer — An officer then plugs the device into the forensic equipment and runs the program; however, the data that is thereby extracted is not in a form that is capable of being read or understood by the average person — Officers must use a different Cellebrite program called Physical Analyzer to "translate" all the raw data extracted from the phone into an intelligible format — Det. Friend testified that because defendant's phone was "locked" by a passcode, he was unable to perform the usual, in-house data extraction; therefore, he contacted Trooper (Tpr.) Gabhart, who was at that time a member of an electronic crimes task force assigned to U.S. Secret Service (USSS), for assistance — USSS could not use Cellebrite's extraction program due to phone's passcode; therefore, USSS sent phone to Cellebrite — Forensic specialist with Cellebrite successfully completed a data extraction from the phone on August 12, 2019, and placed it on an encrypted thumb drive — Cellebrite performed no other work in the investigation — Cellebrite's forensic lab administrator signed "Certification and Business Record of Cellebrite, Inc." (Certification) attesting to Cellebrite's general protocols; chain of custody of defendant's phone; and specific analysis it performed on defendant's phone — Tpr. Gabhart took raw data on encrypted thumb drive and ran it through Physical Analyzer, which produced a "report" of the translated data — Tpr. Gabhart conducted a limited review of translated data to see if child pornography was present as had been suspected by Det. Friend — Tpr. Gabhart concluded that it was present and returned the evidence to Det. Friend — Sixty-eight images of child pornography were found on cell phone via data extraction and were admitted into evidence — Raw data extracted from phone, Physical Analyzer report, and Certification signed by Cellebrite forensic lab administrator were not admitted into evidence — Both Det. Friend and Tpr. Gabhart testified and were cross-examined by defendant — Commonwealth did not call Cellebrite analyst who extracted raw data to testify — Defendant did not raise a chain of custody argument on appeal — Defendant argued that admission of photographs violated Confrontation Clause because data extraction from which pictures were obtained was testimonial hearsay and he was not afforded the opportunity to cross-examine the analyst who performed the extraction — Kentucky Supreme Court held that raw, machine extracted Cellebrite data that is devoid of any human input, conclusions, or assertions does not implicate Confrontation Clause because it is not testimonial hearsay — Cellebrite analyst simply extracted data, placed it on an encrypted drive, and mailed it back to the requesting officer — Analyst did not make any written, oral, or nonverbal assertions regarding the data — In fact, analyst would not have been able to make any assertions or conclusions about the data because it had not yet been "translated" into a readable format by Physical Analyzer — In addition, Det. Friend and Tpr. Gabhart, who were the only two individuals to translate data and/or made conclusions that it contained child pornography, were subjected to cross-examination by defendant — Trial court did not abuse its discretion in finding that data extraction was properly authenticated — Commonwealth presented more than enough evidence to overcome its slight burden of demonstrating that the data extraction was a true and accurate copy of all the data on defendant's cell phone at that time it was seized — Defendant claimed that Commonwealth committed prosecutorial misconduct in its opening statement and closing argument during guilt phase — Allegations were not preserved; therefore, reviewed for palpable error — There was no palpable error — In its closing argument, prosecutor noted that defendant "couldn't' take his eyes off" 68 images of child pornography when they were briefly displayed on a screen for the jury as Det. Friend read the concomitant description of each image from defendant's indictment — Jury was able to see and assess defendant's body language when images were shown — Prosecutor's comment was isolated and evidence against defendant for offense of possession of child pornography was overwhelming — During both opening statement and closing argument, prosecutor had a moment where she momentarily became emotional — Both moments were brief and prosecutor quickly regained her composure and continued speaking — Double jeopardy was not violated when one nude image of John was used to convict defendant of both use of a minor in a sexual performance and possession of a matter portraying a sexual performance by a minor —

Jason Baldwin v. Com. (2023-SC-0544-MR); Madison Cir. Ct., Maier, J.; Opinion by Chief Justice Lambert, *affirming*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Jason Baldwin was convicted of one count each of first-degree rape; first-degree sodomy; distribution of obscene material to a minor; use of a minor in a sexual performance; and first-degree sexual abuse. He was also convicted of sixty-eight counts of possession of matter portraying a sexual performance by a minor. He now appeals his convictions and resulting sentence of life imprisonment as a matter of right.[1]

[1] Ky. Const. § 110(2)(b).

In addition to several other issues raised by Baldwin, this appeal requires this Court to address as a matter of first impression whether raw, machine extracted data constitutes testimonial hearsay that would implicate a criminal defendant's Confrontation Clause rights. After thorough review, we hold that it does not and affirm the Madison Circuit Court in full.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January 2019 Baldwin lived in a subdivision in Richmond, Kentucky with his girlfriend, Tina, and Tina's nine-year-old grandson John.[2] Nicole and David lived in the home immediately next to Baldwin with their two children, four-year-old Jane and eight-year-old Adam. David and Baldwin met "just being neighborly," and the two families began to socialize, including having cookouts and celebrating holidays together. As John and Adam were close in age, they often played together. Baldwin and Tina both worked the night shift, and when they were both working the same night, David and Nicole would babysit John. Baldwin and Tina sometimes returned the favor by babysitting Jane and Adam.

[2] We will use pseudonyms to identify each of the children discussed in this case in order to protect their privacy. In a further effort to protect the identity of the children, the adults involved in this case, apart from Baldwin, will be identified by only their first names.

January 6, 2019, was the first time Baldwin babysat Jane and Adam by himself without Tina. David and Nicole were attending a retirement party for a work colleague and dropped Jane and Adam at Baldwin's home sometime in the early evening. The only people present in the home were Baldwin and the three children. At some point, while John and Adam were watching a movie in the living room, one of Baldwin's dogs inflicted a minor scratch on Jane's leg. Baldwin took her into his bedroom under the guise of getting her a Band-Aid.

Jane, who was eight years old when she testified at Baldwin's trial, said that she remembered laying on Baldwin's bed on her back and that he directed her take off her pants and underwear. He then showed her a picture on his phone of "someone licking someone's private parts." After he showed her the image, he "touched and licked [her] private part." When the Commonwealth asked Jane to be more specific about what she meant by her "private part" she said it was the "front part" that "lets [her] use the bathroom" to go "number one." Jane further said she thought Baldwin's fingers touched her on the "inside." She told Baldwin she did not like it and he stopped. John, who was thirteen years old during trial, partially corroborated Jane's testimony. He said that he and Adam were watching a movie that night when one of the dogs scratched Jane, and he remembered Baldwin taking Jane into his bedroom to get a Band-Aid which took about ten minutes.

After David and Nicole picked their children up from Baldwin's home on January 6, Nicole gave Jane a bath to get her ready for bed. During her bath Jane told Nicole what Baldwin did to her. David and Nicole immediately called 911 and two patrol officers from the Richmond Police Department (RPD), Officers Creech and Coleman, responded to their home. After speaking with David and Nicole, the officers contacted Detective Jason Friend.[3] When Det. Friend arrived on scene he also spoke with Jane's parents then immediately thereafter went to Baldwin's home next door with Ofc. Creech. Baldwin consented to the officers' entry, and Ofc. Friend read him his *Miranda*[4] warnings before speaking to him. Ofc. Friend informed Baldwin of the nature of Jane's allegations and asked him to come with them to the police station to be interviewed. Baldwin invoked his right to counsel and declined. Because Jane had alleged Baldwin used his cellphone during the sexual abuse, the officers seized Baldwin's phone and left.

[3] Det. Friend was a patrol officer at the time of Baldwin's trial, but we will refer to him by the title he held at the time of his investigation.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

On January 15, 2019, Det. Friend attended a forensic interview of Jane at a Children's Advocacy Center (CAC). After the interview, Det. Friend obtained an arrest warrant for Baldwin for the charges of first-degree rape and first-degree sodomy. He was further charged with distributing obscene material to a minor when he was indicted by a grand jury on January 23, 2019.

Det. Friend obtained a search warrant for Baldwin's cellphone on January 8, 2019, and examined its external memory card. On it, he found a video of Tina performing oral sex on Baldwin that he believed could have been the image that Baldwin showed Jane on his phone during the January 6 incident. Det. Friend also found several files that had been deleted. Det. Friend did not know what those files contained, but they had titles such as: "LS magazine," "LS models," "LS dreams," "David Hamilton," "Lolita's kingdom," and "Lolita's sex party." He testified that the files containing the term "LS" were significant to him because LS Studios was a now defunct Ukrainian company that produced and provided a subscription service for child pornography between 2001 and 2004. David Hamilton was similarly significant because he was a well-known child pornography producer in the 1980s. Despite the depth of his knowledge in this area, Det. Friend was unaware of the connection the term "Lolita" has with pedophilia. *See* Vladimir Nabokov, Lolita (1955).

Although the memory card contained no child pornography, the deleted folder titles made Det. Friend strongly suspect that the phone itself would. He therefore obtained a data extraction from it. As the Confrontation Clause implications of that data extraction are the primary issue in this case, we reserve discussion of that process for Section II(B) of this Opinion below. The data extraction demonstrated that there were several innocuous items on Baldwin's cellphone that connected him to that data: his social media accounts; pictures of himself, his family, his home, his truck; Tina's contact information, etc. It also contained sixty-eight images of child pornography that had creation dates[5] between October 7, 2018, and January 6, 2019. The final image was placed on Baldwin's phone approximately one hour before Det. Friend seized it. As it is not relevant to the issues raised by this appeal, we will spare the reader the horrendous details of those photographs but note that they included nude images of unidentified prepubescent boys and girls, as well as unidentified female infants.

[5] By "creation date," we do not mean the date an image was originally created. Rather, it is the date that the meta data on Baldwin's phone indicated that an image came to be on it.

In addition to the images of unknown children, there were images of John nude from the waist down. Because of those photographs, Det. Friend also had John forensically interviewed at a CAC.

Following that interview, superseding indictments were obtained against Baldwin for first-degree sexual abuse, use of a minor in a sexual performance, and sixty-nine[6] counts of possession of matter portraying a minor in a sexual performance.

[6] The Commonwealth later dismissed one of the counts of possession of matter portraying a minor in a sexual performance due to an error in the description of the image on the indictment.

At trial, John testified that he began living with Baldwin and Tina when he was seven years old. The first time Baldwin sexually abused him he was alone in the home with Baldwin because Tina was at work. John asked Baldwin if he could play a violent video game that Tina would not allow him to play. Baldwin told him he would let him play the game if he did something for Baldwin. Baldwin then took John into his bedroom, took his pants off, and touched his genitals. John was unsure how many times Baldwin touched his genitals over the ensuing two years, but he knew it occurred more than ten times. Baldwin would abuse him in both Baldwin's bedroom and the living room and would touch John's penis with both his hands and his mouth. John further testified that Baldwin would take pictures of him with his clothes off, and that the sexual abuse stopped after Jane disclosed on January 6, 2019. John did not tell anyone about the abuse until his CAC interview because Baldwin told him he would hurt Tina if he did. At that time, John was living with Tina because both of his parents had substance use disorder and were unable to care for him.

Baldwin testified in his own defense and denied his guilt. He claimed that he was unaware that any of the images of child pornography were on his phone and made several suggestions as to how the images came to be on it. He first insinuated that a malware program on the internet had placed the images on his phone. He also implied that someone may have taken a memory card out of one of his trail cameras, placed child pornography on it, put in back in the trail camera, and he thereafter inadvertently put the memory card into his phone. Finally, he suggested that the manner in which his phone was handled by law enforcement after it was seized allowed some unknown malicious entity to place child pornography on it. Though we again note, as did the Commonwealth, that no new child pornography was placed on the phone after the date it was seized. He further alleged that both Jane and John's allegations were untrue and highlighted the fact that, due to a lack of physical evidence, it was "their word against his."

The jury found Baldwin guilty of first-degree sodomy, first-degree rape, and distribution of obscene material to a minor for his offenses against Jane on January 6, 2019. It further found him guilty of use of a minor in a sexual performance and first-degree sexual abuse, continuing course of conduct, for his offenses against John. Finally, it found him guilty of sixty-eight counts of possession of matter portraying a sexual performance by a minor, including one count for the image of John naked from the waist down.

Additional facts are discussed below as necessary.

II. ANALYSIS

A. Warrantless Seizure of Baldwin's Cellphone

Baldwin filed a pre-trial motion to suppress all the evidence obtained from his cellphone on the basis that it had been seized in violation of the Fourth Amendment. U.S. Const. amend. IV.; U.S. Const. amend. XIV; Ky. Const. § 10. The motion, which cited no case law, asserted that the officers lacked probable cause to seize his phone and highlighted that Det. Friend did not seek a search warrant until two days after the seizure. The Commonwealth did not file a response.

During the suppression hearing that followed, Det. Friend was the sole witness. He testified that because Jane had alleged that Baldwin used his cellphone during the January 6 incident, he believed the phone contained evidence of a crime. On the same night the incident occurred, and immediately after speaking to Jane's parents, Det. Friend and Ofc. Creech went next door to Baldwin's house. Ofc. Creech was wearing a body camera during the interaction and that footage was played during the suppression hearing.

The body camera footage showed Baldwin answering his front door at around 11:50 p.m. The officers asked him if they could come in and ask him some questions about a case they were investigating; Baldwin consented to their entry. The front door opened into the living room and the officers initially spoke to Baldwin while he was sitting on a couch. They asked him if anyone else was in the home and he told them that John was home but asleep. The officers then told him they wanted to ask him some questions and read him his *Miranda* warnings. Baldwin initially agreed to talk to them and asked what was going on. Det. Friend informed him that Jane had alleged that Baldwin had touched her privates. The detective then asked him if he had a cellphone and he acknowledged that he did. Det. Friend told him that Jane had also alleged he had used his cellphone during the abuse. At that point, Baldwin stood up from the couch and went around the corner into the kitchen and picked up his phone; both officers followed.

Baldwin picked up his phone and said, "I don't know what I would have been viewing," and asked, "Do I need to call [John's] grandma to come get him or something?" Det. Friend said he would like for him to do that because he wanted Baldwin to go to the police station with them to be interviewed. Baldwin responded, "Alright, well at this time I think I want a lawyer." Det. Friend told him that they would be seizing his cellphone, and Baldwin responded he did not consent to that. Baldwin then started doing something on the phone and said, "Let me make a few phone calls." Det. Friend told him they had to monitor him, and Baldwin said that was fine.

Baldwin grabbed a cigarette and walked out of the kitchen into the living room with his phone still in hand. When he got to the living room, he turned around to get a lighter and realized that Ofc. Creech was directly behind him. Baldwin became agitated, threw his hands up, and said, "You guys can pat me down but please give me a little bit of space so you're not my shadow." Det. Friend responded that they were going to go ahead and take his cellphone. Baldwin still had his arms raised with his phone in his left hand. Ofc. Creech held Baldwin's left wrist and Det. Friend took the phone out of his hand. Baldwin did not struggle against them or try to keep them from taking it. Det. Friend explained that Baldwin told them to give him space and they were not going to allow that while he still had the phone. As Baldwin had invoked his right to counsel, and because they had accomplished the seizure of the phone, the officers left the premises. Det. Friend filed an application for a search warrant for the phone on January 8, 2019, at 11:37 a.m., approximately thirty-six hours after it was seized.

During the suppression hearing, the Commonwealth argued that, based on Jane's allegations, the officers had a reasonable belief that Baldwin's phone would contain evidence of a crime. It primarily relied upon *United States v. Williams*, in which the Sixth Circuit noted that "[i]f 'law enforcement authorities have probable cause to believe that a container holds. . . evidence of a crime' and the exigencies of the circumstances demand it,' seizure of the container 'pending issuance of a warrant to examine the contents' is permitted." 998 F.3d 716 (6th Cir. 2021) (quoting *United States v. Place*, 462 U.S. 696, 701 (1983) (collecting cases)). The Commonwealth asserted that the exigencies of the circumstances demanded seizure of the phone because Baldwin's behavior gave the officers reason to believe he would attempt to delete evidence off of it if it was not seized immediately.

Defense counsel responded that there was no reason one of the officers could not have stayed at the scene with Baldwin and the phone while the other officer left to obtain a warrant to seize it. Counsel further argued that the thirty-six-hour delay between seizure of the phone and seeking the search warrant rendered the warrantless seizure unreasonable. It is notable for our purposes that while defense counsel asserted that no exigent circumstances existed, he never argued that any exigent circumstances that may have existed were trumped by the "police-created exigency" doctrine. *See Kentucky v. King*, 563 U.S. 452, 469 (2011) (holding "the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."); *Turley v. Commonwealth*, 399 S.W.3d 412, 424 (Ky. 2013) (citing *King*, 563 U.S. at 462) ("[A] police-created exigency justifies a warrantless search only so long as the police conduct leading up to that exigency was lawful under the Fourth Amendment.").

The trial court took the matter under advisement and thereafter issued a written order. The court identified the two issues before it as being whether the initial seizure of the phone was lawful and, if so, whether the post-seizure delay in seeking and executing the search warrant was reasonable. As to the first issue, relying on *Place*, the trial court found that the initial seizure of the phone was lawful because "[a]t the time the phone was seized, probable cause[7] existed to believe that the phone might contain evidence that would corroborate [Jane's] account of the alleged offense and/or possess evidence of a crime." And, citing *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009), the trial court concluded that "[t]he temporary seizure of the phone, while the investigating officer obtained a search warrant, did not meaningfully interfere with [Baldwin's] possessory interests."[8] The trial court further concluded that exigent circumstances existed as it found that digital information contained on a phone can be deleted, altered, or otherwise made unavailable with relative ease, and. . . [i]n light of those considerations, the RPD officers temporarily seized Mr. Baldwin's phone to secure it for examination later and to avoid the destruction of evidence. . . The temporary seizure of the phone was. . . reasonably based on concerns regarding potential destruction of evidence of criminal wrongdoing on the device.

[7] Out of an abundance of caution, we note that while the *Place* Court did state that when an officer has

> probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it[,]

the issue actually addressed by the United States Supreme Court in *Place* was whether such a seizure could occur "on the basis of *less than* probable cause[.]" 462 U.S. at 701-02 (emphasis added). Specifically, whether a seizure could be permitted based only on the "reasonable, articulable suspicion, premised on objective facts" standard established by *Terry v. Ohio*, 392 U.S. 1 (1968). 462 U.S. at 702.

[8] The *Mitchell* Court held that a twenty-one-day delay between the warrantless seizure of a hard drive and the filing of an application for a search warrant was unreasonable based on the circumstances of the case. *Id*. at 1351-53. Nevertheless, it initially held that a seizure "to ensure that the hard drive was not tampered with before a warrant was obtained. . . would not have violated the Warrant Clause." *Id.* at 1350. In other words, *Mitchell* held that the initial seizure of the hard drive was lawful, but the delay in seeking a search warrant to search it violated the defendant's Fourth Amendment rights.

The trial court next addressed whether the thirty-six-hour delay in seeking a search warrant rendered the initial lawful seizure unreasonable. Citing *United States v. Burgard*, 675 F.3d 1029, 1033-34 (7th Cir. 2012) (collecting cases), the trial court conceded that no bright line test exists to determine when a delay becomes unreasonable and that courts are instead directed to weigh factors "including the infringement on the person's possessory interest, brevity of the seizure, the state's basis for seizing the item, whether the seizure was supported by reasonable suspicion or probable cause, and the diligence with which law enforcement acted."

In weighing those factors, the trial court concluded that while individuals clearly have a meaningful possessory interest in their cellphones, the Commonwealth has a substantial interest in prosecuting sexual offenses perpetrated against children. It further found that the initial seizure was supported by probable cause based on Jane's allegations, and that the delay between seizure of the phone and seeking the warrant was less than two full days. It found that "the brief delay in seeking the initial search warrant was not unreasonable" and denied Baldwin's motion to suppress.

The only argument Baldwin presents to this Court is that the exigent circumstances exception to the warrant requirement did not justify the seizure of his cellphone because the officers created the exigent circumstances themselves. Baldwin relies solely on *Hall v. Commonwealth*, 438 S.W.3d 387 (Ky. App. 2014) (applying *King* and holding that the police-created exigency doctrine applied because the officers entered an apartment in a manner that violated the Fourth Amendment). This argument was never asserted before the trial court and is therefore unpreserved. *See* RCr[9] 9.22. Baldwin has not requested review for palpable error under RCr 10.26, and we decline to address it.

[9] Kentucky Rule of Criminal Procedure.

B. The Cellebrite Data Extraction

Baldwin's next assertions of error concern the admission of the images of child pornography that were found on his cellphone. He contends that the admission of these photographs violated his Confrontation Clause rights because he was unable to cross-examine the Cellebrite forensic analyst that extracted data that led the officers to the discovery of the images on his cellphone. He further argues that they were not properly authenticated.

Cellebrite is a for profit, digital forensics company that specializes in the creation and manufacturing of programs that can perform forensic extractions on digital devices. Members of law enforcement are not privy to how Cellebrite's proprietary technology works, but they can be trained to use it. Cellebrite's extraction equipment allows law enforcement to perform an extraction of all the data that exists on a device. In essence it creates a "clone" of all the information on a particular device and uploads it to a computer; all an officer must do is plug the device into the forensic equipment and run the program. However, the data that is thereby extracted is not in a form that is capable of being read or understood by the average person. Officers must use a different Cellebrite program called Physical Analyzer to "translate" all the raw data extracted from the phone into an intelligible format. One of the officers who testified in this case, Kentucky State Police Trooper[10] Aaron Gabhart, stated that unless an individual had an "extreme knowledge of computers and programing" they would be unable to look at the raw data from an extraction and know what it contained before translating it with the second Cellebrite program, Physical Analyzer.

[10] At the time of Baldwin's trial, Trooper Gabhart was a United States Secret Service Agent. We will refer to him using the title he held at the time of the investigation at issue.

Det. Friend testified that he seized Baldwin's cellphone on January 6, 2019. He explained that under normal circumstances both the data extraction and the Physical Analyzer translation would have been conducted at RPD's station. But because Baldwin's phone was "locked" by a passcode, Det. Friend was unable to perform the usual, in-house data extraction. He contacted Tpr. Gabhart, who was at that time a member of an electronic crimes task force assigned to the United States Secret Service (USSS), for assistance. Det. Friend hand delivered the phone to Tpr. Gabhart at the USSS' Louisville, Kentucky, field office on February 8, 2019. Tpr. Gabhart was likewise unable to use Cellebrite's extraction program due to the phone's passcode. Because of this roadblock, Tpr. Gabhart packaged and mailed the phone to the USSS' Cleveland, Ohio, field office on the same day he received the phone: February 8, 2019. The Cleveland field office received the phone on February 12, 2019, but the agents there were also unable to extract the phone's data because of its passcode. They therefore sent the phone to Cellebrite's American headquarters in Parsippany, New Jersey, on May 31, 2019.

On June 6, 2019, Cellebrite's Forensic Lab Administrator, Joseph Raspante, received the phone and delivered it to the forensic specialist who was assigned to perform the extraction. That forensic specialist successfully completed a data extraction from the phone on August 12, 2019, and placed it on an encrypted thumb drive. The cellphone and the encrypted thumb drive were shipped back to the Cleveland field office on September 27, 2019. The Cellebrite analyst performed no other work in the investigation. The analyst did not, for example, run the raw data through Physical Analyzer or opine on whether that data contained child pornography. The analyst simply made a copy of the phone's data and mailed it back.

On September 30, 2019, Mr. Raspante signed a "Certification and Business Record of Cellebrite, Inc." (Certification). The Certification attested to: Mr. Raspante's familiarity with Cellebrite's protocols for the intake, processing, and return of mobile devices; the date and manner in which Baldwin's phone was received; the date the phone was provided to a Cellebrite forensic specialist and that the specialist was able to extract data from it; the analyst's actions in making a copy of the data extraction and placing it on an encrypted drive; and the manner in which the phone was returned to the requesting entity. It further stated that the contents of the data extraction were not examined by anyone at Cellebrite, that the device did not leave the custody of Cellebrite at any time, and that the Certification itself and the information it referenced were business records kept by Cellebrite in the course of a regularly conducted activity.

The Cleveland field office received the phone and the thumb drive containing the data extraction on September 30, 2019, and shipped those items to Tpr. Gabhart in Louisville on October 4, 2019. The Cleveland field office did not perform any investigation, it simply forwarded the package. Tpr. Gabhart received that package on October 9, 2019. He took the raw data on the encrypted thumb drive and ran it through Physical Analyzer, which produced a "report" of the translated data. Det. Friend had previously informed Tpr. Gabhart that Baldwin's phone might contain child exploitation material. Tpr. Gabhart therefore conducted a limited review of the translated data to determine if such materials were present, as that would heighten the protocols for handling the evidence. Based on his limited review, he concluded child pornography was present. He immediately informed Det. Friend and returned the evidence to him. On October 22, 2019, Det. Friend received the phone, the thumb drive containing the raw data, and the Physical Analyzer report containing the translated data. The translated data revealed the dozens of images of child pornography for which Baldwin was later indicted.

At trial, Baldwin's physical cellphone and the sixty-eight images of child pornography found on it via the data extraction were admitted into evidence. The raw data extracted from the phone, the Physical Analyzer report, and the Certification signed by Mr. Raspante were not admitted. Both Det. Friend and Tpr. Gabhart testified and were subjected to cross-examination by Baldwin. The Commonwealth did not call the Cellebrite analyst that extracted the raw data to testify.

Before the trial court, Baldwin objected to the photographs being admitted based on a lack of proper authentication. He further asserted that the Confrontation Clause required the Commonwealth to make the Cellebrite forensic specialist who extracted the raw data available for cross-examination.[11] The trial court ruled that the Commonwealth had sufficiently authenticated the photographs, and that the Confrontation Clause did not require the Commonwealth to make the Cellebrite analyst available for cross-examination. The court noted that, while there was no Kentucky authority on the issue, the Fifth Circuit has held that that raw, machine produced cellphone data extractions "contain[] 'only machine-generated results,' and [are] thus non-testimonial." *United States v. Hill*, 63 F.4th 335, 359 (5th Cir. 2023). The trial court agreed with the Fifth Circuit and found that the data extraction in this case was not testimonial and that the Confrontation Clause was not implicated. *See*, *e.g.*, *Peacher v. Commonwealth*, 391 S.W.3d 821, 834 (Ky. 2013) ("[T]he Confrontation Clause of the Sixth Amendment precludes the use against a criminal defendant of testimonial hearsay statements unless the statement's maker, the declarant, testifies at trial or otherwise has been available for cross-examination by the defendant.").

[11] Baldwin also raised a chain of custody argument before the trial court but abandoned it after the trial court found that the Commonwealth was not required to establish a perfect chain of custody so long as it demonstrated there was a reasonable probability that the evidence had not been altered in any material respect, and that it had satisfied that burden. *See*, *e.g.*, *Helphenstine v. Commonwealth*, 423 S.W.3d 708, 717 (Ky. 2014). Baldwin has not renewed his chain of custody argument to this Court.

Before this Court Baldwin renews his argument that the admission of the photographs violated his Confrontation Clause rights because the data extraction from which they were obtained was testimonial hearsay and he was not afforded the opportunity to cross-examine the analyst who performed the extraction. He additionally asserts that the Commonwealth failed to properly authenticate any of the photographs.[12] We address each argument in turn.

[12] Baldwin also argues that the data extraction did not qualify for admission under the business records exception to hearsay. *See* KRE 803(6). Our holding below that the data extraction was not hearsay eliminates the need to address that argument.

1) *Baldwin's Confrontation Clause rights were not violated.*

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him[.]" U.S. Const. amend. VI; U.S. Const. amend. XIV. *See also* Ky. Const. § 11 ("In all criminal prosecutions the accused has the right to. . . meet the witnesses face to face[.]"). Baldwin's assertion that his right to confrontation was violated was properly preserved for our review by his arguments below and we will review for harmless error. *Staples v. Commonwealth*, 454 S.W.3d 803, 826 (Ky. 2014). "Harmless error analysis applied to a constitutional error, such as [a] Confrontation Clause violation. . . involves considering the improper evidence in the context of the entire trial and asking whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 826-27 (internal quotation marks omitted).

We begin, as we must, with the United States Supreme Court's Confrontation Clause jurisprudence as delineated in *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 822 (2006); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); and *Smith v. Arizona*, 602 U.S. 779 (2024).

Prior to *Crawford*, the Supreme Court utilized an amorphous "indicia of reliability" test to determine when an unavailable witness' testimonial hearsay statement was admissible. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. at 68-69.[13] In *Crawford*, the Supreme Court abandoned that test and endeavored to establish an interpretation of the Confrontation Clause that more closely aligned with the Framer's intentions. It opined that "the principal evil at which the Confrontation Clause was directed was the. . . use of *ex parte* examinations as evidence against the accused." *Id.* at 50. Thus, it held, the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony[,]'" and defined "testimony' as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51.

[13] *Roberts* held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" 448 U.S. at 66.

Although the *Crawford* Court saved for another day any attempt to provide a comprehensive definition of "testimonial," it held that when testimonial hearsay evidence is at issue "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. Stated differently, to admit a non-testifying witness' testimonial hearsay statement into evidence, that witness must be unavailable, and the defendant must have had a prior opportunity to cross-examine that witness. Two years later, in *Davis*, the Court provided additional, albeit non-exhaustive, guidance on when a statement is "testimonial" within the context of a police interrogation. 547 U.S. at 822. It held that a statement is nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency[,]" and a statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

The hearsay statements at issue in *Crawford* and *Davis* did not concern forensic evidence.[14] But in *Melendez-Diaz*, the Supreme Court squarely rejected an attempt to formulate a forensic evidence exception to *Crawford*. 557 U.S. at 313-21. During the trial in *Melendez-Diaz*, the prosecution entered three "certificates of analysis" that showed the results of the forensic testing conducted on a substance seized at the time of the defendant's arrest. *Id*. at 308. The certificates stated that "[t]he substance was found to contain: Cocaine[]" and each were sworn before a notary public as mandated by state law. *Id.* The certificates were admitted at trial "pursuant to state law as 'prima facie evidence of the composition, quality and the net weight of the narcotic. . . analyzed.'" *Id.* at 309. The defendant objected to the admission of the certificates under the Confrontation Clause because the analysts that conducted the testing were not called as witnesses by the prosecution. *Id.*

[14] In *Crawford*, the defendant's wife gave a recorded statement to police and thereafter declined to testify at trial pursuant to Washington's marital privilege statute. 541 U.S. at 39-40.

Davis concerned separate appeals from two cases. 547 U.S. at 817-21. In the first, the prosecution played a recording of a 911 call that the victim made during a domestic violence incident involving the defendant because the victim refused to testify at trial. *Id.* at 817-19. In the second, the prosecution entered a victim's affidavit describing a domestic violence incident involving the defendant when she refused to testify at trial. *Id.* at 819-21.

The Supreme Court held that the admission of the certificates violated the defendant's right to confrontation. *Id.* at 309-11. It noted that the certificates were plainly affidavits, which were mentioned twice in *Crawford* as belonging to the "core class of testimonial statements[,]" and held that they were "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving" that the substance seized by police was cocaine. *Id.* at 310. The Court further discussed that the evidence was "the precise testimony the analysts would be expected to provide if called at trial[,]" and that the certificates were therefore "functionally identical to live, in-court testimony, doing precisely 'what a witness does on direct examination.'" *Id.* at 310-11 (quoting *Davis*, 547 U.S. at 830).

Moreover, the affidavits were clearly "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," as state law provided that their sole purpose was to establish prima facie evidence of the composition, quality, and weight of an analyzed substance. *Id.* at

311. The Court held that the defendant was entitled to confront those analysts at trial absent a showing that the analysts were unavailable to testify and that the defendant had a prior opportunity to cross-examine them. *Id.*

Bullcoming and *Smith* both involved the application of *Melendez-Diaz* to slightly varying facts. In *Bullcoming*, law enforcement executed a search warrant to obtain a sample of the defendant's blood following a vehicular collision. 564 U.S. at 652. That sample was then tested via gas chromatograph at a state lab and the results of that testing were memorialized in a report that was completed and signed by the forensic analyst who conducted it. *Id.* at 652-53. The report stated, *inter alia*, that the defendant's BAC[15] was .21, that the seal of the sample was received intact and was broken in the laboratory, and that the analyst had followed the established procedures for testing the sample. *Id.* at 653. By the first day of trial the analyst who conducted the testing and made the report had been placed on unpaid leave. *Id.* at 655. In lieu of calling that analyst to testify, the prosecution was permitted to admit the report through the testimony of a different analyst from the same lab that neither observed nor reviewed the initial analyst's testing. *Id.* at 655-56.

[15] Blood Alcohol Content.

The *Bullcoming* Court rejected the New Mexico Supreme Court's holding that the initial analyst "simply transcribed the result generated by the gas chromatograph" and that the defendant's "true 'accuser'" was the machine. *Id.* at 659. The Court reasoned that "[the analyst's] certification. . . *reported more than a machine-generated number*[,]" as it stated that the analyst received the sample intact, that he adhered to a particular protocol, and that nothing affected the integrity of the sample or the validity of the analysis. *Id.* at 659-60 (emphasis added). The Court concluded that those "representations, relating to past events and human actions *not revealed in raw, machine-produced data* are meet for cross-examination." *Id.* at 660 (emphasis added). The Court further rejected the state's argument that the report was nontestimonial, as "*Melendez-Diaz* left no room for that argument[.]" *Id.* at 663.

Finally, in *Smith*, police executed a search warrant and obtained large quantities of suspected drugs that were sent to a state crime lab and tested by Analyst Elizabeth Rast. 602 U.S. at 789-90. Rast prepared a set of typed notes and signed a report that documented, for each of the items tested: a description of the item; the weight of the item and how she measured that weight; the test performed on the item, including whether she ran a test "blank" on the equipment; the results of those tests; and a conclusion that the items tested contained usable quantities of methamphetamine, marijuana, and cannabis. *Id.* at 790.

In the weeks leading up to trial, Rast ceased working at the crime lab. *Id.* The prosecution therefore called Greggory Longoni, a forensic scientist that had no previous connection to the case, to testify about his "independent opinion on the drug testing performed by Rast." *Id.* Relying on Rast's records, Longoni arrived at the same conclusions as Rast, and when he testified he related what was in her records item by item. *Id.* at 791. The Arizona Court of Appeals upheld this practice on the basis that Analyst Rast's records did not come in for the truth of what they asserted but, rather, to demonstrate the basis for Longoni's opinions. *Id.* at 791-92. The *Smith* Court rejected that reasoning and held that "[i]f an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." *Id.* at 795. As Rast's report could have only supported Longoni's conclusions if what was stated in her report was true, the Court concluded that Longoni improperly testified to hearsay statements contained in the report. *Id.* at 798-800. Consequently, the Court concluded that if Rast's report was also testimonial, the defendant's right to confrontation would have been violated. *Id.* at 800. As that issue was not properly before it, it remanded to the Arizona Court of Appeals for further proceedings. *Id.* at 800-03.

Thus, it is clear that the Confrontation Clause, although certainly applicable to forensic evidence, applies only to forensic evidence that is testimonial hearsay. It follows, then, that any Confrontation Clause inquiry raises two questions: does the evidence at issue constitute hearsay and, if so, is that hearsay testimonial? Neither the United States Supreme Court nor this Court have addressed that inquiry as it relates to the category of evidence at issue here: raw, machine produced data that contains no human input, conclusions, or assertions. After thorough review, we hold as a matter of first impression that raw, machine extracted Cellebrite data that is devoid of any human input, conclusions, or assertions does not implicate the Confrontation Clause because it is not testimonial hearsay.

The Kentucky Rules of Evidence define "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). "Declarant" is in turn defined as "a person who makes a statement[,]" KRE 801(b) (emphasis added), while "statement" is defined as either "[a]n oral or written assertion" or "[n]onverbal conduct *of a person*, if it is intended *by the person* as an assertion." KRE 801(a)(1)-(2) (emphasis added).

The first question we must address, then, is: who is the alleged declarant here? It cannot be the Cellebrite analyst who conducted the extraction, as that individual made no "statement." KRE 801(b). He or she simply extracted the data, placed it on an encrypted drive, and mailed it back to the requesting officer. The analyst did not make any written, oral, or nonverbal assertions regarding the data. KRE 801(a)(1)-(2). Indeed, the analyst would have likely been unable to make any assertions or conclusions about the data because it had not yet been "translated" into a readable format by Physical Analyzer. And while we do not know what process the analyst used to bypass the passcode on Baldwin's cellphone, that process would not have altered the data that was already present on the phone; it simply opened the door to it. And with that door opened, the only thing left to do was extract the data. Tpr. Gabhart testified that in the absence of a passcode, performing an extraction is as simple as plugging the phone into Cellebrite's forensic equipment and downloading the extracted data to a computer. The analyst simply had no part in creating the data or drawing conclusions about what it contained.

Consequently, the only other possible "declarant" is the computer the Cellebrite analyst used to extract and download the data. But to conclude that the computer was the declarant, we would have to hold that a computer is a person. KRE 801(b) ("A 'declarant' is a person who makes a statement."). We decline to do so as KRE 801 is plainly limited on its face to statements made by human beings. Consequently, we hold that the raw data extraction was not a hearsay statement, and that the Confrontation Clause was not implicated by the admission of the photographs obtained from it.

We find support for this holding in the federal circuit courts, as a majority of them have reached the same conclusion based on the definition of hearsay under the Federal Rules of Evidence, which similarly define a hearsay "declarant" as "the person who made the statement." FRE 801(b). *See United States v. Juhic*, 954 F.3d 1084, 1089 (8th Cir. 2020) ("Machine-generated records usually do not qualify as 'statements' for hearsay purposes but can become hearsay when developed with human input."); *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 110 (9th Cir. 2015) ("Because the program makes the relevant assertion. . . there's no statement as defined by the hearsay rule. In reaching that conclusion, we join other circuits that have held that machine statements aren't hearsay."); *United States v. Lamons*, 532 F.3d 1251, 1263-64 (11th Cir. 2008) (holding that a machine generated compact disk of data automatically collected from phone calls made to an airline's corporate toll-free number was not hearsay because it was not a statement by a human); *United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir. 2008) (holding that a machine cannot be a declarant for the purposes of the rule against hearsay); *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) ("[T]his raw data generated by the machines were not hearsay statements as implicated by the Confrontation Clause. . . Only a person may be a declarant and make a statement. Thus, 'nothing "said" by a machine. . . is hearsay.'"); *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005) ("[T]he. . . information was automatically generated by the computer. . . without the assistance or input of a person. . . there was neither a 'statement' nor a 'declarant' involved here within the meaning of Rule 801."); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) ("'[U]nder FRE 801(a), a statement is something uttered by 'a person,' so nothing 'said' by a machine. . . is hearsay.'").

A host of appellate courts from our sister states have likewise held that a machine cannot be a declarant that makes a hearsay statement absent some form of human input. *See State v. Lester*, 910 S.E.2d 642, 649 (N.C. 2025); *Commonwealth v. Wallace*, 289 A.3d 894, 905 (Pa. 2023); *Wade v. State*, 156 So. 3d 1004, 1024-25 (Fla. 2014); *State v. Buckland*, 96 A.3d 1163, 1169-72 (Conn. 2014); *State v. Kandutsch*, 799 N.W.2d 865, 879-80 (Wis. 2011), *superseded on other grounds by statute as stated in In re Commitment of Jones*, 911 N.W.2d 97 (Wis. 2018); *Commonwealth v. Thissell*, 928 N.E.2d 932, 937 n.13 (Mass. 2010); *Bryan v. State*, 903 S.E.2d 160, 168 (Ga. Ct. App. 2024); *Gore v. State*, 605 S.W.3d 204, 209 (Tex. Ct. App. 2020); *People v. Rodriguez*, 224 Cal. Rptr. 3d 295, 314 (Cal. Ct. App. 2017); *Baker v. State*, 762, 117 A.3d 676, 683 (Md. Ct. App. 2015); *State v. Ziegler*, 855 N.W.2d 551, 556 (Minn. Ct. App. 2014); *Cranston* *v. State*, 936 N.E.2d 342, 344 (Ind. Ct. App. 2010); *People v. Dinardo*, 801 N.W.2d 73, 79 (Mich. Ct. App. 2010); *People v. Buckner*, 228 P.3d 245, 250 (Colo. Ct. App. 2009); *Wimbish v. Commonwealth*, 658 S.E.2d 715, 720 (Va. Ct. App. 2008); *State v. Van Sickle*, 813 P.2d 910, 913 (Idaho Ct. App. 1991).

Moreover, the sparse number of jurisdictions that have specifically addressed the interplay of the Confrontation Clause with cellphone data extractions have held that the raw, machine produced data from an extraction, alone, does not constitute testimonial hearsay and therefore does not implicate the Confrontation Clause.

In *Hill*, the Fifth Circuit opinion relied upon by the trial court below, several defendants were convicted for their involvement in a scheme to rob armored vehicles as they restocked automated teller machines. 63 F.4th at 342. Special Agent Jeffrey Coughlin testified to information extracted from the defendants' cellphones, and the defendants objected on Sixth Amendment grounds because Agent Coughlin "did not personally extract the reports from their cellphones or observe the extraction[.]" *Id.* at 357.

The Fifth Circuit noted its previous opinions which, reviewing for plain error,[16] held that the admission of GPS cellphone tracking reports containing only "raw, machine-produced data" was not error. *Id.* at 358 (citing *United States v. Waguespack*, 935 F.3d 322, 333-34 (5th Cir. 2019); *United States v. Ballesteros*, 751 Fed. Appx. 579, 579-80 (5th Cir. 2019) (unpublished)). It also recognized, as we have already discussed, that several other federal circuit courts have held "that 'machine statements aren't hearsay.'" *Id.* (citing *Lizarraga-Tirado*, 789 F.3d at 1110; *Lamons*, 532 F.3d at 1263; *Moon*, 512 F.3d at 362; *Washington*, 498 F.3d at 230; *Hamilton*, 413 F.3d at 1142; *Khorozian*, 333 F.3d at 506).

[16] The federal courts' standard for plain error review is comparable to Kentucky's standard of review for palpable error. *Compare* Fed. R. Crim. P. 52(b) *with* RCr 10.26.

Finally, it highlighted that the *Bullcoming* Court "emphasized that the report in question there 'contained not only raw, machine-produced data, but also representations relating to past events and human actions,' e.g., the validity of the analysis or the integrity of the sample." 63 F.4th at 359. Based on the foregoing, the *Hill* Court held that "the extraction reports at issue here were non-testimonial, raw machine created data[,]" because "[k]ey differences exist between test reports generated by a person's analysis and test reports which are the result of machine analysis." *Id.* at 359. *See also State v. Green*, 543 P.3d 484, 489-93 (Idaho 2024); *Pena v. State*, ---- S.W.3d ----, 2024 WL 5081673 (Tex. Crim. App. Dec. 12, 2024); *State v. Lautanen*, 217 N.E.3d 59 (Ohio Ct. App. 2023); *People v. Abad*, 490 P.3d 1094, 1104-07 (Colo. App. 2021).

By way of contrast, the Fourth Circuit's opinion in *United States v. Arce*, demonstrates an example of when extracted cellphone data is considered testimonial because it contains human input or conclusions. 49 F.4th 382 (4th Cir. 2022). In *Arce*, the defendant was convicted of receiving and possessing child pornography based on the child pornography materials found on his cellphone. *Id.* at 385. During the defendant's trial, several Cellebrite reports "which included all the information extracted from the phone, not just the charged images" were introduced into evidence through the testimony of an Agent Montoya. *Id.* at 391. The defendant challenged the admission of the reports on Sixth Amendment grounds. *Id.* The Fourth Circuit held that "[t]hough most of [the] reports contained only non-testimonial evidence. . . one report included testimonial statements categorizing the images as likely child pornography." *Id.*

The *Arce* Court explained that while "in general, when 'machines generate[] data. . . through a common scientific and technological process,' the operators of those machines do not make a 'statement' under the Confrontation Clause. . . characterizations of, or conclusions drawn from[] the data are statements." *Id.* at 392 (citing *Washington*, 498 F.3d at 230; *Moon*, 512 F.3d 362). Agent Montoya testified that after he extracted an image using Cellebrite, he would enter it into the Griffeye database "which uses a hashing algorithm to identify unique images and match them with known child-pornography images. A hashing algorithm generates for a given image an alphanumeric identifier, which, essentially, is unique to that image." *Id.* at 389.

As part of Agent Montoya's investigation, he "compared the hash values of images from Arce's phone to [the Griffeye] database of 'known' child-pornography images that Griffeye created using input from law enforcement officers." *Id.* at 392. In turn, the Cellebrite report used those hash values to label images as child abuse material or child exploitation material. *Id*. The Court explained that a statement in the Cellebrite report that a given image was child exploitation or abuse material depended on two premises. *Id.* at 393. The first was that a given image in the Griffeye database was in fact child exploitation or abuse material, which "derives from unknown law enforcement officers' judgments that certain images qualify." *Id.* The second premise was that "the hash value of one of the known images matches that of an image found in the Cellebrite download." *Id.* The Court held:

> It is the first of these premises that creates a Confrontation Clause problem. The second premise—the hash values match—may just be the kind of machine-generated data from a common technological process that is non-testimonial. *See Washington*, 498 F.3d at 230 & n.2. But the first premise—a given image in the Griffeye database is child exploitation or abuse material—is classic testimonial evidence. That conclusion depends on the judgment of law enforcement that a given image is child pornography. And that judgment is made for the purpose—or at least the foreseeable result—of identifying and prosecuting criminal cases. So the statements in the Cellebrite report identifying a given image is Child Exploitation Material or Child Abuse Material are testimonial. And including those testimonial statements violated Arce's Confrontation Clause rights.

Id. The Court concluded by holding that any error in admitting the portions of the Cellebrite reports that contained testimonial statements was harmless, as the report's statement that a given image was child pornography was duplicative of the actual photographs of child pornography that were admitted. *Id.*

In this case, the Cellebrite analyst that extracted the raw data from Baldwin's cellphone did not make any testimonial statements about that data or provide any input to produce that data. The analyst simply extracted the data and sent it back in its raw form, and raw, purely machine generated data is not testimonial hearsay. The only two individuals that translated the data and/or made conclusions that it contained child pornography—Det. Friend and Tpr. Gabhart—were subjected to cross examination by Baldwin. This Court is satisfied that Baldwin's Confrontation Clause rights were not violated because they were never implicated to begin with, and we affirm.

2) *The photographs were properly authenticated.*

Baldwin further alleges that the trial court erred by finding that the Commonwealth properly authenticated the photographs of child pornography because it did not prove that the data extraction was what it purported to be: a digital copy of the data on his cellphone.

At trial, Tpr. Gabhart testified prior to Det. Friend. During a bench conference before Tpr. Gabhart's testimony the Commonwealth notified the court of its intention to use the Certification signed by Mr. Raspante to question Tpr. Gabhart and to authenticate the data extraction to later admit the images of child pornography. The Commonwealth contended the Certification was admissible as a business record. *See* KRE 803(6). The Certification provided the date the phone was received at Cellebrite; the UPS tracking number associated with its delivery; and the phone's make, model, and International Mobile Equipment Identity (IMEI) number.[17] It further stated that when the analyst completed the data extraction, all of the evidence was placed in a sealed evidence bag and mailed back; the UPS tracking number for that shipment was also provided. The Certification stated that the device never left the custody or control of Cellebrite and that Cellebrite did not examine or alter any of the data on the device. The Certification was signed by Mr. Raspante under penalty of perjury.

[17] An IMEI number is a unique serial number assigned to a particular cellphone.

The trial court denied the Commonwealth's request to enter the Certification into evidence because it contained testimonial statements. Notwithstanding, the court noted that the Certification had previously been made part of the record[18] and that it provided *prima facie* evidence that the raw data was what the Commonwealth purported it to be. In other words, while the Certification was inadmissible it still served to authenticate the raw data extracted from the phone. Thus, the photographs obtained from the extraction would be admissible if the Commonwealth met the other evidentiary hurdles for admission.

[18] The Commonwealth filed a pre-trial memorandum addressing authentication and chain of custody issues and attached the Certification as

an exhibit to the memorandum.

Following that ruling, Tpr. Gabhart testified to the chain of custody recounted in Section II(B) above. He stated he recorded the cellphone's IMEI number before mailing it to Cleveland in tamper resistant packaging and that the Cleveland agents did not report to him that the package had been tampered with in any way when they received it. When he later received the phone and other evidence back from Cleveland, it arrived in tamper resistant packaging with its seal intact. He verified it was the same phone he sent using the IMEI number and ultimately returned all of the evidence he received from Cleveland to Det. Friend. Det. Friend testified that he recorded the phone's make, model, and IMEI number prior to hand delivering it to Tpr. Gabhart in an evidence package sealed with evidence tape. He demonstrated to the jury where the IMEI number was engraved on the back of Baldwin's phone. He further noted that the Cellebrite Physical Analyzer report in this case included the same IMEI number.

After the foregoing testimony, the Commonwealth moved to admit the images of child pornography extracted from the phone. The defense renewed its previous objection based on a lack of authentication. The trial court overruled the objection, and found:

> I believe based on the [Certification] the court reviewed that the Commonwealth has made a *prima facie* showing that the clone drive is what it purports to be. The testimony today by these two officers that reflects on chain of custody and their standard operating procedures tends to validate its trustworthiness. And I mean that in the sense that it gets past the court's gatekeeping function. I don't mean that in the sense that it's not subject to cross examination, as I've said [inaudible] to cross-examine and I think that's where it goes at this point: to the weight of the evidence and not its admissibility.

We agree.

The Kentucky Rules of Evidence state that "[t]he requirement of authentication. . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." KRE 901(a). The Commonwealth's burden under KRE 901 is slight and requires only a *prima facie* showing that the material is a true and accurate reflection of what it is purported to be. *See Sanchez v. Commonwealt*h, 680 S.W.3d 911, 926 (Ky. 2023) (quoting *Brafman v. Commonwealth*, 612 S.W.3d 850, 866 (Ky. 2020); *Kays v. Commonwealth*, 505 S.W.3d 260, 270 (Ky. App. 2016)). Whether sufficient evidence is presented to authenticate a given piece of evidence is within the sound discretion of the trial court, and we review that ruling for abuse of discretion. *Brafman*, 612 S.W.3d at 866. This Court will uphold a trial court's finding that a piece of evidence was properly authenticated unless that ruling was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

We hold that the trial court acted well within its discretion by ruling that the data extraction was properly authenticated. Based on the evidence recounted above, the Commonwealth presented more than enough evidence to overcome its slight burden of demonstrating that the data extraction was a true and accurate copy of all the data housed on Baldwin's cellphone at the time it was seized. We would only add that, in addition to the Certification and the officers' testimony about chain of custody and their evidence handling protocols, several items found in the data itself served to further authenticate the evidence. In particular, it contained photographs of Baldwin, his vehicle, his home; his social media accounts; Tina's contact information; and photographs of John that were both criminal and non-criminal. No error occurred, and we affirm.

C. Alleged Prosecutorial Misconduct

Baldwin next asserts that the Commonwealth committed prosecutorial misconduct in its opening statement and closing argument during the guilt phase of his trial. He concedes that none of his arguments were preserved by contemporaneous objection, but requests review for palpable error. RCr 10.26.

Prosecutorial misconduct is "'a prosecutor's improper or illegal act involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment.'" *Murphy v. Commonwealth*, 509 S.W.3d 34, 49 (Ky. 2017) (quoting *Commonwealth v. McGorman*, 489 S.W.3d 731, 741-42 (Ky. 2016)). When the alleged misconduct is challenged by an objection, we will reverse "if proof of the defendant's guilt was not such as to render the misconduct harmless, and if the trial court failed to cure the misconduct with a sufficient admonition to the jury." *Murphy*, 509 S.W.3d at 49 (quoting *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010)) (internal quotation marks omitted). But when, as here, the defendant fails to object to the alleged misconduct, this Court "'will reverse only where the misconduct was flagrant and was such as to render the trial fundamentally unfair.'" *Murphy*, 509 S.W.3d at 49 (quoting *Ordway v. Commonwealth*, 391 S.W.3d 762, 789 (Ky. 2013)).

The four-part test utilized to determine whether alleged misconduct was flagrant is: "(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." *Murphy*, 509 S.W.3d at 49. When applying this test, we must also bear in mind that "opening [statements] and closing arguments are not evidence and prosecutors have a wide latitude during both." *Stopher v. Commonwealth*, 57 S.W.3d 787, 805-06 (Ky. 2001). And, that "[i]n the end, our review must center on the essential fairness of the trial as a whole, with reversal being justified only if the prosecutor's misconduct was 'so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings.'" *Dickerson v. Commonwealth*, 485 S.W.3d 310, 329 (Ky. 2016) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)).

Baldwin first argues against a statement made by the Commonwealth during its closing argument. For context, we note that all sixty-eight images of child pornography were briefly displayed on a television screen for the jury as Det. Friend read the concomitant description of each image from Baldwin's indictment. During closing argument, after the Commonwealth's Attorney asserted that all of the circumstantial evidence presented pointed to Baldwin knowingly possessing child pornography on his phone, she said:

> And I will ask you this, if you were wondering whether Mr. Baldwin had any interest in those images, whether they are something he might like to look at, did you notice him while we were showing them? He couldn't take his eyes off it. He could not take his eyes off it. One last look. One last chance to see those little kids.[19]

Baldwin argues that he had a constitutional right, absent any disruptive behavior, to be present at all stages of the proceedings against him and that this right included the right to view the evidence presented against him in the midst of trial. U.S. Const. amend. VI; U.S. Const. amend. XIV; Ky. Const. § 11. He therefore contends that this comment was analogous to the Commonwealth commenting on his right to remain silent and was an "improper manipulation tactic to ensure a conviction." We disagree.

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[19] While Baldwin's appellant brief does not directly classify this statement as alleged prosecutorial misconduct, that assertion is at the core of his argument. We therefore address it as such.

To determine if this comment was flagrant misconduct, we first ask whether the remark tended to mislead the jury or prejudice the defendant. The statement was certainly not misleading. The video record in this case demonstrated that when the images of child pornography were being displayed in the courtroom, Baldwin kept his focus primarily on the television screen. But, given that the statement would have been prejudicial to Baldwin, this factor weighs in his favor. Next, the challenged comment was isolated, and therefore weighs in favor of the Commonwealth. Third, the comment was deliberately placed before the jury, and we must weigh this factor in Baldwin's favor. But we note that the jury was likely able to see and assess the body language of Baldwin in the moments where the images were portrayed as well.

Finally, and most significantly, the strength of the evidence against Baldwin for the offense of possession of child pornography was overwhelming. All sixty-eight images were found on Baldwin's personal, passcode protected cellphone, and all the non-criminalized data that was extracted from it demonstrated that the phone belonged to him (photographs of him, his social media accounts, Tina's contact information, etc.). Moreover, when the final image of child pornography was placed on the phone approximately one hour before Det. Friend seized it on January 6, 2019, the only two people present in Baldwin's home were himself and John. Baldwin asserted no logical explanation for how those images came to be on his phone without his knowledge, and the sheer number of images alone tends to refute any contention that he was unaware he possessed them. We hold no flagrant prosecutorial misconduct occurred from this argument.

Baldwin's next arguments address what he deems "emotional outbursts" by the Commonwealth's

Attorney during her opening statement and closing argument. Towards the end of her opening statement, the Commonwealth discussed the reasons John had not told anyone what Baldwin was doing to him. She then said:

> I think, in this case, if you pay attention to how the investigation progresses and how the evidence and the information builds, you will see that if [Jane], at four years old, hadn't been brave enough to tell her parents—sorry—what had happened to her, we likely would have never known what was happening to [John].

When the Commonwealth's Attorney said "sorry" her voice cracked, and it was apparent that she became emotional momentarily. However, she recovered quickly and continued with composure. Later, the Commonwealth began its closing argument by thanking the jurors for their service and by thanking Jane's parents and Det. Friend. Her voice again cracked as though she were about to cry, and she said:

> I'm sorry you all, I do get, and I don't mean to get emotional, and I'm going to try, it's just very hard to walk in this courtroom and not still be a mom and not still be a human being and dealing with the issues that we're talking about today is emotional.

Again, she quickly regained her composure and continued her argument.

Neither of these instances, which can hardly be classified as emotional outbursts in the first place, can be deemed flagrant prosecutorial misconduct. First, there is nothing in the record to suggest that the prosecutor's brief displays of emotion were some kind of gamesmanship calculated in advance to manipulate the jury. Prosecutors are human beings, and we cannot command them to remain emotionally numb or indifferent. This is particularly true in cases where children are victimized by adults and there are disturbing images that must be put before the jury. Though that is not to say that excessive, disingenuous displays of emotion by a prosecutor could never be considered improper. But that did not occur in this case. Notwithstanding, we cannot dispute that the prosecutor's emotions could have tended to prejudice Baldwin, and we must therefore weigh this factor in his favor.

However, the second, third, and fourth factors weigh in the Commonwealth's favor: these instances were isolated, as they occurred twice over the course of a three-day trial; there is no indication the Commonwealth's Attorney deliberately became emotional and she appeared to be embarrassed by it. Additionally, the evidence of Baldwin's guilt was overwhelming. Not only was there proof regarding dozens of counts of possession of child pornography discussed above, but the Commonwealth also presented testimony from both Jane and John. Jane was four years old when she disclosed the abuse. At that age, she had no reason to have had any exposure to, or knowledge of, what oral sex is. Yet she came home after being babysat solely by Baldwin and immediately told her mother that Baldwin had shown her an image of two individuals engaged in oral sex and that he proceeded to do the same thing to her. She presumably told the forensic interviewer the same thing during her CAC interview, as Det. Friend sought an arrest warrant for Baldwin after it, and, four years later, she testified to the same thing during Baldwin's trial. John's testimony was equally damning. In addition to testifying about the numerous instances of physical sexual abuse he endured, John testified that Baldwin would take nude pictures of him, and those very images were found on Baldwin's cellphone. Based on the forgoing, we cannot hold that flagrant prosecutorial misconduct occurred.

D. Double Jeopardy

Baldwin next argues that his right to be free from double jeopardy was violated when one nude image of John was used to convict him of both use of a minor in a sexual performance, KRS[20] 531.310, and possession of a matter portraying a sexual performance by a minor, KRS 531.335. He concedes this alleged error is not preserved. Nevertheless, "we will review for palpable error, as we have held. . . that failure to present a double jeopardy argument to the trial court should not result in allowing a conviction which violates double jeopardy to stand." *Clark v. Commonwealth*, 267 S.W.3d 668, 674–75 (Ky. 2008); *see also Walden v. Commonwealth*, 805 S.W.2d 102, 105 (Ky. 1991).

[20] Kentucky Revised Statute.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution demands that "no person shall be subject for the same offence (sic) to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V; U.S. Const. amend. XIV. The Constitution of Kentucky provides nearly identical protections. Ky. Const. § 13 ("No person shall, for the same offense, be twice put in jeopardy of his life or limb[.]"). Kentucky follows the touchstone *Blockburger*[21] test to determine whether a defendant's double jeopardy rights have been violated. *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996). Under that test, "[d]ouble jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Id.* at 809 (quoting *Blockburger*, 284 U.S. at 304); *see also* KRS 505.020(1)(a) and (2)(a) (codifying the *Blockburger* test). We must examine whether KRS 531.310 (the "use statute") requires proof of a fact that KRS 531.335 (the "possession statute") does not and vice versa.

[21] *Blockburger v. United States*, 284 U.S. 299 (1932).

Pursuant to KRS 531.310, "A person is guilty of the use of a minor in a sexual performance if he. . . induces a minor to engage in a sexual performance." The jury instructions for this offense reflected this statutory language by requiring proof beyond a reasonable doubt:

> A. That in this county between December 24, 2018, and January 6, 2019, and before the finding of the Indictment herein, [Baldwin] knowingly induced [John] to engage in a sexual performance;
>
> AND
>
> B. That [John] was less than 16 years of age.

In contrast, the statute that prohibits the possession of a matter portraying a sexual performance by a minor, KRS 531.335, provides in relevant part:

> (1) A person is guilty of possession. . . of matter portraying a sexual performance by a minor when, having knowledge of its content, character, and that the sexual performance is by a minor, he[:]
>
> > (a) Knowingly has in his. . . possession or control any matter which visually depicts an actual sexual performance by a minor person[.]

Baldwin's jury instruction for the first of sixty-eight counts of possession of a matter portraying a sexual performance by a minor reflected this statute by requiring proof beyond a reasonable doubt:

> A. That in this county on or about January 6, 2019, and before the finding of the Indictment herein, [Baldwin] knowingly had in his possession or control any matter visually depicting an actual sexual performance by a minor; (Five Duplicates of the image he created of [John's] penis.)
>
> AND
>
> B. That when he did so, he had knowledge of the content and character of the matter and knew that the person engaged in the sexual performance was a minor.

The instructions further defined "sexual performance" as "any performance or part thereof which includes sexual conduct by a minor[,]" and defined "performance" as follows: "any play, motion picture, photograph, or dance. Performance also means any other visual representation exhibited before an audience."

We hold that Baldwin's rights against double jeopardy were not violated by his convictions under these statutes that each concerned the same photograph of John. Under these facts, the "use statute" required proof that Baldwin induced John to engage in a sexual performance. KRS 531.310. The "possession statute" has no such factual requirement, as it criminalizes only the knowing possession or control of a matter that depicts a sexual performance by a minor. KRS 531.335(2)(a). Similarly, the "possession statute" requires proof of knowing possession of a matter that depicts a sexual act by a minor but does not require that the defendant be the individual that induced the minor to create that matter. Put simply, Baldwin's action in inducing John to engage in a sexual performance by allowing Baldwin to take a sexually explicit photograph of him was a separate and distinct crime from his knowing possession of that photograph thereafter. As the *Blockburger* test was clearly satisfied, no violation of Baldwin's right to be free from double jeopardy occurred.

E. Directed Verdict

Baldwin next asserts that the trial court erred by denying his motion for directed verdict for the count of first-degree rape perpetrated against Jane based on his argument that the Commonwealth failed to prove that Baldwin's finger penetrated Jane's vagina. *See* KRS 510.040(1)(b) (defining rape in the first degree); KRS 510.010(8) (defining sexual intercourse).

During Jane's testimony the Commonwealth sought to prove the offense of first-degree rape by eliciting the following testimony:

> **CW:**[22] Let's talk just for a second more about this. When you say he touched you with his fingers, where on your body did his fingers touch you?
>
> **Jane:** I think it was inside.
>
> **CW:** Okay, was it the part of your private like where your panties touch you, or the part of your private where your panties don't touch you?
>
> **Jane:** I don't remember.
>
> **CW:** Okay, but you think it was inside?
>
> **Jane:** I think.

At the close of the Commonwealth's evidence, defense counsel argued Baldwin was entitled to a directed verdict on the first-degree rape charge because Jane testified that she did not know if Baldwin's finger penetrated her. The Commonwealth responded that Jane said she thought his fingers touched her on the inside and that was enough evidence to submit the charge to the jury. The trial court agreed with the Commonwealth and denied the motion. Following the conclusion of all of the evidence, defense counsel renewed his motion for directed verdict on the first-degree rape charge on the same grounds and it was again denied.

[22] Commonwealth.

Immediately after defense counsel's renewed motion was denied, the parties and the court began preliminary discussions about the jury instructions. Given Jane's testimony, the Commonwealth raised the issue of providing an instruction for the lesser included offense of first-degree sexual abuse. It clarified that it was not requesting that instruction but was raising it as an issue for consideration. Defense counsel requested time to confer with Baldwin before stating his position on providing the lesser included offense instruction. As it was late in the evening, it was agreed that discussions would continue the following morning.

The next morning, defense counsel informed the court that it would not be requesting the lesser included instruction. The Commonwealth likewise did not request the instruction and left the decision to the court's discretion. The trial court opted to provide the first-degree sexual abuse instruction, as it found that a reasonable juror could have doubted Baldwin's guilt for the offense of first-degree rape and find him guilty of first-degree sexual abuse. *See, e.g.*, *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995) ("An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser-included offense.").

During the Commonwealth's closing argument, it was candid with the jury about the reason the first-degree sexual abuse instruction was included. It acknowledged that it did not do the best job in formulating the questions it asked Jane regarding that offense. Nevertheless, it argued that when Jane was asked if Baldwin's finger touched her on the inside or the outside, she responded she thought it was on the inside. The Commonwealth explained to the jury that if they believed there was any penetration by Baldwin, no matter how slight, then it could find him guilty of first-degree rape. But, if it did not believe penetration occurred, it should find him guilty of first-degree sexual abuse. As previously noted, the jury found Baldwin guilty of first-degree rape and not the lesser included offense of first-degree sexual abuse.

Baldwin's motions for directed verdict at the trial court level properly preserved this issue for our review. *See Ray v. Commonwealth*, 611 S.W.3d 250, 266 (Ky. 2020). And we must determine whether, under the evidence, it was clearly unreasonable for the jury to find Baldwin guilty of first-degree rape. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

Baldwin's argument before this Court compares the facts of this case to those of *Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993) in asserting that Jane's testimony was insufficient to prove penetration occurred. In *Sharp*, the appellant was convicted of numerous sexual offenses against his former stepdaughters. *Id.* at 543. He argued before this Court that he was entitled to a directed verdict on the charge of first-degree rape against the younger of the two children, N.S., because the Commonwealth failed to prove penetration occurred. *Id.* at 547. N.S., who was between 4 ½ and 6 ½ years old at the time the crimes occurred, testified that the appellant "touched her 'middle part' with his 'middle part' or 'private thing' and that the act 'hurt.'" *Id.* The Commonwealth also produced medical records from several years after the offense indicating that N.S.' hymen had been penetrated in the distant past. *Id.* at 547-48. The *Sharp* Court held that "[w]hile such evidence was slight, it was sufficient." *Id.* at 548.

Baldwin argues that, in contrast to *Sharp*, Jane did not testify that she experienced any pain, and the Commonwealth did not present medical records suggesting that penetration occurred. While those assertions are true, they do not mean that Baldwin was entitled to a directed verdict. A trial court may not grant a defendant's motion for a directed verdict "if the prosecution produces. . . more than a mere scintilla of evidence." *Benham*, 816 S.W.2d at 187-88. While we concede that this is a close case, we conclude that the Commonwealth presented more than a mere scintilla of evidence that penetration occurred. Jane, who was four years old at the time of the offense and eight years old when she testified, was posed a non-leading question by the Commonwealth: "Where on your body did his fingers touch you?" and Jane responded, "I think it was inside." Based on this testimony we cannot hold that it would have been clearly unreasonable for the jury to find Baldwin guilty of first-degree rape. In addition, we consider it significant that the Commonwealth explained to the jury during its closing argument that if the jury did not believe any penetration occurred it should find Baldwin guilty of first-degree sexual abuse and yet it still found Baldwin guilty of first-degree rape. Further, the trial court properly considered the possibility that the jury might believe that no penetration occurred and instructed on the lesser charge.

F. Cumulative Error

In the event this Court held that more than one of the foregoing issues resulted in non-reversible error, Baldwin requests reversal under the cumulative error doctrine. That doctrine is used "only to address 'multiple errors, [which] although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair.'" *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012) (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky.2010)). As we conclude no error occurred in the underlying trial, the doctrine is inapplicable.

III. CONCLUSION

Based on the foregoing, we affirm.

All sitting. Bisig, Conley, and Goodwine, JJ., concur. Keller and Thompson, JJ.; concur in result only. Nickell, J., concurs in result only by separate opinion, in which Thompson, J., joins.

CRIMINAL LAW

DISCOVERY

FAILURE TO DISCLOSE JAIL PHONE CALLS

PROSECUTORIAL MISCONDUCT

RIGHT TO REMAIN SILENT

PROSECUTOR'S COMMENTS DURING *VOIR DIRE* ON WHETHER OR NOT A DEFENDANT WILL TESTIFY

Defendant appealed as a matter of right his convictions on charges of murder, receiving stolen property, being a felon in possession of a handgun, and being a second-degree PFO — REVERSED and REMANDED — Trial court entered order under RCr 7.24, which required, in part, that Commonwealth disclose any relevant written or recorded statements by defendant that were within possession of Commonwealth — Commonwealth's failure to disclose jail phone calls between defendant and his sister was a discovery violation requiring reversal since the undisclosed information may have substantially impacted defense strategy and the presentation of defendant's defense — In those calls, defendant made statements regarding his trial strategy concerning his gun charge and victim's death that were relevant and incriminating — Kentucky Supreme Court admonished prosecutors to refrain from offering any opinion at trial regarding the likelihood that a defendant will or will not testify — During *voir dire*, prosecutor may ask whether the jury will consider the defendant's credibility the same as it would with any other witness if defendant testifies, while noting defendant's right to testify or to remain silent — Exceeding this boundary and offering opinion as to whether the defendant will or will not testify places improper pressure on defendant's exercise of the right to remain silent and is plain error — Further, prosecution's reference to defendant's silence before trial to undermine the credibility of his testimony at trial is plain error violating defendant's right to remain silent —

William P. Brown v. Com. (2024-SC-0301-MR); Fayette Cir. Ct., Travis, J.; Opinion by Justice Bisig, *reversing and remanding*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

The Fayette Circuit Court held a jury trial of Appellant William P. Brown on charges of murder, receiving stolen property, being a felon in possession of a handgun, and being a second-degree persistent felony offender. The jury found Brown guilty of these charges and recommended a total sentence of life in prison. The trial court sentenced in conformity with that recommendation and Brown now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). After careful review, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

This case relates to the murder of 62-year-old Ava Creech, whose body was found on October 2, 2020, bound, gagged, and decomposing in a closet in her apartment on Victoria Way in Lexington. Creech suffered from severe scoliosis and thus her best friend Autumn Yeary frequently stopped by to help Creech with tasks around the home. On September 10, 2020, Yeary stopped by Creech's apartment and found her there with Appellant Brown, and thus did not stay long.

On the following day, Yeary arrived at Creech's apartment and discovered her dressed up and on her way out. Yeary learned that Creech was angry with Brown regarding some money he owed her. Though Yeary attempted to convince Creech to let the debt go, Creech was determined to collect it. This was the last time Yeary saw Creech.

On September 12, Yeary went to Creech's apartment but neither Creech nor her blue Kia were there. Yeary called Creech's cell phone but the call went straight to voicemail. Yeary returned to Creech's apartment several times on that day and the next and continued trying to call her, but was unable to locate or reach Creech.

On September 15, Yeary noticed that items from Creech's trunk had been left in the parking lot next to the spot where Creech parked. Yeary contacted Renee Simpson, a mutual friend who had a spare key to Creech's apartment.[1] Yeary and Simpson entered the apartment and eventually discovered a young woman they did not know, Layla Hackett, lying on Creech's bed.

Yeary called the police and Officer Conner Sands with the Lexington Police Department ("LPD") responded. Hackett told Officer Sands that Brown had let her stay in the apartment. Officer Sands went inside the apartment with Hackett so she could retrieve her things, and then later did a second protective sweep of the apartment. He was not searching for and did not locate a deceased person at that time.

Officer Sands also attempted to have Creech's cell phone pinged but it had been turned off. The last ping had been on September 12 in Clay City, Kentucky. Brown's phone pinged at the same time and location, and again on September 13 off a tower close to Creech's apartment—the same day Hackett said Brown took her to Creech's apartment.

On September 17, LPD Detective Jeremy Adkins went to Creech's apartment. Creech's landlord informed Detective Adkins that someone named Bill had been staying with Creech for the past three weeks.

On September 22, Detective Adkins received an anonymous tip through Crimestoppers identifying Brown as a person of interest in connection with Creech's disappearance. He later learned the tip had been submitted by Christine Brumagen, a woman with whom Brown had been spending time. Law enforcement obtained Brown's cell phone records, which revealed he was in regular contact with Creech from August 17 until September 11, after which time communication between them ceased. Brown shut off service to his cell phone on September 28.

Detective Adkins spoke with Hackett on September 28. Hackett confirmed Brown took her to Creech's apartment on September 13 and let her stay there, and that Hackett did not know Creech.

On October 1, Detective Adkins searched a database and discovered Brown had pawned a number of items on September 21 and 22. Creech's son confirmed that those items included a necklace belonging to Creech.

On October 2, LPD Detective Jeff Jackson executed a search warrant for Creech's apartment. A strong smell was present, which Detective Jackson traced to a closet. Detective Jackson removed totes from the closet and discovered Creech's body lying beneath them. Creech's wrists were bound with duct tape. Duct tape was also wrapped around her head several times, completely covering her nose and mouth. There were no signs of forced entry on the door or windows of the apartment.

An autopsy revealed that Creech suffered blunt force trauma to the back of her head, and that a wad of paper towels had been shoved in her mouth as a gag. Her cause of death was both blunt force trauma to the head and asphyxia from smothering. Her body was also badly decomposed. The medical examiner testified the level of decomposition was consistent with having died on September 11, but the death also could have occurred days later.

Fingerprints taken from a Swiffer in Creech's apartment were matched to Brown. A roll of duct tape collected from Creech's kitchen tested positive for human blood and had the DNA of both Brown and Creech on it.

On October 5, Detective Adkins located records indicating that a white minivan was registered to Brown. Law enforcement located the van the following day sitting outside Brumagen's residence, and ultimately located Brown inside. At the time he was found to be in possession of pill bottles bearing Creech's name.

Brumagen stated she met Brown in January 2020, and that around August 24 he had stopped contacting her. However he resumed frequently contacting her on September 11 or 12. On September 13, Brown called Brumagen and offered her the white minivan. She met him in a Walmart parking lot, where Brown picked her up in Creech's missing blue Kia. He drove Brumagen to a location she later found out was Creech's apartment and gave her the van.

Brumagen kept the van for a few days before Brown called and asked for it back. On September 16, Brumagen met Brown, who was driving Creech's blue car, and followed him to a Walmart parking lot where he left Creech's car. Brown told Brumagen he believed the police were looking for the blue car. Brumagen informed law enforcement that Brown had then thrown Creech's car keys into a tree line outside a hotel. Police located the keys to Creech's car at the site identified by Brumagen.

Police never recovered the cell phone of either Creech or Brown. However a search warrant for their phone records revealed that Creech and Brown had exchanged 46 calls and texts between August 12 and September 11. Creech's last call was made on September 11 to Brown. Brown never contacted Creech's cell phone after September 11.

Brown was ultimately arrested and indicted for the murder of Creech, receiving stolen property in the form of Creech's car, receiving stolen property in the form of Creech's necklace that he pawned, being a felon in possession of a handgun, and being a second-degree persistent felony offender. At trial, Brown testified on his own behalf. He stated that he had nothing to do with Creech's disappearance or murder. Brown testified that he helped Creech out around her apartment, and that at some point she got bed bugs which required them to wrap everything in plastic bags secured with duct tape. Brown offered this as an explanation for the duct tape at her apartment. Yeary and Creech's landlord also testified that Creech had had a bed bug problem.

Brown further testified that on the afternoon of September 12, he drove Creech to Martin, Kentucky so that she could sell drugs. He stated that along the way, Creech became aggravated by her daughter-in-law's persistent texting and therefore turned her phone off. He claimed that he dropped off Creech while she sold the drugs and then picked her up for the drive back to her apartment in Lexington. Brown testified that Creech had a lot of money on her at the time. Brown stated they arrived back at Creech's apartment very late, and that Hackett was still in her apartment at the time. Brown also testified that he had a deal with Creech that in exchange for driving her to Martin, he would be able to use her car when they returned to Lexington because his minivan had a short that made it difficult to drive. This was his explanation for his possession of Creech's car after Creech's disappearance.

Brown further told the jury that on September 15 or 16, Simpson called and told him Creech was going to report the car missing if he did not return with it. Brown claimed he did not want to return the car to Creech's apartment because he did not want to deal with the police if she had called them. He thus testified he told Simpson he would meet her in

[1] Simpson was deceased at the time of trial.

the Hamburg area of Lexington with the car.

Brown further stated that the car got a flat tire on the way to Hamburg and he therefore left it in a Walmart parking lot. According to Brown, he arranged for two other men to fix the car and return it to Simpson in Hamburg, but he never heard anything further from her about the car. Brown also testified he had purchased Creech's pills that were in his possession when he was arrested. Brown further insisted the necklace he pawned was not Creech's, but rather from another woman who had exchanged it for methamphetamine, despite being shown a photograph of Creech wearing the necklace and the fact that Creech's son identified the necklace as belonging to her.

The jury found Brown guilty on all counts and recommended a total sentence of life in prison. The trial court sentenced Brown in accordance with that recommendation, and he now appeals to this Court as a matter of right.

ANALYSIS

Brown raises six issues for our review: (1) whether the prosecutor's comments on Brown's decision to testify or remain silent warrant reversal; (2) whether the Commonwealth's failure to disclose jail phone calls between Brown and his sister warrants reversal; (3) whether the admission of hearsay regarding Bill Rector's writing of a pink Post-It note violated Brown's rights under the Confrontation Clause; (4) whether Brown was entitled to a mistrial after the prosecutor told the jury that defense counsel had lied to them; (5) whether Brown was entitled to directed verdict on the murder charge; and (6) whether there is sufficient cumulative error to warrant reversal. We conclude that the Commonwealth's failure to disclose the jail phone calls was a discovery violation necessitating reversal as the undisclosed information may have substantially impacted defense strategy and the presentation of Brown's defense. We therefore reverse and remand for a new trial. We further address only the remaining issues likely to recur in the event of retrial.[2]

[2] Though evidence of course may differ on retrial, we note that based upon the significant evidence of guilt presented here, we would have found no error in the trial court's denial of Brown's motion for a directed verdict on the murder charge.

I. The Commonwealth's Failure To Disclose Jail Phone Calls Was A Discovery Violation Requiring Reversal.

Brown argues that the Commonwealth's failure to disclose recordings of jail phone calls between Brown and his sister Patricia that were presented to the jury unduly prejudiced his defense and thus requires reversal. We agree.

While the prosecutor was cross-examining Brown, she asked whether he and Patricia had phone calls discussing the case. Brown was in jail at the time and the calls were therefore recorded. Defense counsel objected, noting that the recorded calls—at least some of which had occurred the week of trial—had not been disclosed in discovery. Defense counsel therefore requested an opportunity to review the calls during a break. The prosecution asserted it did not have to disclose the calls, and the trial court overruled Brown's objection.[3]

[3] The trial court appears to have been focused more on the issue of whether Brown's statements in the calls were admissible under the hearsay rules than on whether there had been a discovery violation.

The prosecution then played for the jury a portion of a recorded call in which Brown told Patricia his lawyer advised him "it's just hard to go in there and dispute the gun too much without making it look like you're lying about the murder." The prosecution also played portions of a call where Brown implied it was good for his case that Simpson was dead.[4] These calls were mentioned and portions of them were also replayed during the Commonwealth's closing statement. The prosecution also referred to the calls during their penalty phase closing as evidence that after being in jail on the charges for more than three years, Brown "hasn't learned anything" and "doesn't care," and invited the jury "when coming to a decision on that 20- to 50-year, life [sentence], consider all that."

[4] By way of reminder, Simpson was the friend of Creech who assisted Yeary in searching Creech's apartment, and who Brown also testified was involved with Creech's purported attempts to recover her car from Brown after he borrowed it.

Defense counsel's objection to admission of the calls, raising of the discovery violation, and request for an opportunity to review them was sufficient to preserve this error for consideration. Kentucky Rule of Evidence ("KRE") 103; Rule of Criminal Procedure ("RCr") 9.22. We review a preserved allegation of error in the admission of evidence for abuse of discretion. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 298 (Ky. 2008).

RCr 7.24(1) requires the prosecution, upon written request by the defendant, to disclose and permit inspection and copying of "any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness." RCr 7.24(2) also permits the trial court to order the prosecution to permit the defendant to inspect and copy physical evidence that "may be material to the preparation of the defense." Here, the trial court entered such an order, which provided in relevant part that the Commonwealth was to disclose "[a]ny relevant written or recorded statements . . . by the Defendant" that were within the possession of the Commonwealth.

Here, Brown's statements in the calls regarding his trial strategy regarding the gun charge and Simpson's death were relevant and incriminating, and thus disclosure was required under the Rule and the trial court's discovery order. Brown's comment on the call about not disputing the gun charge to avoid appearing guilty for the murder clearly suggests a possible consciousness of guilt for the murder. Similarly, the recorded call in which Brown suggested he and his lawyer felt positive about the death of a material witness likewise suggests consciousness of guilt. We also note that the calls had been recorded five days before Brown took the stand, and thus the Commonwealth had ample time to produce them before he testified. As such, their disclosure was mandated by RCr 7.24 and the trial court's discovery order.

We also pause to note that the Commonwealth's contention before the trial court that disclosure was not required because the calls were offered as rebuttal evidence was a misstatement of the law. To the contrary, we have plainly held that

> the duty of discovery imposed [under RCr 7.24] does not end at the close of the Commonwealth's case in chief. Rebuttal does not offer a protective umbrella, under which prosecutors may lay in wait. "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced."

Chestnut, 250 S.W.3d at 297 (quoting *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972)). Thus, to the extent the trial court's refusal to order the Commonwealth to disclose the calls was premised on the use of that evidence solely for rebuttal purposes, it was error.

Reluctantly, we also find that the error requires reversal. We have held that a criminal discovery violation warrants reversal if "there is a reasonable probability that if the evidence were disclosed the result would have been different," or if the lack of disclosure "makes it doubtful that defense counsel would have proceeded in the same manner at trial." *Trigg v. Commonwealth*, 460 S.W.3d 322, 328 (Ky. 2015) (citation omitted). Here, Brown points out that had he been aware of the Commonwealth's possession of the recorded calls, he may have chosen not to testify at trial. He further points out he also may have chosen to testify, but to address the calls preemptively during the course of direct examination. Brown also explains that he declined to pursue bifurcation of the felon in possession of a handgun charge on April 29, 2020. He asserts that had he known then of the Commonwealth's intention to introduce the recorded calls from three days earlier in which he referenced a strategy of not vigorously contesting the gun charge to lend credibility to his denial of the murder charge, he might have chosen to seek bifurcation of the gun charge.

We find it both plausible and reasonable that Brown might have altered his defense in these meaningful ways had he known of the Commonwealth's intention to produce the recorded calls at trial. As such, it is doubtful that Brown's defense would not have been materially changed by proper disclosure of the recordings. We therefore conclude the Commonwealth's failure to produce the calls requires reversal and remand for a new trial.

II. The Prosecution's Comments On Brown's Decision To Testify And Failure To "Tell His Story" Before Trial Were Error.

Brown also argues that two comments by the prosecution on his decision as to whether to testify or remain silent were error. Again, we agree.

The first comment occurred during voir dire when the prosecutor was addressing the issue of assessing witness credibility with the panel. More particularly, the prosecutor was discussing reasons a witness may or not be considered credible. The prosecutor then made the following statement to the panel:

> Likewise, sometimes defendants testify. They don't have to testify, sometimes they do. Okay? Sometimes I'm wrong, but from where I'm sitting, where I'm standing right now, I always try to tell y'all what I think is going to happen, he's gonna testify. That's what I believe right now. He could change his mind.

Defense counsel objected and a bench conference was held, after which the trial court directed the prosecutor to move on. No admonition was given to the panel. However, the prosecutor did inform the panel that Brown had the right not to testify. Brown ultimately testified. He now argues that the prosecutor's comment violated statutory and constitutional prohibitions against the prosecution commenting on a defendant's exercise of the right to testify or remain silent.

Trial courts have broad discretion in the conduct of voir dire. *Newcomb v. Commonwealth*, 410 S.W.3d 63, 86 (Ky. 2013). However, both the Fifth Amendment to the U.S. Constitution and Section 11 of the Kentucky Constitution guarantee a defendant a right against self-incrimination, and thus the right to remain silent. KRS 421.225 further provides that a defendant's failure to testify also "shall not be commented upon or create any presumption against him."

Here, the prosecutor inexplicably offered her opinion during voir dire that Brown would testify. It is not beyond reason to conclude the jury would thus have expected—based on this representation by an attorney charged with representing the Commonwealth—for Brown to testify. As such, the comment improperly placed Brown in the predicament of either having to testify when he wished to remain silent in order to avoid defying the jury's expectation, or to remain silent at the expense of the risks inherent in failing to meet the jury's expectations. Either outcome would result in improper pressure upon Brown's decision as to whether to testify or remain silent. The comment therefore violated Brown's right to remain silent and was error.

While we have already found reversal warranted due to the discovery violation discussed above, and thus need not consider whether this error was also reversible, we nonetheless admonish the prosecutors of this Commonwealth to refrain from offering any opinion at trial regarding the likelihood that a criminal defendant will or will not testify. That said, we also acknowledge that the comment at issue here was made in the course of the prosecution's appropriate inquiry into whether the panel would assess Brown's credibility the same as any other witness. *See Finch v. Commonwealth*, 681 S.W.3d 84, 91 (Ky. 2023) ("The remainder of the complained of language seems to be meant to assess whether anyone in the venire would view a defendant's credibility differently than any other witness. This served the fundamental purpose of voir dire: 'to obtain a fair and impartial jury whose minds are free and clear from all interest, bias, or prejudice that might prevent their finding a just and true verdict.'") (quoting *Newcomb*, 410 S.W.3d at 86). However, such an inquiry may be made by simply asking whether the jury will consider the defendant's credibility the same as it would with any other witness *if* he testifies, while noting his right to testify or to remain silent. Exceeding this boundary and offering opinion as to whether the defendant *will* or *will not* testify places improper pressure upon his exercise of the right to remain silent and is plain error.

The second comment occurred during the prosecution's cross-examination of Brown. During that examination, the prosecutor asked the following line of questioning highlighting that Brown had not previously shared the version of events he testified to at trial:

> Commonwealth: But you do remember a lot of information that you've never provided before today.
>
> Brown: I've never spoken with anybody about this before today.
>
> Commonwealth: But you had the opportunity to do so, didn't you?

This too was plain error. *See Nunn v. Commonwealth*, 461 S.W.3d 741, 751 (Ky. 2015) (holding that prosecutor's closing statement referring to defendant's failure to tell police the version of events he testified to at trial was "obviously improper" and "clear error."). Again, while we need not resolve whether the error was reversible, we reiterate that references by the prosecution to a criminal defendant's silence before trial to undermine the credibility of his testimony at trial is plain error violating the defendant's right to remain silent.

III. The Admission of Testimony Regarding Authorship of a Post-It Note Violated Brown's Rights Under The Confrontation Clause.

Brown next argues that his Confrontation Clause rights were violated when the Commonwealth asked Detective Adkins to identify who had authored a Post-It note found in Creech's apartment. During the October 2, 2020 search of the apartment, a forensics unit officer saw a pink Post-It note on the side of Creech's refrigerator. The note stated "Ava, this is your old buddy Bill that works at Walmart. Please give me a call and let me know you are alright. Love and care." Notably, the Post-It note had not been observed by Officer Sands during his September 15 search of Creech's apartment, nor did it appear on his body cam footage.

During its opening statement, the prosecution asserted that Brown had written the note as an attempt to deflect suspicion, but that it actually showed his guilt by demonstrating that he was entering and leaving Creech's apartment. However, during trial Detective Adkins reviewed Facebook records and determined that "Bill from Walmart" was a different Bill—Bill Rector. Detective Adkins went to Walmart and spoke with Rector, who confirmed he had written the note and left it on the outside of the door to Creech's apartment.

Afterwards, at trial the Commonwealth introduced the Post-It note as an exhibit and then asked Detective Adkins who wrote it. The defense objected and the trial court directed the prosecution to lay a foundation. The prosecutor then elicited testimony from Detective Adkins that he had spoken with a friend of Creech's named Bill who worked at Walmart, and that the Post-It note had been left on the outside of Creech's door. In closing, the prosecution also stated that Bill Rector told Detective Adkins he had left the note on Creech's door.

Brown argues that the significance of the note to the prosecution's case was that it showed someone was entering and leaving Creech's apartment. Brown contends the note and its author were therefore introduced as evidence of Brown's guilt. Brown thus asserts that admission of Rector's statement that he wrote and left the note on the outside of Creech's door was error because Rector did not testify at trial and Brown therefore had no opportunity to cross-examine him regarding those statements. The Commonwealth acknowledges that the statement was hearsay.

We agree that Detective Adkins' testimony that Rector acknowledged writing the note and placing it on Creech's door violated Brown's right of confrontation. The Confrontation Clause of the Sixth Amendment provides that in criminal prosecutions, "the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause permits the admission of a testimonial out-of-court statement against a criminal defendant only if the maker of the statement is unavailable and there has been a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Here, Rector's statements were testimonial because they were made during the course of police questioning. *Id.* at 52 ("Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard."). In addition, Detective Adkins did not identify Rector as the author of the note until trial was ongoing, and Brown therefore had no prior opportunity to cross-examine Rector. Thus, admission of Rector's statements violated the Confrontation Clause and was error.

CONCLUSION

For the foregoing reasons, we reverse the sentence and judgment of the Fayette Circuit Court and remand for a new trial.

All sitting. All concur.

TAXATION

REAL PROPERTY

TAX EXEMPTION FOR REAL PROPERTY OWNED AND OCCUPIED BY INSTITUTIONS OF RELIGION

Section 170 of the Kentucky Constitution provides, in part, that real property owned and occupied by institutions of religion are exemption from taxation — "Institutions of religion" under Section 170 means any church, religious sect, society, or denomination — Analysis under Section 170 focuses on the taxpayer's classification as an institution of religion and whether such a claimant is a church, religious sect, society or denomination, or otherwise constitutes a board, agency, or nonprofit activity conducted by a general or parent church —

Bill Dunn, McCracken County Property Valuation Administrator v. Solomon Foundation; and Kentucky Department of Revenue (2023-SC-0235-DG) and *Department of Revenue, Finance and Administration Cabinet v. Bill Dunn, McCracken County Property Valuation Administrator; and The Solomon Foundation, Inc.* (2023-SC-0236-DG); On review from Court of Appeals; Opinion by Justice Nickell, *reversing and remanding*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Section 170 of the Kentucky Constitution provides in pertinent part, "[t]here shall be exempt from taxation . . . real property owned and occupied by . . . institutions of religion[.]" The Solomon Foundation ("Solomon") applied for an exemption under this provision which was denied by McCracken County Property Valuation Administrator Bill Dunn ("PVA"). The denial of the exemption was affirmed by the McCracken County Board of Assessment Appeals ("Board of Assessment") whose decision was subsequently affirmed in turn by the Kentucky Board of Tax Appeals ("Tax Board"). Upon judicial review, the McCracken Circuit Court reversed the Tax Board and held Solomon was entitled to the exemption. The Court of Appeals affirmed the opinion and order of the trial court. We granted discretionary review.[1] Having carefully reviewed the law, record, and briefs, we reverse the decision of the Court of Appeals and remand with instructions to reinstate the denial of the exemption by the Tax Board.

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[1] PVA and the Commonwealth of Kentucky, Finance and Administration Cabinet, Department of Revenue ("Revenue") have proceeded as separate parties and filed separate motions for discretionary review. We have elected to consider both appeals together in a single opinion.

I. PROPER PARTIES AND RECORD ON APPEAL

At the outset, we must address two preliminary matters involving the status of the parties and the state of the record on appeal. Solomon first objects to PVA and Revenue proceeding as separate parties and further argues these entities possess a single, undifferentiated interest in the outcome of this litigation. We may briefly dispose of this argument on the grounds of waiver.

In its petition for appeal and amended petition for appeal before the Tax Board, Solomon named PVA and Revenue as separate parties.[2] Moreover, our review of the administrative record failed to uncover any objection by Solomon to the capacity of PVA and Revenue to proceed as separate parties. "It is well settled that failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review, or as an initial matter on discretionary review to this Court." *Urella v. Kentucky Bd. of Med. Licensure*, 939 S.W.2d 869, 873 (Ky. 1997). In addition, we discern no issues of constitutional standing here because there is no indication that either PVA or Revenue individually *lack* a sufficient legal interest in these proceedings. *City of Pikeville v. Kentucky Concealed Carry Coalition, Inc.*, 671 S.W.3d 258, 263 (Ky. 2023) (holding a court must determine for itself whether parties possess constitutional standing). On the contrary, Solomon's claim is that PVA and Revenue merely share the same interest.

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[2] PVA and Revenue were also separately served with notice.

Solomon next argues PVA's citation to matters outside the administrative record should not be considered by this Court. We agree.

In an attempt to portray Solomon as a financial, rather than religious, institution, PVA's brief contains several prominent quotations from Solomon's website. While these references were also included in PVA's trial court brief, there is no indication this material was placed into the administrative record before the Tax Board.

KRS[3] 49.250(1) provides for judicial review of any final order issued by Tax Board "in accordance with KRS Chapter 13B." Under 13B.150, judicial review of a final administrative order "shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter." In other words, judicial review of an agency's decision is limited to "the administrative record already in existence, not some new record made initially in the reviewing court."[4] *Smith v. O'Dea*, 939 S.W.2d 353, 356 (Ky. App. 1997) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985)) (internal quotation omitted); *see also Sunrise Children's Servs., Inc. v. Kentucky Unemployment Ins. Comm'n*, 515 S.W.3d 186, 190 (Ky. App. 2016) ("Courts have 'no authority to consider evidence outside the record or to incorporate new proof into the record.'"). Further, citation to factual information in an appellate brief is simply not a proper substitute for the development of an evidentiary record before the original factfinder. *Wemyss v. Coleman*, 729 S.W.2d 174, 179-80 (Ky. 1987).

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[3] Kentucky Revised Statutes.

[4] Because this Court's task in reviewing the record primarily concerns the evidence developed before the administrative tribunal, we further note PVA's repeated citations to the trial court's factual findings in its statement of the case, while perhaps technically compliant with our briefing rules, is not particularly helpful. We encourage parties to cite directly to the page of the administrative record where the underlying factual information is located.

Moreover, we decline to take judicial notice of this information, sua sponte. This Court has exercised great caution when considering the propriety of taking judicial notice of adjudicative facts on appeal. *Commonwealth, Cab. for Health & Fam. Servs. v. Ivy*, 353 S.W.3d 324, 335 (Ky. 2011). Indeed, the existence of "any doubt should be resolved in favor of a refusal" to take judicial notice. *Lampkins v. Commonwealth*, 701 S.W.3d 99, 114 (Ky. 2024) (quoting 2 *Wharton's Criminal Evidence* § 5:10 (15th ed.)).

While public records and other government documents which are available on the internet may be the proper subjects of judicial notice, we are not convinced that mission statements and other descriptive information contained on a private party's website necessarily exhibit the requisite degree of accuracy and indisputability demanded by KRE[5] 201. *Compare Fox v. Grayson*, 317 S.W.3d 1, 18 n.83 (Ky. 2010) (holding appellate court may properly consider, sua sponte, public records and government documents) *with Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3rd Cir. 2007) ("[C]ourts should be wary of finding judicially noticeable facts amongst all the fluff; private corporate websites, particularly when describing their own business, generally are not the sorts of 'sources whose accuracy cannot reasonably be questioned[.]'"). In addition, we are particularly reluctant to take judicial notice here because we cannot be assured the contents of Solomon's website have remained unchanged throughout the extended years-long pendency of this litigation.

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[5] Kentucky Rules of Evidence.

This Court recognizes the "standards for determining the indisputable accuracy of varying types of online sites and data are still evolving." Robert P. Mosteller, 2 *McCormick On Evid.* § 330 (9th ed. 2025). In the appropriate case, information contained on a party's website may be properly subject to judicial notice in accordance with the dictates of KRE 201. However, we decline to take judicial notice, sua sponte, under the present circumstances, and have disregarded the references to Solomon's website which were not included in the administrative record.

II. FACTS AND PROCEDURAL HISTORY

Solomon is a Colorado nonprofit corporation organized exclusively to promote the religious purposes of Restoration Movement Christian Churches and Churches of Christ. The Restoration Movement concerns the ministries and beliefs of various independent, autonomous, and nondenominational Christian Churches.[6] Two Restoration Movement Churches comprise Solomon's membership: The Crossroads Christian Church of Grand Prairie, Texas, and Christ's Church of the Valley which is located in Peoria, Arizona. Additionally, Solomon's bylaws require all members of its Board of Directors to be active members of Restoration Movement churches.

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[6] The specific religious character of the Restoration Movement is not at issue here. However, we refer the interested reader to the opinion of our predecessor Court in *Martin v. Kentucky Christian Conference*, 255 Ky. 322, 73 S.W.2d 849, 850-51 (1934), for a general discussion concerning the historical background and principles of the Restoration Movement.

To further its goal of promoting the Restoration Movement, Solomon generates revenue through gifts, bequests, and the sale of securities, such as notes, bonds, or other indebtedness upon which interest is paid, to fund loans and provide financing to affiliated churches. This type of operation is commonly referred to as a "church extension fund,"[7] and having obtained such designation, Solomon is exempt from various regulations for the registration and sale of securities under federal and state law.[8] Additionally, Solomon's financial activities do not inure to the benefit of "its directors or other individuals" and, in the event of a dissolution, Solomon's assets will be distributed to its member Churches.

[7] The North American Securities Administrators Association, Inc. promulgated a statement of policy which defines a "church extension fund" as "A NOT-FOR-PROFIT ORGANIZATION affiliated or associated with a DENOMINATION, or a fund that is accounted for separately by a DENOMINATION organized as a NOT-FOR-PROFIT ORGANIZATION, that offers and sells NOTES primarily to provide funding for loans to various affiliated churches and related religious organizations of the DENOMINATION for the acquisition of property, construction or acquisition of buildings and other related capital expenditures or operating needs."

[8] *See*, *e.g.*, 15 United States Code Annotated (U.S.C.A.) § 77c(a)(4); § 78l(g)(2)(D); and § 80a-3(c)(10). Similarly, KRS 292.400 exempts religious organizations from various regulations governing the sale of securities contained in KRS 292.340 to 292.390.

Solomon is also exempt from federal income taxation under Sections 501(c)(3) and 509(a)(2) of the Internal Revenue Code because it qualifies as a public charity which receives more than one-third of its support from gifts, grants, contributions, or membership fees and not more than one-third of support from gross investment income or other taxable sources. In addition, Solomon is not obligated to file a Form 990 or Form 990-EZ[9] with the Internal Revenue Service because it is considered as an "integrated auxiliary of a church" under Treasury Reg. Section 1.6033-2(h).[10] Solomon has further received property tax exemptions in California, Colorado, Idaho, Indiana, Michigan, and New Jersey.

[9] Ordinarily, "[m]ost exempt organizations must file annual information returns, generally on Form 990 or 990-EZ . . . specifying receipts and expenditures and indicating their current financial status." Marilyn E. Phelan, *Rep. Nonprofit Org.* § 2:79 (2023).

[10] Treasury Reg. Section 1.6033-2(h)(1)(i)-(iii) generally defines an "integrated auxiliary of a church" as an organization which is: "[d]escribed both in [Internal Revenue Code] sections 501(c)(3) and 509(a) (1), (2), or (3)"; "[a]ffiliated with a church or a convention or association of churches"; and "[i]nternally supported."

This appeal centers on real property owned by Solomon which is located at 1200 Jefferson Street in Paducah, Kentucky. The property includes a traditional church building and two auxiliary buildings. On September 29, 2015, Solomon acquired the property from Four Rivers Covenant Church, a Kentucky-based church,[11] presumably as part of Solomon's gift-leaseback program.[12] Apparently, that same day, Solomon entered into a triple net lease[13] for the property with The Crossing, an Illinois-based church.[14] The lease required The Crossing to use the property "as a religious facility, i.e., Church, and for purposes related thereto." Approximately two years later, on July 31, 2017, The Crossing subleased a portion of the property to Restoration Church. The next month, The Crossing subleased a smaller portion of the property to Healing Projects. The subleases specify that Restoration Church and Healing Projects must also use the property as a church or for related purposes.

[11] The record reflects that Four Rivers was formerly known as Pathfinder Ministries, which was based in Tennessee. Pathfinder Ministries acquired the property in 1998.

[12] The certificate of consideration on the deed between Solomon and Four Rivers states, "The grantor and grantee, being duly sworn, certify that the value of the property described above is $1,100,000.00, which includes a gift of $615,932.51 made by grantor to grantee and $484,067.49 being consideration paid by grantee to grantor for the transfer of the property." The record is unclear whether Four Rivers maintained any involvement with the property following the conveyance to Solomon.

[13] The term "triple net lease" generally denotes a commercial lease whereby "the tenant is . . . responsible for expenses such as maintenance, insurance, real estate taxes, and utilities, in addition to its lease payments, but the title[] or label[] of . . . 'triple net lease,' . . . ha[s] no legal significance and [is] not decisive of the extent to which the parties intended to shift the expense burdens of various operating, repair and maintenance obligations from landlord to tenant." 49 Am. Jur. 2d *Landlord and Tenant* § 686 (2025) (footnote omitted). Section 8(a) of the lease agreement between Solomon and The Crossing provides in part, "[t]enant shall pay all Real Estate Taxes, if any" and further states, "[a]ny Real Estate Taxes for the first and last year of the Term shall be allocated between Landlord and Tenant, pro rata[.]" As a general matter, however, only property owners have standing to seek a property tax exemption. 84 C.J.S. *Taxation* § 388 (2024).

[14] The lease between Solomon and the Crossing is also dated September 29, 2015.

For the 2019 tax year, PVA assessed the property to have a value of $1.1 million. On November 5, 2018, Solomon applied for a tax exemption from the PVA under Section 170 of the Kentucky Constitution, claiming qualification as both an institution of purely public charity and an institution of religion. Concluding Solomon did not qualify as an institution of religion or an institution of purely public charity, PVA denied the requested exemption by letter dated December 18, 2018. On June 19, 2019, the Board of Assessment, in consultation with Revenue, upheld the PVA's denial of the exemption.

Solomon appealed to the Tax Board which affirmed the denial of the exemption on different grounds in a final order entered on February 16, 2021. The Tax Board initially determined Solomon did not qualify as a purely public charity under Kentucky law. Contrary to the Board of Assessment, however, the Tax Board concluded Solomon was an institution of religion based on the contents of its articles of incorporation and its character as a church extension fund. Nevertheless, the Tax Board further concluded Solomon was not entitled to the exemption because it did not own and occupy the property at issue.

Following the adverse decision of the Tax Board, Solomon filed a petition for judicial review. PVA did not file an answer. However, both parties briefed the legal issues on the merits and otherwise made their respective positions known to the trial court including PVA's claim that Solomon did not qualify as an institution of religion. However, because PVA had not filed a cross-petition for judicial review from the Tax Board, the trial court determined its review was limited to Solomon's claims of error and PVA's responsive arguments.

On October 12, 2021, the trial court entered an opinion and order reversing the denial of the exemption by the Tax Board. The trial court agreed with the Tax Board that Solomon does not constitute an institution of purely public charity. However, while the trial court upheld the finding of the Tax Board that Solomon qualified as an institution of religion, it disagreed with the Tax Board's conclusion that Solomon itself must own and occupy the property. Instead, the trial court interpreted Section 170 to allow a tax exemption where one institution of religion owns property which is occupied by a different institution of religion.

PVA and Revenue separately appealed from the final opinion and order of the trial court.[15] The Court of Appeals affirmed. Specifically, the Court of Appeals held Solomon did not qualify as a purely public charity.[16] Contrary to the trial court, the Court of Appeals determined the issue of whether Solomon qualified as an institution of religion under Section 170 was properly preserved for review. Ultimately, however, the Court of Appeals agreed with the trial court that Solomon was entitled to the exemption. We granted discretionary review and heard oral argument.

[15] After the entry of its opinion and order, but before finality, the trial court granted Revenue's motion to intervene. Apparently, Revenue mistakenly believed the present matter had been held in abeyance pending the outcome of similar litigation in another court.

[16] Because Solomon has not presented any further argument concerning its status as purely public charity in its briefs before this Court, we deemed the issue to have been abandoned. *Halvorsen v. Commonwealth*, 671 S.W.3d 68, 74 (Ky. 2023).

III. LAW AND ANALYSIS

A. The interpretation of Section 170 is properly before this Court

Before turning to the merits of this appeal, we must resolve the parties' dispute whether the issue concerning the interpretation of Section 170 was properly preserved for our review.[17] Solomon contends PVA's failure to file an answer to its petition for judicial review in the trial court forecloses further consideration of this issue because CR[18] 8.04 generally[19] deems "[a]verments in a pleading to which a responsive pleading is required [to be] admitted when not denied in the responsive pleading[.]" In other words, the argument is that PVA's failure to file an answer equates to an admission that Solomon qualifies as an institution of religion under Section 170. Solomon further asserts PVA's failure to preserve this issue must also be imputed to Revenue because Revenue did not intervene until after the trial court entered a final order.

[17] We note PVA's opening brief does not comply with RAP 32(A)(4), which requires an appellant's opening brief to "contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." This rule applies equally to briefs before this Court and the Court of Appeals and we have repeatedly admonished litigants that "[t]he failure of an appellant's brief to conform to the appellate rules justifies the striking of the brief under Kentucky Rules of Appellate Procedure ("RAP") 31(H)(1)." *Gasaway v. Commonwealth*, 671 S.W.3d 298, 310 (Ky. 2023). For its part, Revenue's brief contains the required statement of preservation. Our review of the record indicates PVA and Revenue clearly raised this issue before the trial court and the Court of Appeals. Therefore, in the interest of justice and the avoidance of inconsistent judgments, we decline to impose any sanction for the deficiencies in PVA's brief.

[18] Kentucky Rules of Civil Procedure.

[19] CR 8.04 contains three exceptions which are not applicable here.

Under CR 1(2), the Civil Rules "govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules[.]" In the context of judicial review from an administrative decision, "[t]he civil rules do not apply . . . until after the appeal has been perfected." *Bd. of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). Because an administrative appeal is considered an original action and not a true appeal, we have held "the procedural steps required to 'take' an appeal from an administrative agency action are precisely the same steps required to commence any other original action in the circuit court." *Isaacs v. Caldwell*, 530 S.W.3d 449, 454 (Ky. 2017). Thus, Kentucky courts have long required parties to answer a petition for judicial review from an administrative decision. *Carnahan v. Yocom*, 526 S.W.2d 301 (Ky. 1975); *see also* David V. Kramer, 6 Ky. Prac. R. Civ. Proc. Ann. Rule 7.01 n.6 (2024) ("No reason appears why the same principle [as stated in *Carnahan*] would not apply to appeals from the decisions of other administrative agencies.").

Revenue maintains, however, that KRS 13B.140 does not require the filing of an answer and cites *Western Coca-Cola Bottling Co., Inc. v. Runyon*, 410 S.W.3d 113, 116 (Ky. 2013), and *Anderson v. Cabinet for Health & Fam. Servs.*, 643 S.W.3d 109, 114 (Ky. App. 2022), in support of its position.[20] These cases are distinguishable, however, and thus Revenue's reliance on them is misplaced.

[20] PVA did not respond to Solomon's arguments regarding preservation.

Notably, *Runyon* did not involve an administrative appeal under KRS 13B.140. Instead, in *Runyon*, we examined the detailed procedures for judicial review under KRS 341.450 which constitute "a special statutory proceeding." 410 S.W.3d at 116. "A 'special statutory proceeding' is one that is 'complete within itself having each procedural detail prescribed.'" *McCann v. Sullivan Univ. Sys., Inc.*, 528 S.W.3d 331, 334 (Ky. 2017) (quoting *C.C. v. Cabinet for Health & Fam. Servs.*, 330 S.W.3d 83, 87 (Ky. 2011)). Because the specific provisions relative to responsive pleadings under KRS 341.450(2) "are inconsistent with the . . . requirements of CR 7.01[,]" we held each named defendant was not required to file an answer. *Runyon*, 410 S.W.3d at 116.

We perceive no such inconsistency, however, between KRS 13B.140 and CR 7.01. Unlike KRS 341.450(2), KRS 13B.140 is completely silent on the question of whether a responsive pleading is required, and mere silence does not amount to inconsistency.

Similarly, the decision of the Court of Appeals in *Anderson* has no bearing on the present question because that matter did not involve an administrative appeal under KRS 13B.140. 643 S.W.3d at 112-13. Instead, *Anderson* involved a petition for immediate custody of a child under KRS 620.110. *Id.* Moreover, a petition for immediate custody under KRS 620.110 is an original action in the nature of a writ proceeding where the circuit court is sitting as an appellate court. *Id.* (citing CR 76.36(2) [now RAP 60(D)]); *see also* KRS 620.110 ("During the pendency of the petition for immediate entitlement the orders of the District Court shall remain in effect."). Original actions in an appellate court are governed by different procedural rules than original actions filed in a trial court. *Id.* Again, under KRS 23A.010(4), "an appeal to the circuit court from an order of an administrative agency is not a true appeal but rather an original action[,]" which is "commenced by (1) the filing of a complaint (petition), and (2) the issuance of summons (or warning order) in good faith." *Commonwealth, Transp. Cab., Dept. of Highways v. City of Campbellsville*, 740 S.W.2d 162, 164 (Ky. App. 1987).

PVA's failure to file a responsive pleading, however, does not preclude our review of its argument concerning the proper interpretation of Section 170, notwithstanding the provisions of CR 8.04. Our review of the record indicates that prior to the expiration of the deadline for the filing of PVA's answer, Solomon and PVA filed a joint motion seeking expedited review in the Court of Appeals.[21] The joint motion specifically references PVA's denial of Solomon's claims that the "subject property is exempt from property tax under Section 170 of the Kentucky Constitution under the institutions of religion of the purely public charity exemption" and further explicitly states, "[i]n the interest of judicial efficiency with **Plaintiff preserving the issues raised in its Petition and Defendants denying same**, the Parties hereto respectfully seek to move this appeal forward to the Court of Appeals[.]" (Emphasis added).

[21] The trial court properly denied the parties' joint motion in an order entered on September 7, 2021, concluding KRS Chapter 13B contains "no provision for this court to elect not to rule."

Plainly, Solomon had timely notice of PVA's position on the merits and we perceive the joint motion along with Solomon's failure to raise any subsequent objections in the trial court constitutes an unequivocal waiver of any issues regarding PVA's failure to file an answer.[22] *See* CR 15.02 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); *Impellizeri v. Urban Renewal & Cmty. Dev. Agency*, 429 S.W.2d 41, 43 (Ky. 1968) ("No contention was made in the trial court by appellants that appellee made a 'judicial admission' in its answer."); Kramer, 6 *Ky. Prac. R. Civ. Proc. Ann.* Rule 12.01 at cmt. 5 ("If a plaintiff fails to object to the late filing of an answer, he or she waives the objection and cannot complain subsequently that the pleading was untimely."). Thus, we conclude the issue concerning the proper interpretation of Section 170 is properly before us.

[22] In its reply brief before the trial court, Solomon argued PVA was precluded from raising any issues concerning the scope of Section 170 because it did not file a cross-petition for judicial review. Although the trial court accepted Solomon's argument in this regard, the Court of Appeals properly rejected it on the ground that PVA was not aggrieved by the decision of the Tax Board. By failing to raise this issue in its briefs to this Court, we deem the argument to have been abandoned. *Halvorsen*, 671 S.W.3d at 74.

This Court acknowledges the stakes and importance of the present matter as well as counsel's duty of zealous representation. However, PVA's failure to comply with our briefing rules coupled with Solomon's meritless procedural wrangling have needlessly belabored this opinion. We remind the parties and all litigants that our procedural rules are meant to ensure the fair, orderly, and efficient deployment of judicial resources to serve the administration of justice. *Gasaway*, 671 S.W.3d at 314. Indeed, these rules exist to facilitate "the determination of disputes on their merits rather than on the basis of procedural gamesmanship or tactical advantage." Kramer, 6 *Ky. Prac. R. Civ. Proc. Ann.* Rule 16 at cmt.2; *see also Hashmi v. Kelly*, 379 S.W.3d 108, 113 (Ky. 2012); *Stieritz v. Commonwealth*, 671 S.W.3d 353, 367 (Ky. 2023).

B. Solomon is not an institution of religion under Section 170

PVA and Revenue argue Solomon does not qualify as an institution of religion within the meaning of Section 170. We agree.

The outcome of this appeal depends on the meaning of the phrase "real property owned and occupied by . . . institutions of religion" under Section 170 which is a pure question of constitutional interpretation subject to de novo review. *Kentucky CATV Ass'n, Inc. v. City of Florence*, 520 S.W.3d 355, 359 (Ky. 2017) (citing *Greene v. Commonwealth*, 349 S.W.3d 892, 898 (Ky. 2011)); *Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 535 (Ky.

2007). Under the de novo standard, we owe no deference to the legal conclusions of the lower courts. *Bluegrass Trust v. Lexington-Fayette Urban Cnty. Gov't*, 701 S.W.3d 196, 2024 (Ky. 2024).

The cardinal rule of constitutional construction "is to ascertain the intention of the framers and the people in adopting it." *Meredith v. Kauffman*, 293 Ky. 395, 169 S.W.2d 37, 38 (1943). Unless the provision at issue is ambiguous or employs legal terms of art, we must "give words their plain and ordinary meanings." *Freeman v. St. Andrew Orthodox Church, Inc.*, 294 S.W.3d 425, 428 (Ky. 2009). While dictionaries and other reference works may certainly assist a court in determining the plain and ordinary meaning of a constitutional provision, we must also account for the legal context and remain mindful of the "equally well recognized rule of construction that different sections of a Constitution, including amendments, are to be construed as a whole in an effort to harmonize the various provisions and not produce conflict between them." *Shamburger v. Duncan*, 253 S.W.2d 388, 391 (Ky. 1952). Further, a reviewing court must

> look to the history of the times and the state of existing things to ascertain the intention of the framers of the Constitution and the people adopting it, and a practical interpretation will be given to the end that the plainly manifested purpose of those who created the Constitution, or its amendments, may be carried out.

Keck v. Manning, 313 Ky. 433, 231 S.W.2d 604, 607 (1950).

At common law, church property did not receive an "automatic and unrestricted tax exemption[.]" W. Cole Durham & Robert Smith, 4 *Religious Organizations and the Law* § 33:3 (2d. 2023). Similarly, in Kentucky, the law is well-established that "no property shall be exempt from taxation except as provided in this Constitution[.]" Ky. Const. § 3. Courts and other authorities, therefore, cannot presume, assume, or imply any relinquishment or waiver of the sovereign right of taxation. *Vogt v. City of Louisville*, 173 Ky. 119, 190 S.W. 695 (1917). Any party claiming entitlement to a tax exemption bears the burden to affirmatively demonstrate the claimed exception is authorized by law. *Benevolent Ass'n of Elks v. Wintersmith*, 204 Ky. 20, 263 S.W. 670, 672 (1924). Tax exemptions must be strictly construed, and any doubts are to be resolved in favor of the taxing authority. *Id.* In other words, "it is only where the exemption is shown to be granted in terms clear and unequivocal that the right of exemption can be maintained." *Id.* (quoting *Frederick Elec. Light & Power Co. v. City of Frederick City*, 84 Md. 599, 36 A. 362, 364 (1897)). The law requires courts to apply this narrow approach because "the exemption granted to one person places an additional burden upon others." *Kesselring v. Bonnycastle Club*, 299 Ky. 585, 186 S.W.2d 402, 403 (1945).

With the foregoing standards in mind, we turn to Section 170 which provides in pertinent part:

> There shall be exempt from taxation . . . real property owned and occupied by, and personal property both tangible and intangible owned by, institutions of religion; institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education. . . . The real property may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by the stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years. The exemptions shall apply only to the value of the real property assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the proportion which his interest in the corporation bears to the assessed value of the property.

Prior to a 1990 amendment, Section 170 did not refer to "institutions of religion" and instead exempted:

> [P]laces actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; . . . all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto.

Under the former law, our predecessor Court construed this specific exemption to have a "limited area of application" which was "in nowise supported by the policy underlying the more liberal exemption accorded charitable and educational institutions." *City of Ashland v. Calvary Protestant Episcopal Church of Ashland*, 278 S.W.2d 708, 710 (Ky. 1955).

By employing the phrase "institutions of religion" in conjunction with the removal of usage limitations pertaining to actual places of worship and parsonages, we conclude the current version of Section 170 was clearly intended to place institutions of religion on an equal plane relative to institutions of purely public charity and education as a matter of law and public policy. *See Caudel v. Prewitt*, 296 Ky. 848, 178 S.W.2d 22, 26 (1944) (applying interpretative rule that the use of similar language in constitutional provisions should receive a consistent interpretation). However, while the broadening of the religious exemption was undoubtably significant, this dynamic alone does not illuminate the meaning of the phrase "institutions of religion." Although this aspect of Section 170 presents a matter of first impression, we do not write on an entirely clean slate and take guidance from the general principles established by our rules of construction and prior caselaw.

Under Section 170, entitlement to a tax exemption depends on both the character of the owner and the use of the property. *Mordecai F. Ham Evangelistic Ass'n v. Matthews*, 300 Ky. 402, 189 S.W.2d 524, 526 (1945); *Kesselring*, 186 S.W.2d at 403-04. To ascertain the religious character of a property owner for tax exemption purposes, the *Ham* decision instructs that courts must look beyond legalistic forms and superficial labels "to see the beneficial or real ownership, *its nature and functions*." 189 S.W.2d at 527 (emphasis added).

This searching analysis is akin to piercing the corporate veil which must necessarily account for the totality of relevant circumstances on a case-by-case basis. *Id.* To be clear, the undertaking of such a fact-intensive examination does not impute any wrongdoing, dishonesty, or malfeasance on the part of the taxpayer. *Id.* Instead, courts and tax authorities must conduct a rigorous inquiry to satisfy the standard of strict compliance demanded by our precedents. *Wintersmith*, 263 S.W. at 672.

Otherwise, any person or enterprise could obtain a tax exemption through the artful drafting of legal documents and the mere self-declaration of a religious purpose. *Ham*, 189 S.W.2d at 528. For tax exemption purposes, "[i]t is not enough that a corporation believes and declares itself to be" an institution of religion. *American Guidance Foundation, Inc. v. United States*, 490 F.Supp. 304, 307 (D.D.C. 1980); *see also* 84 C.J.S. *Taxation* § 347 (2024) ("It cannot be sufficient for a group simply to label itself as a religion in order to enjoy tax-exempt status."). Thus, while an organization's articles of incorporation, by-laws, and tax status under foreign law[23] are relevant considerations, they are not dispositive of entitlement to an exemption under Section 170.

[23] Considering the wide variety of constitutional and statutory tax exemptions, "[i]t is important to bear in mind that cases reaching different conclusions are not necessarily inconsistent or conflicting, inasmuch as they may involve interpretation of differently phrased or worded enactments." F. P. Renner, Annotation, *Construction of Exemption of Religious Body or Society from Taxation or Special Assessment*, 168 A.L.R. 1222 § III(a) (1947).

Kentucky law has employed a similar functional approach to determine the character of institutions of purely public charity and education. To maintain a consistent judicial voice, we should thus construe "institutions of religion" in the same manner as "charity" and "education" have previously been interpreted relative to the term "institution." *See Caudel*, 178 S.W.2d at 26.

Our predecessor Court defined an "institution" for the purpose of Section 170 as "that which is set up, provided, ordained, established, or set apart for a particular end, especially of a public character or affecting the community." *Commonwealth v. Gray's Trustee*, 115 Ky. 665, 74 S.W. 702 (1903). Applying this definition to an institution of purely public charity, Kentucky law has long required that "the institution *must itself be* a charity[.]" *Iroquois Post No. 229 v. City of Louisville*, 309 S.W.2d 353, 355 (Ky. 1958) (emphasis added); *Banahan v. Presbyterian Housing Corp.*, 553 S.W.2d 48, 51 (Ky. 1977); *Hancock v. Prestonsburg Indus. Corp.*, 365 S.W.3d 199, 201 (Ky. 2012). In *Hancock*, we specifically focused on the nature of the institution's activities and distinguished "between a charitable institution and an organization which has incidental charitable benefits[.]" 365 S.W.3d at 202.

Similarly, in explaining the nature of "institutions of education," our predecessor Court observed:

> The framers of the constitution evidently had in mind institutions of education, such as colleges and schools, which are organized for the purpose of affording those desiring to acquire an education an opportunity to do so. They meant

> *institutions that were officered in the usual way*, and employing corps of professors or teachers to furnish instruction to the students in attendance.

Bosworth v. Kentucky Chautauqua Assembly, 112 Ky. 115, 65 S.W. 602, 603 (1901) (emphasis added). Additionally, Kentucky caselaw limited the meaning of "institution of education" to the ordinary sense, meaning "a place where systematic instruction in any or all of the useful branches of learning is given by methods common to schools and institutions of learning." *Kesselring*, 186 S.W.2d at 404.

In *Kesselring*, our predecessor Court distinguished this common understanding of "institution of education" from "schools for teaching dancing, riding and other special accomplishments [which] are not schools or institutions of education in the ordinary sense." *Id.* Moreover, the *Kesselring* Court differentiated between institutions that provide a direct educational benefit from organizations whose educational benefits are merely incidental to other non-exempt activities. *Id.* at 404. In other words, the requirement is that an institution "must itself be" a school, university, or other scholastic establishment which functions in the usual or ordinary manner. *Bosworth*, 65 S.W. at 603; *see also Iroquois Post*, 309 S.W.2d at 355.

Taking the logic of *Iroquois Post* and *Bosworth* as a framework, we must next consider what it means for an institution to "itself be" a religion. Fortunately, we need not formulate a global, comprehensive definition of religion and may properly limit this opinion to the specific context of tax exemptions under Section 170. *Freeman*, 294 S.W.3d at 429 ("[O]ur ruling here today in defining this term is restricted to 'institutions of religion' . . . under Section 170 of our state Constitution."). Moreover, the question of whether an entity satisfies the requirements for tax-exempt status under a constitutional provision or statute is distinct from the question of whether a particular activity constitutes religious expression under the First Amendment. *American Guidance*, 490 F.Supp. at 306 (D.D.C. 1980). Indeed, "[i]t is important to note . . . that an examination of what constitutes a 'church' for purposes of applicable provisions of the tax code does not require consideration of whether an organization's beliefs and practices represent a 'religion' within the purview of the First Amendment to the Constitution." *Church of Eternal Liberty Life & Liberty, Inc. v. C.I.R.*, 86 T.C. 916, 923-24 (1986) (citing *Chapman v. Commissioner*, 48 T.C. 358, 361 (1967)). Inevitably, however, "[t]he means by which an avowedly religious purpose is accomplished separates" an institution of religion under Section 170 "from other forms of religious enterprise." *American Guidance*, 490 F.Supp. at 306.

Notably, our predecessor Court determined Section 170 exists *in pari materia* with Sections 5 and 189 of the Kentucky Constitution. *Calvary Protestant*, 278 S.W.2d at 710; *Commonwealth v. Thomas*, 119 Ky. 208, 83 S.W. 572, 573 (1904). Laws *in pari materia* "are to be considered together, as if they were one law." *Greer v. City of Covington*, 83 Ky. 410, 2 S.W. 323, 325 (1885). Indeed, "[c]onstitutions, like statutes, are to be construed so that all parts of them may stand together[.]"[24] *Crick v. Rash*, 190 Ky. 820, 229 S.W. 63, 71 (1921).

[24] While the term "*in pari materia*" derives from the canon of construction governing related statutes, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 253 (2012), this Court has consistently applied the same principle to matters of constitutional interpretation. *Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998) ("Sections 14, 54 and 241 have been interpreted to work in tandem[.]"); *Bd. of Ed. of Spencer Cnty. v. Spencer Cnty., Levee, Flood Control, & Drainage Dist. No. 1*, 313 Ky. 8, 230 S.W.2d 81, 83 (1950) ("[T]he provisions of Sections 180 and 184 of the Constitution are considered together, as they must be[.]"); *City of Winchester v. Nelson*, 175 Ky. 63, 193 S.W. 1040, 1042 (1917) ("[I]t has been frequently held by this court that sections 157 and 158 must be considered together[.]").

Section 5 of the Kentucky Constitution sets forth the right of religious freedom and forbids the granting of governmental preferences upon

> any *religious sect, society or denomination*; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

(Emphasis added). Similarly, Section 189 prohibits the appropriation of governmental funding for the support of "any church, sectarian or denominational school." Our predecessor Court read these provisions together with Section 170 as a "comment, which borders on precaution . . . that serves to guide us when dealing with the taxation of *property owned by a church*."[25] *Calvary Protestant*, 278 S.W.2d at 710 (emphasis added). Moreover, legal questions involving the ownership of church property "must take into consideration the organization and government of *the church*[.]"[26] *Thomas v. Lewis*, 224 Ky. 307, 6 S.W.2d 255, 257 (1928) (emphasis added).

[25] We further observe the Supreme Court of the United States has definitively held the granting of a property tax exemption does not constitute the unconstitutional establishment of religion. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 672 (1970) ("The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.").

[26] The organization and government of a religious body is commonly referred to as an "ecclesiastical polity" and denotes the form of religious authority and government in matters "both ecclesiastical and temporal." *Clay v. Crawford*, 298 Ky. 654, 183 S.W.2d 797, 800 (1944). American law generally recognizes three types of religious government; (1) hierarchical, (2) congregational or independent; and (3) synodal or presbyterian. *Watson v. Jones*, 80 U.S. 679, 722-23 (1871); *Thomas*, 6 S.W.2d at 257. While Kentucky decisions involving the subject of ecclesiastical polity have frequently arisen in the context of Christian churches, "[v]ariations upon the three models are found throughout the religious world, with most of the non-Christian religions following some type of congregational model." Durham & Smith, 1 *Religious Organizations and the Law*, at § 8:6.

Additionally, in interpreting Section 170, Kentucky jurisprudence has specifically construed the term "religious society" interchangeably with the word "church," meaning "some group organized and maintained for the support of public worship[.]" *Ham*, 189 S.W.2d at 527. Moreover, under Kentucky law, the term "religious society"

> was commonly used in the generally accepted sense, and in accordance with designations or definitions given in the dictionaries and elsewhere as being an association or body of communicants or a church usually meeting in some stated place for worship or for instruction, or organized for the accomplishment of religious purposes such as instruction or dissemination of some tenet or particular faith or otherwise furthering its teachings.

Id. The *Ham* Court further specified, however, that the sole purpose of a religious society need not be limited to "public worship[.]" *Id.* at 528 (citation omitted). Indeed, "the term 'religious society' is broader than a local church or congregation and embraces any board or agency of a general church or parent body, such, for example, as the Roman Catholic Church or the Methodist Church." *Id.* Additionally, businesses and other income producing activities "conducted *by a general or parent church*" whose revenue was utilized solely to advance religious objectives such as "a publishing house printing and distributing religious books" may properly fall within the exemption. *Id.* (emphasis added) (citation omitted).

Importantly, the *Ham* Court further distinguished a religious society from a religious corporation.[27] *Id.* at 527. The Court explained:

> Distinction may be drawn between a religious corporation, which is but an inanimate person, a legal entity possessing none other than temporal powers, and a church or body of communicants or group gathered in a common membership for mutual support and edification in piety, worship and religious observances, or a society of individuals united for religious purposes at a definite place or places.

Id. A religious society, within the meaning of the Kentucky Constitution, may be further contrasted with various activities of religious fellowship. *Id.* at 528 ("The many contributors and the audiences may be regarded as a kind of fellowship but not as a 'society' within the meaning of the Constitution."). The salient characteristics of a religious society are "communion," "unity," and "society." *Id.* "The term society itself implies a getting together of its members, although it is true persons may worship God or even receive religious instructions without getting together." *Id.* (internal quotations omitted).

[27] We further note the term "religious corporation" strictly denotes "an artificial construction of the state, which is designed to provide the *congregants* with an orderly procedural framework in order for them to freely exercise their religion." 1A *Fletcher Cyc. Corp.* § 80 (2024) (emphasis added).

Similarly, the Supreme Court of Ohio emphasized the associational aspect of a religious society and described the traditional legal understanding as follows:

> Religious societies of sects or denominations are founded for the purpose of uniting together in public religious worship and religious services, according to the customary, habitual, or systematic forms of the particular sect or denomination, and in accordance with, and to promote and enforce their common faith and belief.
>
> . . .
>
> It is equally unreasonable to suppose that a denomination or sect of religious persons would form themselves into a religious society, without any intention *to meet together as such*, to worship according to that faith, and without any stated or customary religious public services. It would be a society without association; a society in name only, but not in fact.

State v. Township 9, 7 Ohio St. 58, 64-65 (1857) (emphasis added). By contrast, "'[r]eligiously affiliated' institutions usually provide services on a professional level" and "do not proselytize, participate in worship, or promote religious education." Durham & Smith, 3 *Religious Organizations and the Law*, at § 26:6. The Maryland Court of Appeals further illustrated the longstanding distinction between a religious society and a religiously affiliated organization as follows:

> As to the Society for the Relief of the Poor of the Methodist Episcopal Church of Baltimore City Station, its object being to secure and afford pecuniary aid and assistance to the indigent and poor members of the church attached to that station, **it was not an ecclesiastical society at all, but rather a benevolent or charitable one, whose work was closely connected with the work of the church, but essentially distinct therefrom**, and therefore, while affiliated with, and auxiliary to, the church organization, this society was certainly no integral part thereof.

Trustees of Methodist Episcopal Church of Baltimore City v. Asbury Sunday-School Society, 109 Md. 670, 72 A. 199, 202 (1909) (emphasis added).

Further, the connection between Section 170 and church ownership resonates with the general historical character of religious tax exemptions. *See* Carl Zollmann,[28] *American Civil Church Law* 237 (1917). "The constitutional provisions or statutory enactments which exempt educational and charitable associations . . . . generally add an exemption, more or less qualified, of the property owned or used by religious bodies." *Id.* Moreover, "when the constitutions which are silent on this matter were adopted it was and remained a recognized practice to exempt *church property* from taxation." *Id.* at 245 (emphasis added). This longstanding practice of exempting "church bodies" from taxation was largely premised on "[t]he moral influence exerted by these bodies over their adherents, like the charity administered and the education imparted by private charitable and educational institutions[.]" *Id.* at 238. Indeed, the overarching purpose of codifying the customary religious exemptions was "to foster religious societies" and "justify a practice as old as the oldest of the thirteen colonies." *Id.* at 239, 248.

[28] Professor Zollmann's work has "often [been] incorrectly identified in print as 'Zollman[.]'" Robert M. Jarvis, *Carl Zollmann: Aviation Law Casebook Pioneer*, 73 J. Air L. & Com. 319, 322 (2008).

Importantly, we are further convinced contemporary usage at the time Section 170 was amended in 1990 maintained the traditional understanding that, for tax exemption purposes, the phrase "institution of religion" refers to a church, religious sect, society, or denomination. For example, when *Freeman* was rendered in 2009, this Court continued to "recognize that churches are unique" and attributed the ownership of "churches, mosques, tabernacles, temples, and the like" to "institutions of religion."[29] 294 S.W.3d at 429 (emphasis added). Moreover, because the framers of the 1990 Amendment to Section 170 deliberately employed the same phrase "institutions of" to refer to religion, purely public charity, and education, we must presume and reiterate each of these phrases was intended to receive a similar legal and grammatical interpretation. *See Caudel*, 178 S.W.2d at 26.

[29] While the character of ownership for the purpose of Section 170 was not at issue in *Freeman*, we are persuaded by its general observations on this subject. Dicta may be "persuasive or entitled to respect" according to its reasoning and applicability and where "it was intended to lay down a controlling principle." *Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952).

Against this constitutional and legal background, we thus interpret "institutions of religion" under Section 170 to mean any church, religious sect, society, or denomination. While the 1990 amendment to Section 170 clearly removed the specific usage and acreage limitations pertaining to houses of worship and parsonages, we cannot conclude the amendment expanded the scope of the ownership requirement to include institutions of a character beyond the parameters established by prior Kentucky law.

Applying this standard to the present appeal, we cannot conclude Solomon constitutes an institution of religion under Section 170. Although Solomon's stated purpose is to advance the religious objectives of its Members and the Restoration Movement in general, Solomon is not, itself, a church, religious sect, society, or denomination, as those terms have been traditionally understood under Kentucky law.

While Solomon may support and promote religion through the funding of loans, leasing of property, and issuance of debt securities, we perceive the nature of these contributions to constitute "a kind of fellowship" as opposed to a community of individuals organized and associated, *as such*, "for worship or for instruction, or organized for the accomplishment of religious purposes such as instruction or dissemination of some tenet or particular faith or otherwise furthering its teachings." *Ham*, 189 S.W.2d at 527. In other words, we fail to discern the type of associational aspects which our precedents have recognized to be consistent with those of a church or religious society. *Id.*

Additionally, we cannot conclude Solomon constitutes a board, agency, or other nonprofit income-producing activity "conducted by a general or parent church." *Id.* at 528. The *Ham* Court based this expansive conception of a religious society on Judge Cooley's classic treatise on taxation, which, in turn, relied upon the decision of the Supreme Court of Tennessee in *Book Agents of Methodist Episcopal Church, South v. Hinton*, 92 Tenn. 188, 21 S.W. 321 (1893). *Id.*; Thomas M. Cooley; Clark A. Nichols, *Law of Taxation* § 742 n.77 (4th ed. 1924).

In *Methodist Episcopal*, the Tennessee Court determined a separately incorporated publishing house constituted a "religious and charitable institution" because the "corporation was created as an arm or agency of the Methodist Church[.]" 21 S.W. at 323. To support this determination, the Court took particular note of language establishing direct control by the church over the corporation. *Id.* at 322. Specifically, the corporate charter provided the publishing house "shall 'now, and at all times hereafter,' be under the control of the Methodist Episcopal Church, South, according to the laws and usages of the same, as contained in their present or any future edition of their Discipline." *Id.* Additionally, the Court noted other internal church documents authorizing direct church oversight and involvement with the policies and activities of the corporation. *Id.*

Upon review of the present record, we do not perceive similar evidence of church control over Solomon. Indeed, the mere involvement, membership, or participation of a church or association of churches in the creation of a nonprofit corporation, without more, does not establish a relationship of agency or control. *Hope Lutheran Church v. Chellew*, 460 N.E.2d 1244, 1248-49 (Ind. Ct. App. 1984). Similarly, a finding of church agency or control does not necessarily follow from a commonality of religious belief amongst a corporate board of directors. *Id.* at 1248; *see also St. Catherine's Church Corp. of Riverside v. Technical Planning Associates, Inc.*, 520 A.2d 1298, 1300 (Conn. App. 1987).

Application of the foregoing legal authority to Solomon's independent corporate structure controverts any claim to existence as a religious society. Pursuant to its by-laws, Solomon, as a corporate entity, may appoint "at least five (5) and not more than eleven (11) persons" to serve on its board of directors, while the two member churches may each appoint one additional director to serve on the board. Thus, representative voting directors appointed by the two member Churches can never comprise a majority of Solomon's board membership, thereby discounting any claim by Solomon that it exists as an agency or under the control of any religious body.

In other legal contexts, courts have determined church control of an organization simply entails the ability of the church to appoint the majority of directors, trustees, or officers. *See Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001) ("An organization is controlled by a church when, for example, a religious institution appoints a majority of the organization's officers or directors."). We perceive this analysis to be equally applicable here. "[O]nce incorporated," Solomon "became a distinct and autonomous entity, one controlled by its board of directors and clearly distinguishable from the churches." *Hope Lutheran*, 460 N.E.2d at 1248. Stated differently, Solomon "alone was the agency" here. *Id.* at 1249.[30]

[30] Neither can Solomon transform itself from into an institution of religion by merely pointing to its church-centered client base. Patron churches that borrow funds or lease premises from Solomon are thereby subordinated and beholden to the corporation, exerting no control or authority over the lender or lessor. Further, non-member churches generally act as independent congregations, established with distinctive legal forms and governmental structures. For these reasons, a religious client base, alone, cannot establish Solomon as an institution of religion. *See Thomas*, 6 S.W.2d at 257.

In addition to its non-church governing structure, Solomon's by-laws provide further evidence the corporation is neither an agent of nor controlled by any church, group of churches, or other religious entity. First, the corporate by-laws task Solomon's board of directors, not its member churches or their leadership, with "establishing policies to ensure the Corporation remains sound in administration and program." Second, they provide that "the business and property of the Corporation shall be managed and controlled by" the board of directors and that "all of the corporate powers . . . are hereby vested in and shall be exercised by the Board of Directors."[31] And third, they grant Solomon's board of directors authority to empower its officers and agents to enter contracts "in the name of and on behalf of the Corporation." Here, Solomon's activities relative to its ownership and leasing of the McCracken County property resulted from its own direction, and from actions taken on its own behalf, as opposed to a matter of its member Churches' agency, conduct, or control.

[31] These general corporate powers are subject to exceptions relating to the size and composition of the board of directors and provisions relating to the merger or dissolution of the corporation.

Based on the foregoing, we hold, while Solomon's motivations may arguably be laudable, benevolent, and religiously motivated or affiliated, as an institution, Solomon is not itself a church, religious sect, society, or denomination for the purpose of the property tax exemption under Section 170. Kentucky law disfavors tax exemptions and this Court is duty bound to construe such exemptions strictly, "with all doubts resolved against the exemption's application[.]" *Popplewell's Alligator Dock No. 1., Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 461 (Ky. 2004).

Further, we conclude the recent decision of the Supreme Court of the *United States in Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Com'n*, 605 U.S. 238 (2025), does not compel a different interpretation of Section 170. The question presented in *Catholic Charities* was whether the denial of an exemption from unemployment compensation taxes violated the First Amendment. *Id.* at 241. Although Solomon did not raise any claims under the First Amendment or Section 5 of the Kentucky Constitution below, we ordered the parties to submit supplemental briefing on the applicability, if any, of *Catholic Charities* to the present appeal.

In *Catholic Charities*, the Supreme Court examined a Wisconsin law which granted an exemption from unemployment compensation taxes to "nonprofit organizations 'operated, supervised, controlled, or principally supported by a church or convention or association of churches,' but only if they are 'operated primarily for religious purposes.'" *Id.* at 242 (quoting Wis. Stat. § 108.02(15)(h)(2)). Notably, Catholic Charities' character as a religious organization was not in dispute. *Id.* at 245.

Instead, the denial of the exemption was solely premised upon a determination that the activities of Catholic Charities were "secular in nature, not religious." *Id*. (internal quotation omitted). The Wisconsin Supreme Court affirmed the denial of the exemption, reasoning Catholic Charities "neither attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees[.]" *Id.* at 245-46 (citation omitted). The Wisconsin Court further relied upon the fact that "[b]oth employment with the organizations and services offered by the organizations are open to all participants regardless of religion, and the charitable services offered by the subentities could be provided by organizations of either religious or secular motivations." *Id.* at 246 (internal quotation omitted).

The Supreme Court reversed and observed, "[a] law that differentiates between religions along theological lines is textbook denominational discrimination." *Id.* at 248. The Court further explained:

> This case involves that paradigmatic form of denominational discrimination. In determining whether petitioners qualified for the tax exemption . . . the Wisconsin Supreme Court acknowledged that [Catholic Charities] are controlled by a church, the Roman Catholic Diocese of Superior, thereby satisfying one of the exemption's two criteria. The court's inquiry instead turned on whether [Catholic Charities] are "operated primarily for religious purposes." On that criterion, the court recognized that petitioners' charitable works are religiously motivated. The court nevertheless deemed [Catholic Charities] ineligible for the exemption . . . because they do not "attempt to imbue program participants with the Catholic faith," "supply any religious materials to program participants or employees," or limit their charitable services to members of the Catholic Church. Put simply, [Catholic Charities] could qualify for the exemption while providing their current charitable services if they engaged in proselytization or limited their services to fellow Catholics. [Catholic Charities'] Catholic faith, however, bars them from satisfying those criteria. . . .
>
> Wisconsin's exemption, as interpreted by its Supreme Court, thus grants a denominational preference by explicitly differentiating between religions based on theological practices. Indeed, petitioners' eligibility for the exemption ultimately turns on inherently religious choices (namely, whether to proselytize or serve only co-religionists), not "'secular criteria'" that "happen to have a 'disparate impact' upon different religious organizations."

Id. at 249-50 (internal citations omitted). The Supreme Court further held that the disparate treatment of Catholic Charities did not withstand strict scrutiny. *Id.* at 254.

Importantly, the classification of Catholic Charities, as a "nonprofit organization[] 'operated, supervised, controlled, or principally supported by a church or convention or association of churches,'" was not in dispute relative to the requirements of the applicable Wisconsin statute. *Id.* at 242, 245. By contrast, the classification of Solomon as an institution of religion, within the meaning of Section 170, is precisely the question at the heart of the present appeal. *See Kesselring*, 186 S.W.2d at 404. Under Kentucky law, an "organization must reasonably come under the classification of" an institution of religion "[t]o be exempt from the payment of taxes[.]" *Id.* We do not read *Catholic Charities* to delimit the authority of state courts to interpret the scope of tax exemptions under state law so long as denominational preferences and religious discrimination are avoided.

To be clear, our holding today is not based on a determination that Solomon's activities are inherently secular in nature or otherwise lack a sufficiently religious purpose or motivation relative to the practices of other religions or denominations. The analysis under Section 170 focuses, instead, on the taxpayer's classification as an institution of religion and whether such a claimant is a church, religious sect, society or denomination, or otherwise constitutes a board, agency, or nonprofit activity conducted by a general or parent church. Thus, we express no opinion on the theological significance of Solomon's activities and simply conclude that Solomon is not within the category of institutions to which the privilege of a property tax exemption has been conferred by Section 170 of the Kentucky Constitution.

C. We decline to further interpret the "owned and occupied" requirement under Section 170

Having determined Solomon does not qualify as an institution of religion for the purpose of Section 170, we need not reach the question of whether the phrase "owned and occupied by . . . institutions of religion" requires unity of ownership and occupation. Indeed, "no further questions need be determined" where a claimant fails to establish the requisite character of ownership. Renner, *supra* note 20, at § III(b)1. Moreover, it is the longstanding practice of this Court to refrain from addressing constitutional questions unless absolutely necessary to a decision on the merits of the case. *Commonwealth v. Bredhold*, 599 S.W.3d 409, 414 (Ky. 2020) (citing *Blair v. United States*, 250 U.S. 273, 279 (1919), and *Louisville/Jefferson Co. Metro Gov't v. TDC Group, LLC*, 283 S.W.3d

657, 660 (Ky. 2009)). Additionally, Kentucky "courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992). Because Solomon is not an institution of religion, we decline to adjudicate the issue whether unity of ownership and occupation is required under Section 170. Thus, we must "leave this question for another day." *Kulkarni v. Horlander*, 701 S.W.3d 181, 189 n.8 (Ky. 2024).

CONCLUSION

Accordingly, the decision of the Court of Appeals is reversed and remanded with instructions to reinstate the denial of the exemption by the Tax Board, consistent with this opinion.

All sitting. Lambert, C.J.; Conley, Goodwine, and Thompson, JJ., concur. Keller, J., concurs in result only. Bisig, J., dissents with separate opinion.

ATTORNEYS

Suspended from the practice of law —

In re: Colin Doan Edmundson (2025-SC-0314-KB); In Supreme Court; Opinion and Order entered 9/18/2025. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This case is before the Court upon the Board of Governors' (Board) recommendation to suspend Colin Edmundson from the practice of law for 181-days after being found guilty by default of numerous violations in several cases. Supreme Court Rule (SCR) 3.210. His bar number is 98735, and his listed bar address is 908 Minoma Avenue, Louisville, 40217. Pursuant to SCR 3.370(10), we may adopt the findings and conclusions of the Board when no notice of review has been given. *Kentucky Bar Ass'n v. Leadingham*, 318 S.W.3d 598, 599 (Ky. 2010). We do so now and impose the 181-day suspension upon Edmundson.

I. Underlying Facts and Conclusions of Law

In the first underlying case, 23-DIS-0221, Edmundson was appointed Guardian ad Litem in a trio of family court cases. On June 7, 2023, Edmundson filed a motion to sever all visitation between Ronald Simpson and his three children. The entirety of that motion constituted one complete introductory sentence and a second incomplete sentence reading, "In support of the instant motion, the undersigned states the following: 1. At the outset of this case, Respondent Father had a nonexistent . . . ." In a stupefying turn of the events, the family court granted the motion. Simpson attempted to contact Edmundson several times after Edmundson relayed the order to him by phone and email. Edmundson never responded. Simpson stated in his complaint that prior to the order he had a good relationship with his children and that Edmundson had never interviewed or spoke with him prior to filing his motion to sever visitation.

Service of the Complaint was attempted at Edmundson's listed bar address but was incapable of being completed as the occupant stated Edmundson did not maintain an office there. He was served at the Jefferson County Courthouse on September 9, 2023, but failed to participate in the proceedings. On December 20, 2023, Edmundson was formally charged with violations of SCR 3.130(3.1),[1] 3.130(3.3)(a)(1),[2] 3.130(8.1)(b),[3] and 3.130(3.4)(c).[4] Service of the charges was made on January 25, 2024, and Edmundson again failed to respond. Submission of the charges occurred on July 22, 2024. The Board unanimously found Edmundson guilty of all charges.

[1] "A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

[2] "A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]"

[3] A lawyer, in connection with a disciplinary matter, shall not "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6."

[4] "A lawyer shall not: knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists[.]"

In the second disciplinary case, 23-DIS-0347, Edmundson filed a civil claim on behalf of Jeremy Brady a day after the statute of limitations had run. The civil case was ultimately dismissed upon those grounds. In an additional case, Edmundson was retained by Bridget Thompson to file a claim against an estate. Edmundson failed to file the claim in the appropriate amount of time. In each case, Edmundson failed to maintain contact with his clients at his listed address or by phone. On January 25, 2024, he was served with the complaint. On May 18, 2014, formal charges of violations were issued, to wit: two counts of SCR 3.130(1.3),[5] two counts of 3.130(1.4)(a)(3),[6] one count of 3.130(3.4)(c), and one count of 3.130(8.1)(b). Edmundson was served with the charges on May 21, 2024, and failed to respond. Submission occurred on July 22, 2024. The Board unanimously found him guilty on all charges.

[5] "A lawyer shall act with reasonable diligence and promptness in representing a client."

[6] "A lawyer shall: keep the client reasonably informed about the status of the matter[.]"

In the third disciplinary case, 23-DIS-0377, Edmundson was retained by Elizabeth Sharp in a negligence action and paid $357.00 against State Farm Insurance Company. Edmundson informed Sharp he would send a strongly worded letter to State Farm and follow up with a phone call. He failed to do either. Sharp was unable to further contact Edmundson by phone call or text message. Sharp filed a complaint on December 13, 2023, and Edmundson was served on February 1, 2024. He failed to respond. On March 18, 2024, formal charges were issued alleging violations of SCR 3.130(1.3), 3.130(1.4)(a)(3), 3.130(1.16)(d),[7] 3.130(3.4)(c), and 3.130(8.1)(b). Edmundson was served on May 21, 2024, and failed to respond. Submission occurred on July 22, 2024. The Board unanimously found him guilty of all charges.

[7] "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred."

The fourth disciplinary case, 24-DIS-0016, Brittany McLemore retained Edmundson for help in a family law matter. She paid a retainer of $500 through Cash App. Edmundson failed to appear in any of the matters before the family court, did not make any filings on her behalf, and was unable to be contacted by McLemore. She demanded return of the retainer, but Edmundson failed to respond. When McLemore attempted to claw back the $500 through Cash App by reversing her payment, Edmundson did not approve the reversal. A complaint was filed on January 16, 2024, and Edmundson was served on February 1, 2024. He did not respond. On March 18, 2024, formal charges were issued alleging violations of SCR 3.130(1.3), 3.130(1.4)(a)(3), 3.130(1.16)(d), 3.130(3.4)(c), and 3.130(8.1)(b). Edmundson was served on May 21, 2024, and did not respond. Submission occurred on July 22, 2024. The Board unanimously found him guilty of all charges.

In the final disciplinary case, 24-DIS-0194, Latasha Saxton, as Power of Attorney for her brother, retained Edmundson to file a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion for her incarcerated brother. Saxton submitted evidence in her complaint demonstrating a total payment of $3,500, although the formal charge would only allege an installment payment of $1,035. Regardless, Edmundson failed to file the motion and could not be further contacted by Saxton. He failed to return any money he received. Saxton filed a complaint on June 28, 2024. Edmundson was served on August 2, 2024. He failed to respond.

On November 6, 2024, formal charges were issued alleging violations of SCR 3.130(1.3), 3.130(1.4)(a)(3), 3.130(1.16)(d), 3.130(3.4)(c), and 3.130(8.1)(b). Edmundson was constructively served on January 15, 2025. He failed to respond. Submission occurred on March 6, 2025. The Board unanimously found him guilty of all charges.

Edmundson has been indefinitely suspended from the practice of law since June 13, 2024, regarding his failure to respond in the Simpson case. *In Re Edmundson*, 694 S.W.3d 313 (Ky. 2024). Prior to that, he had been suspended for failure to comply with Continuing Legal Education requirements. *Id.* at 313. In support of the discipline in this case, the Board relied upon *In Re Oliver*, 701 S.W.3d 176 (Ky. 2024). In that case, we imposed a 181-day suspension when Oliver committed similar ethical violations in three underlying disciplinary cases. *Id.* at 180. We agree *In Re Oliver* is good authority and factually consonant with the underlying facts in this case. Additional cases in support are *Kentucky Bar Ass'n v. Quesinberry*, 250 S.W.3d 308 (Ky. 2008) and *Kentucky Bar Ass'n v. Stevenson*, 2 S.W.3d 789 (Ky. 1999). In all three cases, involving similar rules violations, a 181-day suspension was imposed in a default case.

ACCORDINGLY, the Court ORDERS:

(1) Respondent, Colin Doan Edmundson, is adjudged guilty on all counts and hereby is suspended from the practice of law for one hundred and eighty-one (181) days from the date of this Opinion and Order;

(2) Because Edmundson's suspension exceeds 180 days, he must fulfill all relevant requirements under SCR 3.502 for reinstatement;

(3) Pursuant to SCR 3.390, Edmundson, if he has not already done so, shall, within twenty days from the entry of this Opinion and Order, notify all clients in writing of his inability to represent them, and notify all courts in which he has matters pending of his suspension from the practice of law, and furnish copies of said letters to the Office of Bar Counsel. Pursuant to SCR 3.390(2), Edmundson shall, to the extent possible, immediately cancel and cease any advertising activities in which he is engaged;

(4) During the time of his suspension, Edmundson shall not accept new clients or collect unearned fees;

(5) Edmundson shall immediately refund $357.00 to Elizabeth Sharp; $500.00 to Brittany McLemore; and $3,500.00 to Latasha Saxton;

(6) Edmundson shall attend, at his expense, and successfully complete the Ethics and Enhancement Professionalism Program (EPEP);

(7) In accordance with SCR 3.450, Edmundson is directed to pay all costs associated with these disciplinary proceedings, in the amount of $886.69, for which execution may issue from this Court upon finality of this Opinion and Order.

All sitting. Lambert, C.J.; Bisig, Conley, Goodwine, Keller, and Nickell, JJ.; concur. Thompson, J., concurs in result only.

ENTERED: September 18, 2025

INSURANCE

COMMERCIAL UMBRELLA POLICY

DRAM SHOP CLAIMS

EXCLUSION OF LIQUOR LIABILITY COVERAGE

Restaurant known as "Roosters" served food and alcohol to tortfeasor — Tortfeasor left Roosters and visited another restaurant and bar venue — Tortfeasor then left second venue, drove the wrong way on the interstate, and collided with another vehicle, carrying a family of five — All five occupants in second vehicle were killed, as was tortfeasor — At time of the accident, Roosters was insured by Grange Insurance Company (Grange) pursuant to a business owners policy (BOP) and a commercial umbrella policy (CUP) — It is undisputed that BOP provides for $1,000,000 limit of liability for bodily injury and property damage arising out of the selling, serving, or furnishing of alcoholic beverages — First paragraph of CUP states: "Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered." — The body of the policy contains "Section I – Coverages, Subsection 2. Exclusions, with subsection c. Liquor Liability" — This provision generally excludes liquor liability, but it makes an exception for liability arising from the business of the insured of serving alcohol — The language then indicates the umbrella coverage will follow the primary policy, "unless otherwise directed by this insurance" — Endorsement CU 47 at the end of the policy states that it replaces the liquor liability exclusion — Personal representative of the deceased family filed a civil action against various defendants — Personal representative's fourth amended complaint added Roosters as a defendant — Roosters filed third-party petition for declaratory judgment against Grange for a declaration of coverage under the BOP and the CUP — Roosters argued that BOP provided liquor liability coverage, which Grange did not dispute — Roosters also argued that CU 47 in the CUP modified, but did not replace, exclusion c. — In the alternative, Roosters argued CU 47 was ambiguous, and the ambiguity should be construed in its favor — Trial court found CU 47 was ambiguous and granted summary judgment in favor of Roosters — Grange appealed — Court of Appeals held that CU 47 was unambiguous and that CU 47 "replaced the entirety of Section I 2 c of the policy, intentionally deleting the paragraphs which otherwise would have provided coverage"; therefore, it reversed and remanded for trial court to direct a declaratory judgment that the CUP does not provide coverage — Roosters appealed — AFFIRMED — CU 47 is unambiguous, and Roosters is not entitled to coverage under the CUP — Unambiguous contracts are enforced as written — When an endorsement deletes language from a policy, a court must not consider the deleted language in its interpretation of the remaining agreement — Though the BOP and the CUP are related, they are separate policies; therefore, the Kentucky Supreme Court looked only to the four corners of the CUP for its analysis — The CUP must be enforced as written, otherwise Roosters would be extended insurance coverage beyond the bargained-for-terms — CU 47 plainly states that exclusion c. in the original policy form is "replaced by" the new c. Liquor Liability provision in CU 47 — Language in CU 47 is unambiguous and precludes coverage under the CUP —

Georgetown Chicken Coop, LLC; Anthony Crish; Chad Givens; Cock-A-Doodle-Doo, LLC; Preston Restaurant "A", LLC; and Robert Gauthier v. Grange Insurance Company (2023-SC-0522-DG); On review from Court of Appeals; Opinion by Justice Goodwine, *affirming*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This matter comes before the Court for review of the Court of Appeals' opinion holding the Fayette Circuit Court erred in finding an ambiguity in the commercial umbrella policy. Based on our review, we affirm the Court of Appeals.

I. BACKGROUND

This is an insurance coverage action that arises out of dram shop claims against two parties insured by Grange Insurance Company ("Grange"). The underlying claims arose out of a motor vehicle accident that resulted in the deaths of five members of the Abbas family whose estates are the tort plaintiffs in the underlying action and Joey Lee Bailey ("Bailey") who was the overserved driver.

On the evening of January 5, 2019, Bailey was a customer of the Appellants at their restaurant known as "Roosters" in Georgetown. At Roosters, Bailey was served food and alcohol. Bailey left Roosters and visited "Horseshoes," which is a restaurant, bar, and entertainment venue in Lexington. During the early morning hours of January 6, 2019, Bailey left Horseshoes and drove southbound in the northbound lanes of Interstate 75 in Fayette County and collided with a vehicle occupied by the Abbas family, killing Bailey and all five Abbas family occupants.

At the time of the accident, the Roosters Appellants were insured by Grange pursuant to a businessowners policy ("BOP") and a commercial umbrella policy ("CUP"). It is undisputed that the BOP provides for a $1,000,000 limit of liability for bodily injury and property damage arising out of the selling, serving, or furnishing of alcoholic beverages.

The first paragraph of the CUP states: "Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered." The body of the policy contains Section I – Coverages, Subsection 2. Exclusions, with subsection c. Liquor Liability. This provision generally excludes liquor liability, but it makes an exception for liability arising from the business of the insured of serving alcohol. The language then indicates the umbrella coverage will follow the primary policy, "unless otherwise directed by this insurance." Endorsement CU 47 at the end of the policy states that it replaces the liquor liability exclusion.

On April 9, 2019, the personal representative of the Abbas family filed suit against Georgetown Chicken Coop, LLC, (GCC) and other defendants. On January 5, 2021, the Abbas family filed its fourth amended complaint adding Preston "A" Restaurant, LLC; Cock-A-Doodle Doo, LLC; Robert Gauither; Anthony Crish; and Chad Givens, (collectively "Roosters") as defendants. The fourth amended complaint also included a claim for negligent training against Roosters.

On May 3, 2021, Roosters filed a third-party petition for declaratory judgment against Grange for a declaration of coverage under the BOP and the CUP. Roosters argued the BOP provided liquor liability coverage, which Grange did not dispute. Roosters also argued CU 47 in the CUP modified, but did not replace, exclusion c. Alternatively, Roosters argued CU 47 was ambiguous, and the ambiguity should be construed in its favor. Grange responded in opposition.

The circuit court heard argument from the parties and orally found CU 47 was ambiguous. On December 21, 2021, the circuit court entered an order granting summary judgment in favor of Roosters. The circuit court found CU 47 was ambiguous when it looked at the BOP, the CUP, and CU 47 in totality and specifically the relationship between the CUP and CU 47. Though the BOP and the CUP are two separate policies, the circuit court reasoned that the purpose of an umbrella policy is to supplement the underlying policy when the underlying policy is exhausted. The written judgment does not identify any specific ambiguous language.

Grange appealed as a matter of right to the Court of Appeals, which held CU 47 was unambiguous. The court reasoned, "The word replace has an unambiguous meaning. The CU 47 endorsement replaced the entirety of Section I 2 c of the policy, intentionally deleting the paragraphs which otherwise would have provided coverage." *Grange Ins. Co. v. Georgetown Chicken Coop, LLC*, 2022-CA-0101-MR, 2023 WL 6932590, at *4 (Ky. App. Oct. 20, 2023). Thus, the court reversed the judgment and remanded for the circuit court to direct a declaratory judgment that the CUP does not provide coverage.

Roosters moved for discretionary review, which this Court granted.

II. STANDARD OF REVIEW

"It is well settled that the proper interpretation of insurance contracts generally is a matter of law to be decided by a court; and, thus, an appellate court uses a de novo, not a deferential, standard of review." *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 73 (Ky. 2010). We also review a circuit court's decision to grant summary judgment under the de novo standard. *Id.*

III. ANALYSIS

On appeal, Roosters argues the circuit court was correct in finding there was ambiguity in CU 47 and that Roosters was entitled to summary judgment providing coverage under the CUP. Additionally, Roosters raises a new, unpreserved argument that CU 47 contains another ambiguity that would create coverage for negligent supervision claims for the same incident.

First, CU 47 is unambiguous, and Roosters is not entitled to coverage under the CUP. Our longstanding precedent on the interpretation of insurance policies is clear. This Court has long held that unambiguous contracts are enforced as written. *Kentucky State Univ. v. Darwin Nat'l Assurance Co.*, 677 S.W.3d 294, 300 (Ky. 2023).

> "In the absence of ambiguity, a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 687 (Ky. 2012) (quoting *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003)); *see also* KRS[1] 304.14-360. "[W]ords which have no technical meaning in law, must be interpreted in light of the usage and understanding of the common man." *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007) (citation omitted). When "the terms of an insurance policy are clear and unambiguous, the policy will be enforced as written." *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 873 (Ky. 2002).
>
> If no ambiguity exists in the contract, a reviewing court must determine the intention of the parties "from the four corners of that instrument." *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010) (citation omitted). Ambiguity is generally resolved in favor of the insured. *Thomas v. State Farm Fire and Cas. Co.*, 626 S.W.3d 504, 507 (Ky. 2021). Pertinent to the Policy at bar, "'[c]ondition precedent' is a legal term of art with a clear meaning: 'An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises.'" *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 540 S.W.3d 770, 785 (Ky. 2017) (citations omitted).

Id. at 300-301.

[1] Kentucky Revised Statute.

Additionally, "Insurance contract law also dictates that when an endorsement deletes language from a policy, a court must not consider the deleted language in its interpretation of the remaining agreement." *Valassis Commc'ns, Inc. v. Aetna Cas. & Sur. Co.*, 97 F.3d 870, 873 (6th Cir. 1996). In *Liberty Mut. Ins. Co. v. Blandford*, CIV.A. 3:98CV-6-S, 1999 WL 33756670 (W.D. Ky. Sept. 1, 1999), the Western District of Kentucky followed *Valassis* in holding: "There was nothing in the endorsement to suggest that only a portion of the Vacancy Loss Condition was replaced. Therefore, the Vacancy Loss Condition, consisting of both Terms and Provisions, was replaced in its entirety." *Id.* at *3.

As the Court of Appeals points out, there is no Kentucky case law addressing the conflict between primary coverage and an exclusion in an umbrella policy, but we need none so specific. Though the BOP and the CUP are related, they are separate policies, so we need only look to the four corners of the CUP for our analysis. The CUP must be enforced as written, otherwise Roosters "would be extended insurance coverage beyond the bargained-for terms." *Darwin Nat'l*, 677 S.W.3d at 301.

The first two sentences of the CUP provide: "Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered." The liquor liability provision in the primary policy is located in Section I – Coverages, Coverage A – Bodily Injury and Property Damage Liability, Subsection 2. Exclusions c. Liquor Liability. It provides:

> **2. Exclusions.**
>
> This insurance does not apply to:
>
> . . .
>
> **c. Liquor Liability**
>
> "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
>
> (1) Causing or contributing to the intoxication of any person;
>
> (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
>
> (3) Any statute, ordinance or regulation relating to the sale gift, distribution or use of alcoholic beverages.
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:
>
> > (a) The supervision, hiring, employment training or monitoring of others by that insured; or
> >
> > (b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;
>
> if the occurrence which caused the "bodily injury" or "property damage" involved that which is described in Paragraph (1), (2) or (3) above.
>
> However, this exclusion applies only if you are in the business of manufacturing, distribution, selling serving or furnishing alcoholic beverages. For the purposes of this exclusion permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling serving or furnishing alcoholic beverages.
>
> This exclusion does not apply to the extent that valid "underlying insurance" for the liquor liability risks described above exists or would have existed but for the exhaustion of underlying limits for "bodily injury" and "property damage". To the extent this exclusion does not apply, the insurance provided under this Coverage Part for liquor liability risks described above will follow the same provisions, exclusions and limitations that are contained in the applicable "underlying insurance", unless otherwise directed by this insurance.

Endorsement CU 47 explicitly states that it replaces the liquor liability exclusion from the primary portion of the policy:

> **Endorsement CU 47**
> **LIQUOR LIABILITY EXCLUSION**

This Endorsement Changes The Policy. Please Read It Carefully.

This Endorsement modifies insurance provided under the following:

COMMERCIAL LIABILITY UMBRELLA PART

Exclusion c. of Paragraph **2. Exclusions of SECTION I-Coverage A - Bodily Injury and Property Damage Liability** is replaced by the following:

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the **s**ale, gift, distribution or use or alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

Roosters argues that because CU 47 does not explicitly state that it replaces the entirety of exclusion c., CU 47 only replaces the exclusions without effecting the last paragraph that contains exceptions. However, CU 47 plainly states that exclusion c. in the original policy form is "replaced by" the new c. Liquor Liability provision in CU 47. There is nothing left to compare. To accept Roosters' argument would require this Court to ignore the plain terms of CU 47 and engage in judicial editing. Doing so would render the endorsement meaningless. Thus, we hold the language of CU 47 is unambiguous and precludes coverage under the CUP.

Second, we decline to address Roosters' unpreserved argument that CU 47 would create coverage for a negligent supervision claim. In the last paragraph of the Appellants' Brief, Roosters argues that c. Liquor Liability specifically excludes claims for negligent supervision, hiring, training, and monitoring. CU 47 does not contain language regarding negligent supervision, so if it replaces c. Liquor Liability in its entirety, it creates coverage for such claims. This argument is unpreserved, and Roosters does not request review for palpable error. "We will not search the record to construct [the Appellants'] argument for [them], nor will we go on a fishing expedition to find support for [their] underdeveloped arguments." *Curty v. Norton Healthcare, Inc.*, 561 S.W.3d 374, 379 (Ky. App. 2018).

IV. CONCLUSION

For the foregoing reasons, we affirm the opinion of the Court of Appeals.

Lambert, C.J.; Bisig, Conley, Goodwine, Keller, and Nickell, JJ., sitting.

All concur. Thompson, J., not sitting.

WORKERS' COMPENSATION

OFFICIAL DISABILITY GUIDELINES (ODG)

MEDICAL FEE DISPUTE

APPLICATION OF THE ODG TO A REOPENING CLAIM

COMPENSABILITY OF HYDROCODONE UNDER THE ODG

RETROACTIVE APPLICATION OF THE ODG

Official Disability Guidelines (ODG) is a set of evidence-based treatment and disability guidelines recently adopted in Kentucky for use in the treatment of work-related injuries and occupational diseases in workers' compensation claims — Pursuant to ODG, short-acting opioids or narcotics may be considered for the treatment of acute or chronic pain when first-line medications have been attempted without success; however, hydrocodone is not recommended for long-term use due to the lack of evidence supporting its efficacy in long-term pain relief and its associated risks, including dependency and abuse — ODG creates a rebuttable presumption as to whether a treatment is recommended, conditionally recommended, or not recommended for treatment of an injured workers' condition — Worker's Compensation Board (Board) frequently treats recommendations in ODG as comparable to a university evaluator's opinion — When overriding the ODG, written sound medical reasoning supporting deviation is required — Sound medical reasoning may include an explanation that reasonable treatment options have been utilized but failed; a clinical rationale justifying the proposed treatment plan; or any other circumstance precluding recommended or approved treatment options — General Assembly expressly declared that ODG applies to all injuries, not just those that occurred after September 1, 2020, the date of the ODG's regulatory adoption and implementation — Use of a presumption in a workers' compensation medical fee dispute is a remedial change, not a substantive one — ODG does not alter substantive rights of the parties, but rather controls the evidentiary framework within which those rights are adjudicated — In instant action, claimant sustained work-related low back injury on January 18, 1993, while employed with Floyd County Board of Education — In 1995, ALJ awarded benefits for a 50% permanent partial disability and future medical expenses related to the injury — In 2022, employer sought to reopen the claim and submitted a medical fee dispute regarding the compensability of prescriptions for hydrocodone and gabapentin — Claimant was receiving medical treatment from Dr. Garrett, who prescribed hydrocodone — In addition to her back pain diagnosis, claimant has bilateral sciatica and polyneuropathy and neurologic complications from Type II diabetes — Dr. Garrett noted that claimant had been on pain medication since 1993 and projected that claimant would need to remain on the medication for life — Two medical experts testified for employer — Dr. Fadul applied ODG and concluded that, in claimant's case, hydrocodone was not medically reasonable or necessary — Dr. Fadul noted that Dr. Garrett's records did not clearly demonstrate significant pain relief or functional improvement from the ongoing use of hydrocodone and that claimant continued to report high levels of pain despite taking the prescription — Dr. Kakel opined that continued use of hydrocodone was not appropriate for claimant's condition — ALJ found that Dr. Garrett's prescription for gabapentin was compensable, but that her hydrocodone prescription was not compensable — Board and Court of Appeals affirmed — AFFIRMED — The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable — In instant action, employer initiated medical fee dispute; therefore, it had burden of proof — Where the party with the burden of proof was successful before the ALJ, the issue on appeal is whether substantial evidence supported the conclusion — In instant action, substantial evidence supported ALJ's determination that claimant's hydrocodone prescription is non-compensable — Employer submitted opinions from two medical professionals who reviewed claimant's history and evidence in her workers' compensation claim — They applied ODG to claims to reach conclusion that her claims were non-compensable — While hydrocodone may have been a reasonable and necessary treatment for claimant 30 years ago, it is no longer recommended to treat claimant's impairment on a long-term basis —

Judy Howell v. Floyd County Board of Education and Dr. Cassandra Garrett; Hon. Chris Davis, ALJ; and Workers' Compensation Board (2024-SC-0504-WC) and *Floyd County Board of Education v. Judy Howell and Dr. Cassandra Garrett; Hon. Chris Davis, ALJ; and Workers' Compensation Board* (2025-SC-0022-WC); On appeal from Court of Appeals; Opinion by Justice Bisig, *affirming*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This workers' compensation appeal involves Kentucky's adoption and application of the Official Disability Guidelines (ODG), a primary standard of reference for healthcare providers in determining which treatments are medically necessary for workers' compensation injuries. Judy Howell was injured while working for the Floyd County Board of Education in 1993, and ultimately awarded workers' compensation benefits, including future medical benefits. After nearly thirty years of using Hydrocodone, as prescribed by her treating physician, Floyd County initiated a medical fee dispute to contest the compensability of the Hydrocodone. Pursuant to the ODG, Hydrocodone is not recommended for long-term use. Despite Howell's presentation of evidence to support her continued use of Hydrocodone, an ALJ determined the prescription was non-compensable. The Board agreed, as did the Court of Appeals, albeit for different reasons once it assessed Howell's constitutional claims. After review, we uphold the ALJ's decision deeming that the Hydrocodone is non-compensable for treatment of Howell's work-related injury.

FACTS AND PROCEDURAL HISTORY

Judy Howell sustained a work-related low back injury on January 18, 1993, while employed by the Floyd County Board of Education. On July 27, 1995, an Administrative Law Judge (ALJ) awarded benefits for a 50% permanent partial disability and future medical expenses related to the injury. In 2022, the Floyd County Board of Education sought to reopen the claim and submitted a medical fee dispute regarding the compensability of prescriptions for Hydrocodone and Gabapentin.[1]

[1] The medical fee dispute also contested the compensability for another prescription for Duloxetine, but the testimony quicky revealed that the prescription was discontinued and thus no longer a cause for dispute.

Howell provided testimony during a hearing on April 25, 2023, and confirmed she was receiving medical treatment from Dr. Cassandra Garrett. Howell sees Dr. Garrett every three months and is prescribed Hydrocodone. In addition to her back pain diagnosis, Howell has bilateral sciatica and polyneuropathy and neurologic complications from Type II diabetes. In her treatment plan, Dr. Garrett noted that Howell had been on the pain medication since 1993, and that she projected Howell would need to remain on the medication for life.

Dr. Zaid Fadul, a family medicine and addiction specialist, conducted utilization review on behalf of Floyd County and submitted a medical report. In his report, he applied the Official Disability Guidelines for Treatment of Workers' Compensation (ODG) and concluded that, in Howell's case, Hydrocodone is not medically reasonable or necessary. The ODG is a set of evidence-based treatment and disability guidelines Kentucky has recently adopted for use in the treatment of work-related injuries and occupational diseases in workers' compensation claims. The ODG, developed by MCG Health, were adopted by the Commissioner of the Department of Workers' Compensation pursuant to authority expressly granted by the Legislature in Kentucky Revised Statute (KRS) 342.035. Dr. Fadul explained that, according to the ODG, short-acting opioids or narcotics may be considered for the treatment of acute or chronic pain when first-line medications have been attempted without success. However, Hydrocodone is not recommended for long-term use due to the lack of evidence supporting its efficacy in long-term pain relief and its associated risks, including dependency and abuse.

Additionally, Dr. Fadul noted that Dr. Garrett's records did not clearly demonstrate significant pain relief or functional improvement from the ongoing use of Hydrocodone, and that Howell continued to report high levels of pain despite taking the prescription. As a result, Dr. Fadul concluded that Hydrocodone did not meet ODG recommendations and recommended against continued use.

On the employer's behalf, Dr. Rafid Kakel conducted a comprehensive medical records review. In his report, he opined that the continued use of Hydrocodone is not appropriate for Howell's condition. Dr. Kakel explained that there is a lack of evidence demonstrating its long-term efficacy and significant risks associated with long-term use, including physical dependence, tolerance, and addiction. Further, medical literature indicates that opioids may contribute to cardiac-related fatalities and significantly increase the overall risk of mortality.

On June 17, 2023, an ALJ determined that Dr. Garrett's prescription for Gabapentin is compensable, but her Hydrocodone prescription was not compensable. The ALJ determined that the side effects of long-term use of Hydrocodone and the failure to consider alternative pain control methods rendered continuing the prescription to be unreasonable. However, the ALJ did conclude that Howell would be entitled to a reasonable weaning period if she were going to stop taking the Hydrocodone. Howell filed a petition for reconsideration, specifically requesting findings as to what sections of the ODG apply to her claim, and whether the ALJ considered exceptions to the ODG prior to making his determination. Howell also requested findings as to whether this long-standing treatment would have been considered reasonable and necessary treatment, absent the application of the ODG.[2] The ALJ reissued an Order on July 10, 2023 and reaffirmed his reasoning to deny compensability of the Hydrocodone prescription.

[2] Floyd County also filed a petition for reconsideration, rearguing the merits of the claim that Gabapentin is not reasonable and necessary treatment. The petition also argued that the ODG did not recommend Gabapentin because there is no neuropathic condition documented in Howell's medical records.

The Board affirmed the ALJ, concluding that Dr. Fadul and Dr. Kakel's opinions constitute substantial evidence. The Board acknowledged that perhaps another ALJ may have ruled in a different manner based on these facts, but nevertheless the ALJ is the trier of fact who must determine whether a claimant has sufficiently rebutted the ODG's determination that a treatment option is non-compensable.

The Court of Appeals affirmed the Board and the ALJ. Notably, Howell's arguments included claims regarding the constitutionality of the application of the ODG to workers' compensation claims, contesting whether its application complies with the mandates of due process and equal protection. Neither the Board nor the ALJ are empowered to decide constitutional claims. *Blue Diamond Coal Co. v. Cornett*, 300 Ky. 647, 189 S.W.2d 963 (1945). Therefore, the Court of Appeals was the first tribunal to address these claims.

The appellate court explained that adoption of the ODG effectively altered the burden of proof by creating a new, mandatory presumption of non-compensability regarding certain prescriptions, whereas, before the implementation of the ODG, Howell's doctor was free to exercise medical judgment as to which prescriptions were needed so long as those prescriptions were medically "reasonable and necessary." According to the Court of Appeals, prior to adoption of the ODG, Floyd County would have needed to disprove the reasonableness and necessity of the prescription whereas now, it is presumed unreasonable and Howell must rebut it by proving its reasonableness and necessity. Because this type of burden shifting constitutes a substantive change, the statute allowing the Commissioner to adopt the ODG cannot apply retroactively to Howell's claim.

However, despite the court's reasoning that applying the ODG's presumption to Howell's claim effectively "reduced" the amount awarded to her in 1995, i.e., the award entitling her to future medical expenses related to the work injury, and therefore infringing upon her vested right to continued medical treatment, the Court of Appeals concluded there was no error. Irrespective of the presumption imposed by the ODG, the ALJ ultimately weighed substantial evidence presented by both sides of this medical fee dispute and Howell's evidence came up short. As such, the Court of Appeals affirmed the Board and the ALJ.

Howell now appeals to this Court.

ANALYSIS

"The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable." *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009) (citing *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky. 1993)). Here, Floyd County initiated this medical fee dispute contesting the compensability of Hydrocodone, and therefore Floyd County bears the burden of proof. As explained in *Crawford*, the party seeking reopening bears the burden of proving the treatment is unreasonable or unnecessary for the injury's effects. 284 S.W.3d at 140-41. As discussed in further detail below, Howell is then tasked with rebutting Floyd County's evidence.

Where the party with the burden of proof was successful before the ALJ, the issue on appeal is whether substantial evidence supported the conclusion. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). Because Floyd County was successful in proving the non-compensability of Hydrocodone, we must determine whether substantial evidence supports the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. 1984). Substantial evidence is evidence of "substance and relevant consequence" having fitness to induce conviction in the minds of reasonable people. *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265, 270 (Ky. 2018) (quoting *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971)). Therefore, we must determine whether substantial evidence supported the ALJ's determination that Howell's Hydrocodone prescription is non-compensable.

I. The Official Disability Guidelines.

This appeal centers around Kentucky's use of the ODG in assessing the compensability of an injured workers' treatment and prescription medication. KRS 342.035 directs the Commissioner of the Department of Workers' Claims to develop or adopt medical treatment guidelines for use in the treatment of work injuries. On October 22, 2018, the Department announced the selection of the Official Disability Guidelines (ODG) as its treatment guidelines.[3] The purpose of adopting the ODG is to facilitate safe and appropriate treatment of work-related injuries and occupational diseases. As part of this statutory mandate, the Commissioner also promulgated regulations to implement the use of the ODG. 803 KAR 25:260.

[3] According to Floyd County, many states have adopted the ODG, including Tennessee, Indiana and Ohio. The ODG is the most widely used guideline in state workers' compensation systems.

803 KAR 25:260 §1(16) states that "[t]reatment guidelines" are the treatment guidelines developed or adopted by the Commissioner pursuant to KRS 342.035(8)(a), i.e. the ODG. "The treatment guidelines apply to all treatment administered on and after September 1, 2020." 803 KAR 25:260 §5. The regulation explains that

> [t]he employer shall not be responsible for medical treatment designated as "Not Recommended" under the guidelines or not addressed in the treatment guidelines unless it was
> (a) Provided in a medical emergency;
> (b) Authorized by the medical payment obligor; or
> (c) Approved through the dispute resolution process by the administrative law judge.

In this case, according to two medical professionals who utilized the ODG, Hydrocodone is "Not Recommended" to treat Howell's injury. Subsection (2) explains that medical providers contesting treatment deemed "Not Recommended" by the guidelines

> shall articulate in writing sound medical reasoning for the proposed treatment, which may include:
> (a) Documentation that reasonable treatment options allowable in the guidelines have been adequately trialed and failed;
> (b) The clinical rationale that justifies the proposed treatment plan, including criteria that will constitute a clinically meaningful benefit; or
> (c) Any other circumstances that reasonably preclude recommended or approved treatment options.

II. The ODG permissibly creates a rebuttable presumption as to non-compensability of certain prescription medications.

In essence, the ODG creates a rebuttable presumption as to whether a treatment is recommended, conditionally recommended or not recommended for the treatment of an injured workers' condition. The Board explained that it frequently treats the recommendations in the ODG as comparable to a university evaluator's opinion, and cited numerous Board decisions treating the ODG as such. A university evaluator's opinions are governed by KRS 342.315. That statute requires a university evaluator's examination in all occupational disease claims. The opinions of university evaluators are afforded presumptive weight, KRS 342.315(2), and the burden to overcome the findings and opinions of a university evaluator falls upon the opponent of such evidence. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 94 (Ky. 2000). "[T]he opponent of a university evaluator's report may introduce countervailing evidence which will overcome the report." *Id.*

KRS 342.315 creates a rebuttable presumption in favor of the university evaluator's opinion but does not prohibit the fact-finder from rejecting a finding or opinion of a university evaluator. It simply requires the ALJ to specifically state reasons for doing so. KRS 342.315(2).

> To the extent that the university evaluator's testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts the testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption. Stated otherwise, the clinical findings and opinions of the university evaluator constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder.

Magic Coal Co., 19 S.W.3d at 96.

There are parallels between the use of a university evaluator's opinion and a designation from the ODG that a prescription or treatment is not recommended and therefore non-compensable. Like the presumptive weight afforded to a university evaluator's opinion, a "not recommended" designation in the ODG creates a presumption that the prescription or treatment is non-compensable. But an ALJ always has the discretion to reject a university evaluator's opinion where it is determined the presumption has been overcome by some other evidence, and the reasons for doing so are expressly stated in the ALJ's decision. *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890, 890-91 (Ky. 2007). This same rationale is true regarding the presumption created by the ODG because the regulations require that when overriding the ODG, a sound medical opinion supporting such deviation is required. 803 KAR 25:260 §3.

Importantly, this Court has explained that KRS 342.315(2) is properly governed by Kentucky Rule of Evidence 301. As applied to this case, that means that while the ODG's presumption that Howell's Hydrocodone is non-compensable imposes a burden on Howell to present evidence in rebuttal, it "does not shift to [Howell] the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." *Magic Coal Co.*, 19 S.W.3d at 95 (quoting KRE 301).

Therefore, by applying this reasoning to Howell's case, the ODG creates a presumption that may be overcome by the presentation of contrary evidence supporting the long-term use of Hydrocodone. The administrative regulations give explicit instructions as to how a party can overcome the presumption— 803 KAR 25:260 §3 states that "[m]edical providers proposing treatment designated as "Not Recommended" under the guidelines . . . shall articulate in writing sound medical reasoning for the proposed treatment . . . ." This sound medical reasoning may include an explanation that reasonable treatment options have been utilized but failed, a clinical rationale justifying the proposed treatment plan, or any other circumstance precluding recommended or approved treatment options. Floyd County submitted medical evidence, in the form of the opinions of two medical professionals, who reviewed Howell's history and the evidence in her workers' compensation claim. These doctors applied the ODG to Howell's claim to reach their conclusions that the Hydrocodone prescription is non-compensable.

Dr. Fadul opined Hydrocodone is treatment for acute pain and the evidence-based guidelines do not recommend it for long-term use. He noted that, despite the Hydrocodone use, Howell still reported high levels of pain. Dr. Kakel stated his opinion that Hydrocodone is not reasonable or necessary treatment. He emphasized that the ODG do not recommend Hydrocodone as a first-line option, noting evidence shows inconclusive benefit, lack of benefit, or potential harm. In addition, opioids are commonly used for a short-term of less than six weeks. According to the ODG, there are alternatives to opioids that can be used.

Howell presented the medical opinion of Dr. Garrett, who explained her reasoning for prescribing Hydrocodone as well as the long-standing use of the medication. Dr. Garrett also submitted a treatment plan and a statement of exceptions to the ODG Guidelines. Dr. Garrett emphasized Howell's age and the fact that she has been on pain medication for thirty years. Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such proof is not an adequate basis to reverse on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Of course, we must note that Howell is 79 years old and has used the Hydrocodone prescription for approximately thirty years.

In sum, there are three medical reports in the record addressing whether the Hydrocodone is compensable – one report supporting compensability (Dr. Garrett) and two reports supporting non-compensability (Drs. Fadul and Kakel). ALJs are consistently required to weigh conflicting medical evidence when adjudicating workers' compensation claims. KRS 342.285 grants an ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Here, the ALJ deemed the Hydrocodone non-compensable. The Board and Court of Appeals upheld the ALJ's decision. An ALJ's findings of fact are afforded considerable deference and, on appellate review, "will not be set aside unless the evidence compels a contrary finding." *Plumley v. Kroger, Inc.*, 557 S.W.3d 905, 909 (Ky. 2018) (quoting *U.S. Bank Home Mortgage v. Schrecker*, 455 S.W.3d 382, 384 (Ky. 2014)).

Here, Drs. Fadul and Kakel's opinions constitute substantial evidence. While there is conflicting medical evidence in the record, Howell must demonstrate that the evidence was so overwhelming as to compel a favorable finding. *Kroger v. Ligon*, 338 S.W.3d 269, 273 (Ky. 2011). She failed to do so. Therefore, the ALJ did not err in deeming the Hydrocodone non-compensable.

III. KRS 342.035 is applicable to the reopening claim.

Howell argues that the ODG does not apply to her claim because she was injured before the ODG was adopted, and the law in effect on the date of injury controls the outcome of the claim. *Maggard v. Int'l Harvester Co.*, 508 S.W.2d 777, 783 (Ky. 1974). She also asserts that the required use of the ODG takes away her right to receive treatment that she had been receiving for thirty years that provided relief from the effects of her work injury.

Section 20(2) of 2018 Kentucky Acts Chapter 40, the Act now codified in KRS 342.035, which directs the Commissioner to adopt treatment guidelines, provides that KRS 342.035 is

> remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

"[W]hen the General Assembly clearly states legislation is to have retroactive effect or otherwise prescribes its temporal scope or reach, we give effect to the intent of the General Assembly." *Martin v. Warrior Coal LLC*, 617 S.W.3d 391, 396 (Ky. 2021). Thus, based on the Legislature's express declaration, the ODG applies to all injuries, not just those that occurred after September 1, 2020, the date of the ODG's regulatory adoption and implementation.

Howell's argument is essentially that she either had a vested right in receiving certain treatment, i.e., Hydrocodone, or that she had a vested right to expect that the laws generally applicable to medical fee disputes would not change. But Howell's award, in 1995, for her 1993 work injury created no such right. As the Court of Appeals explained, this type of assumption is a type of expectant right. Due process does not apply to mere expectant rights. *See* BLACK'S LAW DICTIONARY 1323 (7th ed. 1999) (defining an expectant right as "a right that depends on the continued existence of present conditions until some future event occurs; a contingent right.").

Medical treatments are inherently fluid, meaning the necessity of a particular treatment may change over time based on change in a patient's conditions, new clinical evidence or changes in treatment guidelines. While Hydrocodone may have been a reasonable and necessary treatment for Howell thirty years ago, medicine has evolved and now that medication is no longer recommended to treat Howell's impairment on a long-term basis. No person can possibly have a reasonable expectation that any particular drug previously deemed compensable will always be deemed reasonable or necessary, or even remain available.

Another facet of Howell's argument is that the presumption created by the ODG effectively imposes a new duty or obligation upon her and is therefore an improper retrospective law. The Court of Appeals explained that, in essence, Howell's argument is that the adoption of the ODG, and its resulting imposition of a presumption of non-compensability for Hydrocodone (that was previously deemed reasonable and necessary for the treatment of her work injury) *diminished* her award.

The Court of Appeals agreed with this contention, reasoning that when Howell was awarded continuing medical benefits in 1995, she was entitled to have the reasonableness and necessity of any prospective work-injury related medical treatment assessed from the standpoint of the law as it existed; and at that time, the operative statutes granted Howell her right to continuing medical benefits. The Court of Appeals concluded that by promulgating 803 KAR 25:260 and 25:270, the Commissioner effectively altered that burden of proof by creating a new, mandatory presumption of non-compensability regarding certain medical treatments and prescriptions – a presumption not based on any evidence of record, but rather solely upon whatever the ODG designates to be "not recommended."

According to the appellate court, before the regulatory adoption of the ODG, there was no limit imposed on Howell's doctor's exercise of medical judgment as to which prescriptions were needed by Howell, except to ensure to implement only prescriptions that were medically reasonable and necessary – an element Howell's employer had the initial burden to disprove. Now, because the ODG does not recommend any form of pain medication for Howell's long-term chronic back pain, the new presumption imposed by the regulatory adoption of the ODG places the initial evidentiary burden, i.e., proving the reasonableness and necessity of her Hydrocodone prescription, on Howell. As such, the Court of Appeals concluded that applying the ODG was a substantive change that would reduce the amount of indemnity ordered or awarded to her, and therefore infringe upon her vested right to continued medical treatment. While the Court of Appeals concluded the presumption was unconstitutionally applied to Howell, it nonetheless upheld the ALJ's determination that the Hydrocodone was non-compensable, given the substantial evidence to support that conclusion.

We disagree with the Court of Appeals. The use of a presumption in a workers' compensation medical fee dispute is a remedial change, not a substantive one. The adoption of the ODG does not alter the substantive rights of parties, but rather controls the evidentiary framework within which those rights are adjudicated. Procedural amendments are "[t]hose amendments which apply to the in-court procedures and remedies which are used in handling pending litigation." *Rodgers v. Commonwealth*, 285 S.W.3d 740, 751 (Ky. 2009) (quoting *Commonwealth of Ky. Dep't of Agric. v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000)). A presumption, like the one created by the ODG in this case, simply alters the procedures for handling the workers' compensation claim.

This Court delineated a two-part test for identifying a remedial statute in *Kentucky Ins. Guar. Ass'n. v. Jeffers ex rel Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000):

> (1) Is the amendment limited to the furtherance, facilitation, improvement, etc., of an existing remedy; and (2) If so, does it impair a vested right.

Nothing in the adoption of the ODG changes Howell's right to continued treatment for her work-related injury, as ordered by the ALJ in 1995. At that time, Howell was awarded future medical expenses related to her work injury. Nothing in the ODG changes that award, as Howell is still entitled to medical expenses for the reasonable and necessary treatment of her work injury. The fact that Howell was initially prescribed Hydrocodone does not entitle her to perpetual funding of that medication without any reconsideration of its medical necessity under updated clinical standards. As explained in the regulations, the "purpose of the treatment guidelines is to facilitate safe and appropriate treatment of work-related injuries and occupational diseases." 803 KAR 25:260 §2(1). It would be illogical, unreasonable, and most importantly unsafe, if the guidelines governing treatment and compensability of workers' compensation claims were not updated in thirty years.

The burden of proof in showing the non-compensability of the Hydrocodone still remains with the employer, who obtained doctors to conduct a review of Howell's medical records and applied the ODG to conclude that Hydrocodone was not recommended for this type of long-term use. Only if an employer is successful in showing a treatment is not recommended does a claimant have to counter that showing with medical evidence from another physician.

The ODG's designation of certain treatments as not recommended does not categorically deny claimants access to those treatments. It merely requires a treating physical to provide sound medical reasoning for the continued use of certain medications. Further, there may be other portions of the ODG that create presumptions in favor of workers' compensation claimants, i.e., that a certain treatment or prescription they are utilizing is recommended and therefore compensable. Regardless of the burdens and presumptions, ultimately the ALJ is given the discretion to weigh the evidence and reach a determination. The ALJ could have agreed with Dr. Garrett that, in Howell's case, the continued used of Hydrocodone was appropriate. That is precisely the role of an ALJ as a trier of fact.

The Court of Appeals also erred in equating medical benefits to income benefits by concluding that any alteration in the process by which medical benefits are reviewed constitutes an unconstitutional reduction in indemnity. Importantly, there are three types of workers' compensation benefits: income benefits, medical expenses, and vocational rehabilitation. KRS 342.730, 342.020, and 342.710. The adoption of the ODG affected the type of medical treatment deemed compensable but did not alter the amount of indemnity benefits or duration of medical benefits. Medical benefits are subject to ongoing review to ensure the treatment is necessary and reasonable. In contrast, income benefits compensate an injured worker for lost wages and are subject to statutory guidelines governing their calculation and duration. These are two distinct benefits.

We reiterate that medical advancements, updated clinical guidelines, and new treatment methods require a process that can evolve with the fast and consistently evolving medical field. If medical and physical conditions were static, KRS 342.125, the reopening statute, would be illusory. As stated in *Messer v. Drees*, "[t]ime often tells more about medical cases than the greatest of experts are able to judge in advance." 382 S.W.2d 209, 212 (Ky. 1964). Howell's failure to prove that the continued use of Hydrocodone was medically necessary and reasonable did not reduce any amount of indemnity ordered or awarded. Howell's medical benefits claim remains in existence, and therefore the adoption of the ODG does not impair a vested right. As such, the statutory amendment allowing the Commissioner to adopt treatment guidelines is remedial, not substantive, and is not unconstitutional as applied to Howell's claim.

IV. The application of the Official Disability Guidelines is not unconstitutional.

Next, Howell argues the use of the ODG violates due process and equal protection. We disagree. Generally, "acts of the legislature carry a strong presumption of constitutionality." *Wynn v. Ibold Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). "Workers' compensation statutes concern matters of social and economic policy." *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 466 (Ky. 2011) (citing *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 42 (Ky. 2009)). Therefore, this Court will uphold workers' compensation legislation "so long as it rationally relates to a legitimate state objective." *Cates v. Kroger*, 627 S.W.3d 864, 870 (Ky. 2021).

Before the Court of Appeals, Howell argued that the Legislature had no authority to delegate medical decision-making for injured workers to the ODG. Howell appears to abandon this argument and, before this Court, has made general assertions that use of the ODG violates due process and equal protection. Howell focuses on the fact that claimants can only access the ODG by purchasing a subscription to see what rules govern their claim.[4]

[4] Floyd County argues that Howell has raised this payment argument for the first time in this Court. We note that the ALJ and Board have no authority to consider constitutional claims. While it does not appear that Howell presented this precise argument to the Court of Appeals, she generally asserted equal protection and due process claims. For the sake of completeness, we nonetheless address her argument.

Due process requires that affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citation and quotation omitted). Specifically, in an administrative setting, this encompasses "a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the administrative action." *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969). Howell has received all procedures she is entitled to under these guarantees of due process.

We note that the statutory adoption of external guidelines is not unprecedented, nor is it per se constitutionally problematic. In determining workers' compensation benefit awards, the Legislature requires benefits be based on the percentage of whole-body impairment as determined by the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Like the ODG, this statutory framework requires physicians and attorneys to access or purchase the AMA Guides to effectively participate in workers' compensation proceedings.[5] Floyd County asserts—and Howell does not dispute—that all Department of Workers' Claims staff may share relevant sections with injured workers upon request, and that claimants may contact specialists at the DWC with questions or complaints about medical treatment denials. Those specialists are authorized to provide pertinent sections of the ODG by email or print. Further, all ALJs have access to the ODG. Additionally, we note that Howell attached portions of the ODG to pleadings in the administrative record, demonstrating that she clearly has access to the ODG and thus was not prejudiced in any way by lack of ODG access or payment of any subscription fees while adjudicating her claim.[6]

[5] Floyd County asserts that medical journals, OSHA regulations, legal research services and legal treatises frequently require payment for full access, yet they are regularly relied upon in courts without constitutional issues.

[6] Howell offers no evidence the subscription fees are so substantial as to interfere with her ability to pursue her claim. In any event, and as noted above, the Department provides ODGs to claimants upon request.

Howell's equal protection claim is similarly unconvincing. The 14th Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. Because workers' compensation statutes concern matters of social and economic policy, the statutes must be rationally related to a legitimate state interest. *Lodestar Energy, Inc.*, 302 S.W.3d at 43. This Court presumes that legislative acts are constitutional. *Id.*

Howell has not shown that she was treated differently than any other workers' compensation claimant. The statute explicitly permitting the adoption of the ODG applies equally to all workers' compensation claimants. The fact that the ODG requires a subscription payment does not change its application. As noted above, if workers' compensation claimants are unable to pay for access, the Department of Workers' Claims will provide access to the relevant portions of the ODG via email or print. Further, Howell demonstrated that she has access to the ODG, and therefore cannot assert any injury stemming from the required purchased of access to the ODG.

Further, the ODG applies uniformly to all workers' compensation claimants and does not create any classifications that would trigger an equal protection violation. Howell asserts that it treats claimants that can pay for access to the ODG differently than claimants who cannot afford access. But, as addressed above, she did have access to the ODG, as demonstrated by her attachment of portions of the ODG in the workers' compensation record below. Therefore, Howell has not demonstrated any cognizable injury from an equal protection standpoint.

CONCLUSION

For the foregoing reasons, we affirm the Court of Appeals, albeit for different reasons, and uphold the ALJ's determination that Howell's Hydrocodone prescription is non-compensable.

All sitting. Conley, Goodwine, Keller, Nickell, and Thompson, JJ., concur. Lambert, C.J., concurs in result only.

ATTORNEYS

Public reprimand —

In re: Darren Craig Lamb (2025-SC-0039-KB); In Supreme Court; Opinion and Order entered 9/18/2025. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This case is before the Court upon the Office of Bar Counsel's (OBC) Motion for Reciprocal Discipline pursuant to Supreme Court Rule (SCR) 3.435. Darren Craig Lamb has been publicly censured by the Supreme Court of Tennessee. His bar number in Kentucky is 99443, and his listed address is 2655 Butterworth Road, Murray, KY 42071. In February 2025, this Court issued a show cause order to Lamb, requiring him to file a response within twenty days of receiving said order and explaining why reciprocal discipline should not be imposed. Lamb has not responded. SCR 3.435(4) requires reciprocal discipline be imposed unless the attorney can demonstrate either lack of jurisdiction or fraud in the out-of-state proceeding, or the misconduct warrants substantially different punishment in Kentucky. Lamb having failed to do either, OBC's motion is granted.

"SCR 3.435 applies to those situations where members of the KBA have been sanctioned for ethical violations in other states." *Kentucky Bar Ass'n v. Calloway*, 224 S.W.3d 585, 586 (Ky. 2007). "[T]he rule requires us to recognize that a final adjudication of misconduct in another jurisdiction establishes conclusively the misconduct for purposes of a disciplinary proceeding in Kentucky." *Id.*

On January 8, 2025, the Board of Professional Responsibility of the Supreme Court of Tennessee imposed a public censure upon Lamb for violations of Rules of Professional Conduct 4.1 (truthfulness in statements to others), 8.4(b) (criminal conduct), 8.4(c) (dishonesty), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(g) (violation of a court order). The underlying facts are that a former romantic partner of Lamb ended their relationship and obtained a temporary order of protection from him. Lamb repeatedly made contact with the complainant despite the protective order. In one instance, Lamb downloaded a civil warrant form from the General Sessions Court (a court in Tennessee analogous to our District Court) and posted it to the complainant's door. Lamb filled out the civil warrant form, including the portion reserved for the court clerk and listing an initial court hearing date, to give the false impression that he had filed suit against the complainant for repayment of a personal loan. Lamb was then charged for harassment, stalking, and contempt.

He pleaded no contest and was granted judicial diversion.

Tennessee's rule 4.1 has its counterpart in SCR 3.130(4.1)(a).[1] This rule is applicable as Lamb, in posting the false civil warrant, made it appear as if he was representing himself in a civil matter against the complainant. Tennessee's 8.4(b) and (c) are mirrored in SCR 3.130(8.4)(b)[2] and (c).[3] These rules are applicable as Lamb pleaded no contest to several criminal charges including harassment, stalking, and contempt. A plea of no contest is the equivalent of a conviction under our Rules. *Kentucky Bar Ass'n v. Taylor*, 549 S.W.2d 508, 509 n.1 (Ky. 1976). There is no counterpart in Kentucky to Tennessee's rule 8.4(d). Finally, OBC contends the counterpart to Tennessee's rule 8.4(g) is SCR 3.130(3.4)(c).[4]

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[1] "In the course of representing a client a lawyer: (a) shall not knowingly make a false statement of material fact or law to a third person[.]"

[2] It is professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]"

[3] It is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"

[4] "A lawyer shall not: knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists[.]"

We are not so sure that is the appropriate rule in this context. SCR 3.130(3.4)(c) is oriented to trial conduct. Despite this, the rule has been used to justify discipline for non-trial conduct. *Kentucky Bar Ass'n v. Moore*, 499 S.W.3d 280, 281-82 (Ky. 2016) (sustaining violation for failure to comply with KYLAP conditions); *Kentucky Bar Ass'n v. James*, 575 S.W.3d 687, 692 (Ky. 2019) (sustaining violation for failure to comply with provisions of reinstatement to the practice of law in Indiana). Typically, however, violations of protective orders are criminal offenses. KRS 403.763. Thus, violations of protective orders are better treated under our rules as violations of SCR 3.130(8.4)(b). *Kentucky Bar Ass'n v. Colston*, 54 S.W.3d 158, 158-59 (Ky. 2001) (public reprimand and suspended six-month probation for convictions of sending harassing communications and violation of a protective order);[5] *see also Kentucky Bar Ass'n v. Davis*, 819 S.W.2d 317 (Ky. 1991) (public reprimand for lawyer convicted of Class B misdemeanor of sending harassing communications).

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[5] *Colston* is the only case we can find imposing discipline specifically for violation of a protective order.

Given Lamb's failure to respond to our show cause order, and based on *Colston* and *Davis*, we conclude public reprimand is a suitable discipline in this case.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Darren Craig Lamb is adjudicated guilty of unprofessional conduct based on the facts set out above.

2. Darren Craig Lamb is Publicly Reprimanded for his conduct.

3. In accordance with SCR 3.450, Darren Craig Lamb shall pay all costs associated with these disciplinary proceedings, for which execution may issue from this Court upon finality of this Order.

All sitting. All concur.

ENTERED: September 18, 2025

CRIMINAL LAW

SEARCH AND SEIZURE

NO-KNOCK WARRANTS UNDER KRS 455.180

LOCAL GOVERNMENT'S ORDINANCE ON NO-KNOCK WARRANTS

GOVERNMENT

SB 4, which was signed by Governor on April 9, 2021, is now reflected in KRS 455.180, KRE 410A, and KRS 523.010(1)(c) — KRS 455.180 generally establishes that no-knock warrants may only be issued upon clear and convincing evidence that the person who occupies the residence is alleged to have committed a crime that would qualify him as a violent offender if convicted, or has previously committed some kind of violent crime — There must also be clear and convincing evidence there is a danger to life or destruction of evidence — KRS 455.180 requires such warrants to be approved by a superior officer of the police officer seeking the warrant and that the Commonwealth's attorney or the county attorney has been consulted — Such warrants can only be executed between 6 a.m. and 10 p.m. unless there is clear and convincing evidence of exigent circumstances — Failure to abide by these requirements results in the inadmissibility of the evidence found as a result of execution of an improper no-knock warrant, KRE 410A — Further, an officer who perjures himself in an application for a no-knock warrant is subjected to criminal charges — On June 24, 2021, mayor of Lexington signed Ordinance No. 056-2021, which states, in part, that no officer of the Lexington-Fayette Urban County Government (LFUCG) Department of Police shall seek or execute no-knock warrants at any location within Lexington-Fayette County — Fraternal Order of Police, Bluegrass Lodge #4 (FOP) challenged this ordinance in Fayette Circuit Court — Trial court found no express or implied conflict between ordinance and SB 4 — Court of Appeals reversed without holding there is a conflict and remanded for further consideration — LFUCG appealed — REVERSED — At oral argument, LFUCG conceded that an officer who seeks a no-knock warrant pursuant to KRS 455.180 will be in violation of the ordinance — Statute and ordinance conflict — KRS 455.180 prevails and ordinance is null, void, and of no effect — Kentucky Supreme Court also noted that, with respect to the judiciary's role in issuing no-knock warrants, ordinance is an indirect infringement upon the judiciary's jurisdiction —

Lexington-Fayette Urban County Government v. Fraternal Order of Police, Bluegrass Lodge #4 (2023-SC-0445-DG); On review from Court of Appeals; Opinion by Justice Conley, *reversing*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This case is before the Court upon discretionary review of the Court of Appeals' holding that Lexington-Fayette Urban County Government's (LFUCG) Ordinance No. 056-2021 might, but might not conflict with the provisions of SB 4, passed by the General Assembly, and now reflected in KRS[1] 455.180, KRE[2] 410A, and KRS 523.010(1)(c).[3] The trial court held the two laws were not in conflict. Upon review, we conclude the ordinance does conflict with the statute. As LFUCG conceded at oral argument, a Lexington Police Department (LPD) officer seeking a "no-knock warrant" pursuant to the statute would necessarily be in violation of the ordinance prohibiting members of the LPD from seeking no-knock warrants. This is a conflict. The statute prevails and the ordinance is null, void, and of no effect.

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[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Evidence.

[3] Several legal questions regarding collective bargaining were also presented by this appeal. Our ruling renders these questions moot and we decline to address them.

I. Facts and Procedural Posture

SB 4 was signed by Governor Beshear on April 9, 2021. It created or amended several different sections of the laws of the Commonwealth; most notably, KRS 455.180. That statute generally establishes that no-knock warrants may only be issued upon clear and convincing evidence that the person who occupies the residence is alleged to have committed a crime that would qualify him as a violent offender if convicted, or has previously committed some kind of violent crime. KRS 455.180(1)(a). There must also be clear and convincing evidence there is a danger to life or destruction of evidence. *Id.* at (1)(b). It requires such warrants to be approved by a superior officer of the police officer seeking the warrant and that the Commonwealth's Attorney or the County Attorney has been consulted. *Id.* at (2) and (3). Finally, it authorizes such warrants only to be executed between 6 a.m. and 10 p.m. unless there is clear and convincing evidence of exigent circumstances. *Id.* at (5). Not only does failure to abide by these requirements result in the inadmissibility of evidence found as a result of execution of an improper no-knock warrant, KRE 410A, but an officer who perjures himself in an application for a no-knock warrant is subject to criminal charges. KRS 523.020(1)(c).

On June 24, 2021, the Mayor of Lexington signed Ordinance No. 056-2021, which states in pertinent part: "No police officer of the Lexington-Fayette Urban County Government Department of Police shall seek or execute no-knock warrant [sic] at any location within Lexington-Fayette County." The Fraternal Order of Police, Bluegrass Lodge #4 (FOP) challenged this ordinance in Fayette Circuit Court. First, the FOP argued the ordinance conflicted with statutory law. Also brought before the trial court were several questions regarding collective bargaining and the duty of LFUCG to collectively bargain with the FOP prior to adopting the ordinance.

The trial court held "there is no express or implied conflict between the No-Knock Ordinance and SB 4."

> The plain language of SB 4 does not expressly prohibit a ban on no-knock warrants. SB 4 merely provides that *if* a court is going to issue a no-knock warrant, it must first meet certain preconditions. In other words, there is nothing in SB 4 that requires the use of no-knock warrants in any circumstance. Accordingly, there is no express conflict.

On appeal, the Court of Appeals seemingly disagreed with the trial court's analysis, but its conclusion was bound up within the broader context of the collective bargaining issues. Accordingly, the Court of Appeals reversed the trial court without holding there is a conflict. Instead, it remanded for consideration of "further pleadings and proof[.]"

In its briefing before this Court, the FOP argues "[t]he No-Knock Ordinance stands in direct conflict with Senate Bill 4; it imposes a complete ban on no-knock warrants, regardless of the clear, statutory ratification of these important safety mechanisms." It further argues SB 4 constitutes a comprehensive scheme of legislation and, therefore, the ordinance is also preempted by SB 4. LFUCG argues "there is no conflict between SB 4 and the Ordinance, either in form or in substance." It specifically alleges "compliance with both is not impossible" because SB 4 is directed to judges and the conditions necessary to be met before a judge may sign and issue a no-knock warrant, whilst the ordinance is only directed at LPD officers and prohibiting them from ever seeking a no-knock warrant. According to LFUCG, "complying with the Ordinance by not seeking a no-knock warrant in the first place ensures there can be no violation of the state statute." LFUCG's counsel at oral argument, however, conceded that an LPD officer who seeks a no-knock warrant pursuant to the statute would necessarily be in violation of the ordinance. Therefore, its argument is not so clear cut as its briefing portends.

II. Analysis

The question we resolve today is nothing more than an interpretation of statutory law and a local ordinance; both questions are reviewed *de novo*. *Normandy Farm, LLC v. Kenneth McPeek Racing Stable, Inc.*, 701 S.W.3d 129, 135 (Ky. 2024) ("Statutory construction also presents a *de novo* question of law."); *Louisville Historical League, Inc. v. Louisville/Jefferson Cnty. Metro Gov.*, 709 S.W.3d 213, 230 (Ky. 2025) ("The interpretation of ordinances presents a *de novo* question of law.").

A perusal of SB 4 demonstrates the General Assembly considered the issue of no-knock warrants seriously and in-depth. SB 4 erects significant guardrails around the issuance of no-knock warrants that Kentuckians may justly believe protects their right from unreasonable searches and seizures pursuant to a no-knock warrant. The clear and convincing evidentiary standard is a significantly higher requirement than probable cause. SB 4 authorizes no-knock warrants only for specific crimes or potentially violent offenders—they cannot be issued for just any suspected criminal behavior. And the time restriction allows them for hours in the day when people are generally awake—a significant issue when there have been several notable incidents around the country in which no-knock warrants executed in the middle of the night led the resident, jolted from sleep, to grab a gun and defend himself from what he may have believed was an unlawful intrusion by private individuals, only to be killed by law enforcement officers.

It is also clear that in erecting these guardrails the General Assembly did not deem it wise or prudent to altogether prohibit no-knock warrants. The General Assembly, through this legislation, has made a policy decision that while no-knock warrants should be sparingly used and generally reserved for violent and dangerous persons, they should not be forbidden. There are appropriate circumstances where such warrants are necessary, and those circumstances are still subject to judicial approval under a clear and convincing standard.

LFUCG's ordinance prohibits members of the Lexington Police Department from *ever* seeking a no-knock warrant. LFUCG has argued that compliance with the ordinance necessarily results in compliance with the statute. Its concession at oral argument, however, that an LPD officer who seeks a no-knock warrant pursuant to the statute will be in violation of the ordinance is not only telling but correct. The statute and ordinance conflict, pure and simple.

KRS 67A.070(2)(a) declares an ordinance conflicts with a statute "[w]hen the ordinance authorizes that which is expressly prohibited by a general statute[.]" Contrary to the assertion that under this statute LFUCG may pass legislation that prohibits what the General Assembly expressly authorizes, our constitution unambiguously declares, "[t]he General Assembly may provide by general law that cities may exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city *and not in conflict with a constitutional provision or statute*." Ky. Const. § 156b (emphasis added).

> When this section of the Constitution provided for the classification of cities for their organization and a definition of their powers by general law, that was not a grant to the General Assembly of authority so to do, but was a limitation upon what, without those limitations, would be the absolute power of the General Assembly to do what it pleased.

Bd. of Trustees of Policemen's Pension Fund v. Schupp, 3 S.W.2d 606, 609 (Ky. 1928) (interpreting previous Ky. Const. § 156). In other words, Section 156b is a limitation upon the General Assembly in that creating a municipality it cannot authorize said municipality to contravene either the constitution or statutes. "It is a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state." *Boyle v. Campbell*, 450 S.W.2d 265, 268 (Ky. 1970) (quoting 37 Am. Jur. *Municipal Corporations* § 165). Consequently, "[a] power vested by legislation in a city corporation to make by-laws for its own government, and the regulation of its own police, can not be construed as imparting to it, the power to repeal the [statutory] laws in force, or to supersede their operation by any of its ordinances." *March v. Commonwealth*, 51 Ky. 25, 29 (1851).[4] "Nor can the presumption be indulged that the Legislature intended that an ordinance passed by the city, should be superior to, and take the place of, the general law of the State upon the same subject." *Id.* Under Section 156b, even if the General Assembly explicitly authorized a city to pass ordinances that prohibit what a statute allows or allow what a statute prohibits, it would be unconstitutional.

[4] Although *March* is particularly old, its enduring relevance for constitutional interpretation is demonstrated by the fact that its holding was adopted by the framers of the Constitution of 1891 in Ky. Const. § 168.

"KRS 67A.070(2)(a) is a type of direct preemption in that an ordinance may be expressly prohibited by a general statute or when there is a comprehensive scheme of legislation." *Lexington Fayette Cnty. Food & Beverage Ass'n v. Lexington-Fayette Urb. Cnty. Gov't*, 131 S.W.3d 745, 750 (Ky. 2004). A type, not *the* only type.[5] As is clear from *Food & Beverage Ass'n*, we still consider whether there is implicit preemption. *Id.* at 751. Borrowing from the interaction between federal and state law, "[i]mplied preemption occurs when the state law *actually conflicts* with federal law or where the federal law so thoroughly occupies the legislative field that it may be reasonably inferred that Congress left no room for the state to supplement it." *Id.* (quoting *Niehoff v. Surgidev Corp.*, 950 S.W.2d 816, 820 (Ky. 1997)) (emphasis added).

[5] Louisville/Jefferson County Metro Government has a similar "home rule" provision granting "authority to govern themselves to the full extent required by local government and not in conflict with the Constitution or laws of this state or by the United States." KRS 83.410(1); *see also* KRS 83.420. We have recognized cities of the first class have an "enhanced authority . . . distinct from other municipalities. Yet, the sovereignty of the state still rules supreme." *Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't*, 501 S.W.3d 425, 428 (Ky. 2016).

While the parties have devoted much of their argument to whether SB 4 constitutes a comprehensive scheme of legislation, the more fundamental inquiry is actual conflict—"[t]he true test of the concurrent authority of the state and local government to regulate a particular area is the absence of conflict." *Food & Beverage Ass'n*, 131 S.W.3d at 750. The ordinance fails to satisfy "this rudimentary principle." *Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't*, 501 S.W.3d 425, 428 (Ky. 2016). True enough, "[t]he simple fact that the state has made certain regulations does not prohibit local government from establishing additional requirements so long as there is no conflict between them." *Food and Beverage Ass'n*, 131 S.W.3d at 750. Nonetheless, "[a]n ordinance . . . cannot forbid what a statute expressly permits." *Ky. Rest. Ass'n*, 501 S.W.3d at 428 (quoting *City of Harlan v. Scott*, 162 S.W.2d 8, 9 (Ky. 1942)). To put it even more plainly, an ordinance cannot make illegal what a statute makes legal, or vice-versa. *Id.* The home rule provision of KRS 67A.070(2)(a) can neither alter nor obviate this principle. *Id.* A brief survey of decades of case law demonstrates that the ordinance below conflicts with the statute and must be declared void.

In *City of Harlan*, Harlan had passed an ordinance prohibiting the operation of movie theatres after 6 p.m. on Sundays pursuant to its general police power. 162 S.W.2d at 8. The General Assembly had regulated the extent of this police power, however, and passed a statute establishing "that the operation of a moving picture show should not be construed a work, labor, trade, business or calling within the meaning of the section." *Id.* at 9. The Court held the statute created "a plain legislative declaration of policy regarding the operation of picture shows on Sunday, declaring that they shall not be construed as work or labor within the meaning of the Sunday closing law." *Id.* Therefore, the ordinance conflicted with the statute.

> [A] municipal ordinance prohibiting Sunday operation of picture shows is invalid since all municipal authority comes from the Legislature and municipal ordinances must be in harmony with the general laws of the State. An ordinance may cover an authorized field of local laws not occupied by general laws *but cannot forbid what a statute expressly permits* and may not run counter to the public policy of the state as declared by the Legislature.

Id. (emphasis added).

In *Arnold v. Commonwealth at Instance of City of Somerset*, Somerset passed an ordinance prohibiting the sale of "any drink containing any malt of any percentage of alcohol." 218 S.W.2d 661, 661 (Ky. 1949). A statute, however, defined "alcoholic beverage" as any drink containing more than one percent of alcohol by volume. *Id.* at 662 (quoting KRS 242.010, repealed in 1998). The Court declared the law to be "that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required." *Id.* at 662 (quoting 37 Am. Jur. *Municipal Corporations* § 165). Therefore, because the statute permitted the sale of alcoholic beverages that were one percent of alcohol by volume or less, the ordinance conflicted as it forbade the sale of any beverage with any percentage of alcohol.

This case is particularly relevant because of its similitude to the argument now before us. Following LFUCG's logic, Somerset's ordinance could easily be justified in that it did nothing more than erect additional "guardrails" around the subject of alcoholic beverages. What conflict is there if the General Assembly says one percent of alcohol by volume or less is fine, and Somerset says no percentage of alcohol is the standard? Does not compliance with ordinance result in compliance with the statute? If the merchants of Somerset never sell a beverage with any alcohol in it, they will manifestly never violate a statute which limits alcohol to one percent by volume or less. Yet there is no trace of that kind of reasoning in the decision. *Arnold* went to the heart of the matter and did not bother with "semantic exercises[.]" *Kentucky Rest. Ass'n*, 501 S.W.3d at 428 (quoting *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327, 329 (N.Y. App. Div. 1962)). The ordinance banned what the statute allowed; it is a *prima facie* conflict which needs no train of scholastic reasoning to justify.

In *Louisville & N. R. Co. v. Commonwealth for Use & Benefit of City of Covington*, the railroad was found guilty of violating a city ordinance when one of its moving trains obstructed a public street within the city for nine minutes. 488 S.W.2d 329, 329 (Ky. 1972). A city ordinance prohibited trains from obstructing public streets for more than five minutes at any one time. *Id.* at 330. A statute, however, prohibited obstruction "by stopping and permitting trains, engines or cars to stand upon a public grade crossing or upon a drawbridge for more than five (5) minutes at any one time[.]" *Id.* (quoting KRS 277.200(1)). The railroad argued the statute's explicit limitation to stopped and standing trains implicitly allowed for a moving train to obstruct a public street without time limit, therefore the ordinance was invalid as conflicting. The Court held otherwise, stating KRS 277.200(2) contemplated the existence of municipal ordinances therefore there was no preemption. *Id.* at 330-31.

For our purposes, however, we can say the statute and ordinance did not conflict. The statute only regulated stopped trains, not moving trains. The ordinance insofar as it also regulated stopped trains was consonant with the statute as both had a limitation of five minutes. But insofar as the ordinance pertained to moving trains, the statute simply did not apply; thus, no conflict. That method of analysis would be employed decades later by this Court in *Food and Beverage Ass'n*, 131 S.W.3d at 750.

In that case, the Food and Beverage Association of Lexington had argued LFUCG's smoking ban in public places conflicted with several statutes. *Id.* We held "those statutes deal almost exclusively with prohibiting the sale, distribution and use of tobacco products to or by persons under the age of 18." *Id.* We also held the Kentucky Food, Drug and Cosmetic Act and Retail Food Code were intended "to govern the food preparation and delivery in the state. Smoking is only considered insofar as the use of tobacco might affect food preparation and delivery." *Id.* at 751. Thus, "[t]here are no state statutes or regulations that expressly relate to indoor smoking and there is no declaration that indoor smoking is within the purview of the retail food code." *Id.* Because the statutes only regulated smoking insofar as food preparation was concerned or regulated "the sale and distribution of tobacco to persons under the age of 18[,]" there was no statutory law regarding "the use of the tobacco products [in public places.]" *Id.* Therefore, an ordinance which only regulated the use of tobacco in public places presented "no conflict." *Id.*

Applying that same method of analysis, we held Louisville Metro's minimum wage ordinance to be in conflict with state law. In *Ky. Rest. Ass'n*, Louisville Metro had adopted an ordinance requiring a minimum wage higher than the statutory minimum of $7.25 an hour. 501 S.W.3d at 427. We held, "[t]he Ordinance at issue here requires businesses to pay workers a higher wage than the statutory minimum. KRS 337.275(1). In other words, what the statute makes legal, the Ordinance makes illegal and, thus, prohibits what the statute expressly permits." *Id.* at 428. Once again, LFUCG's logic would overturn this decision's rationale. Because Louisville Metro's ordinance required a higher minimum wage, complying with that ordinance would have ensured the Commonwealth's lower minimum wage was also complied with. That was not enough. Instead, because complying with the statute necessarily resulted in violating the ordinance, there was a conflict—"precisely the type of 'conflict' that is forbidden under Section 156b of our Constitution[.]" *Id.*

We can concede none of these cases are directly on point, and the dissent does point out means of distinguishing them. Truly though, we do not need to demonstrate which prior decisions are controlling or not to reach the correct conclusion in this case. We need only put SB 4 and the ordinance side by side and ask, "can the class of persons affected by these laws comply with both simultaneously?" If not, there is a conflict. A person must not only be able to comply with the ordinance without violating the statute but must also be able to comply with the statute without violating the ordinance. Our jurisprudence teaches that conflict is a two-way street. Simply because the General Assembly erects guardrails around a certain issue does not mean a local government may not erect further guardrails; but the local government cannot close the street entirely. Applying this test, SB 4 controls and the ordinance is void.

Next, to its proposition that the General Assembly should be presumed to have been aware of Louisville/Jefferson County Metro Government's similar no-knock ordinance, passed before SB 4, we can only say that is a misuse of a canon of statutory interpretation. There are many general expressions of the rule that the General Assembly is presumed to be aware of previous laws when enacting a statute, but it specifically means "the General Assembly is aware of the constitution, previously enacted statutes and the common law." *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 93 (Ky. 2005). It also applies to published judicial decisions of an appellate court construing a statute. *Normandy Farm, LLC v. Kenneth McPeek Racing Stables, Inc.*, 701 S.W.3d 129, 142 n. 11 (Ky. 2024). As a canon of statutory interpretation, it is only applicable when there is an ambiguity in the statute or an apparent conflict with another statute. *Brewer v. Commonwealth*, 922 S.W.2d 380, 381 (Ky. 1996) (quoting *Reynolds Metal Co. v. Glass*, 195 S.W.2d 280, 283 (Ky. 1946)). When two statutes seemingly or do conflict, the rule's salutary purpose is to give effect to both if possible because both statutes are of equal authority. *Mitchell v. Univ. of Kentucky*, 366 S.W.3d 895, 900 (Ky. 2012). When a statute and ordinance conflict, however, the impetus for harmonization does not exist. "As is the osprey to the fish, who takes it by sovereignty of nature[,]" Shakespeare, *Coriolanus*, Act. IV, Sc. 7, so do statutes *always* prevail over a conflicting ordinance because "the sovereignty of the state still rules supreme." *Ky. Rest. Ass'n*, 501 S.W.3d at 428.

LFUCG tries to avoid this conclusion by

arguing SB 4 is directory towards judges of the Commonwealth whilst the ordinance is directory towards members of the LPD. That is not true. SB 4 imposes a clear and convincing evidentiary standard, and it is for the warrant-issuing judge to determine whether that standard has been met. KRS 455.180(1)(a). But SB 4 also directs the actions of law enforcement officers. It is they who must get the approval of their superior officer before approaching the judge. *Id.* at (2). It is they who must consult with the Commonwealth's Attorney or County Attorney. *Id.* at (3). It is they who must execute no-knock warrants between 6 a.m. and 10 p.m. absent clear and convincing evidence of exigent circumstances. *Id.* at (5). And, we may add, it is they who must, through the warrant affidavit, demonstrate to the warrant-issuing judge the existence of clear and convincing evidence under the statute. RCr[6] 13.10(1). SB 4's creation of a criminal law proscribing law enforcement officers from perjuring themselves in a no-knock warrant affidavit and making such perjury a Class D felony is irrefutable proof that SB 4 is as much directed towards law enforcement officers as it is to judges. KRS 523.020(1)(c).[7]

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[6] Kentucky Rules of Criminal Procedure.

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[7] Judges are also liable to sanctions under SB 4. "A judge shall carefully review any application for a warrant pursuant to KRS 455.180 as a neutral and detached magistrate. Failure to act as a neutral and detached magistrate may be referred to the Judicial Conduct Commission." KRS 455.190.

Finally, apropos of the judiciary's role in issuing no-knock warrants, we conclude the ordinance is an indirect infringement upon the judiciary's jurisdiction. Though not specifically argued at the trial court or briefed by the parties, the issue came up during oral argument; therefore, it is appropriate to comment upon it briefly. *Priestly v. Priestly*, 949 S.W.2d 594, 596 (Ky. 1997). We, as head of the judicial branch of the Commonwealth, are keen on separation of powers; particularly where the constitution has created hedges around certain individual rights and bestowed upon us a peculiar authority to maintain them. LFUCG's counsel conceded at oral argument that LFUCG has no authority to limit or infringe upon the judiciary's jurisdiction. *See generally McElroy v. Taylor*, 977 S.W.2d 929, 931 (Ky. 1998) ("The legislature . . . determines the jurisdiction of the district court."); *Jefferson Cnty. Bd. of Educ. v. Edwards*, 434 S.W.3d 472, 476 (Ky. 2014) ("The legislature has the authority to limit the circuit court's subject matter jurisdiction[.]"). "In the issuance of search warrants, courts have constitutionally mandated jurisdiction before prosecution commences." *Commonwealth v. Terrell*, 464 S.W.3d 495, 501 n. 18 (Ky. 2015).

Since LFUCG may not directly infringe upon the judiciary's jurisdiction to issue warrants, it cannot achieve the same outcome indirectly. *Briscoe v. Bank of the Commonwealth of Kentucky*, 36 U.S. 257, 318 (1837); *Bailey v. State of Alabama*, 219 U.S. 219, 244 (1911); *National Rifle Ass'n of America v. Vullo*, 602 U.S. 175, 190 (2024). That is precisely what it does by forbidding LPD officers from seeking no-knock warrants in spite of SB 4's unambiguous authorization that law enforcement officers within the Commonwealth can seek no-knock warrants under certain circumstances, and thereby limiting the judges of Lexington-Fayette County from issuing no-knock warrants when those circumstances are met as authorized by SB 4.

III. Conclusion

The ordinance is null, void, and of no effect. Nothing has been shown to negate this one salient fact: LPD officers are directly prohibited, and the judges of Lexington-Fayette County are indirectly limited by the ordinance from doing what the judges and law enforcement officers in the rest of the Commonwealth are authorized to do per the statute. The ordinance prohibits what the statute allows, it makes illegal what the statute declares is legal, and therefore contravenes the public policy of the Commonwealth. The Court of Appeals is reversed. We affirm Fayette Circuit Court's dismissal of the case on the alternative grounds articulated above.

Lambert, C.J.; Bisig, Conley, Keller, Nickell, and Thompson, JJ., sitting. Lambert, C.J.; Nickell, and Thompson, JJ., concur. Keller, J., dissents by separate opinion which Bisig, J., joins in part. Bisig, J., dissents by separate opinion. Goodwine, J., not sitting.

ATTORNEYS

Imposition of negotiated sanctions —

In re: Harold Wayne Roberts (2025-SC-0281-KB); In Supreme Court; Opinion and Order, entered 9/18/2025. **[This opinion and order is not final. A non-final opinion and order may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Harold Wayne Roberts was admitted to the practice of law in the Commonwealth of Kentucky on October 16, 1992. His Kentucky Bar Association (KBA) number is 84534, and his bar roster address is 3229 Polo Club Boulevard, Lexington, Kentucky 40509. Roberts has filed a motion pursuant to Supreme Court Rule (SCR) 3.480(2)[1] to impose the negotiated sanction of a public reprimand with conditions. After review, this Court approves of the negotiated sanction with conditions as ordered below.

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[1] That rule provides:

The Court may consider negotiated sanctions of disciplinary investigations, complaints or charges prior to the commencement of a hearing before a Trial Commissioner under SCR 3.240. Any member who is under investigation pursuant to SCR 3.160(2) or who has a complaint or charge pending in this jurisdiction, and who desires to terminate such investigation or disciplinary proceedings at any stage of it may request Bar Counsel to consider a negotiated sanction. If the member and Bar Counsel agree upon the specifics of the facts, the rules violated, and the appropriate sanction, the member shall file a motion with the Court which states such agreement . . . The Court may approve the sanction agreed to by the parties, or may remand the case for hearing or other proceedings specified in the order of remand.

I. Basis for Disciplinary Charges

A. 24-DIS-0133

In Spring 2022, Jo Ann Bell hired Roberts to represent her son Camden Bell in a criminal case[2] in which he was charged with the felony offenses of murder (domestic violence) and convicted felon possession in possession of a handgun, as well as being a persistent felony offender in the first degree. Jo Ann signed a fee agreement for a total of $35,000 and paid a portion of the advance fee. Camden, who was the client, never signed the agreement. In March 2022 Roberts entered his appearance in the case and represented Camden at his arraignment. The case progressed slowly for the next year and a half, as Camden was scheduled for both competency and criminal responsibility evaluations at KCPC.[3] Eventually, the Commonwealth filed a motion for a status hearing at which time Roberts filed a motion to withdraw from the representation and scheduled his motion for the same court date: January 26, 2024.

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[2] Franklin Circuit Court, No. 22-CR-0064.

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[3] Kentucky Correctional Psychiatric Center.

After Roberts withdrew, Jo Ann became incredulous about whether he had earned all of the approximately $23,000 she paid him over the course of his two-year representation of Camden and asked Roberts for a refund. Roberts was under the impression that Jo Ann was asking for a refund of the full amount, and they were unable to have a productive conversation concerning the reimbursement of funds. Jo Ann filed a bar complaint against Roberts in April 2024, and the Inquiry Commission issued a five-count charge against him.

Count One alleged a violation of SCR 3.130(1.3) ("A lawyer shall act with reasonable diligence and promptness in representing a client") for a lack of diligence in Roberts' representation of Camden. Roberts denied his guilt of this Count and asserted he worked very hard and effectively during the representation. The Inquiry Commission agreed to dismiss this Count.

Count Two alleged a violation of SCR 3.130(1.8)(f) ("A lawyer shall not accept compensation for representing a client from one other than the client[]") for failing to obtain Camden's informed consent after accepting payment for the representation from Jo Ann. Roberts denied his guilt of this Count and asserted that Camden was aware his mother was paying for the representation and acquiesced to it. The Inquiry Commission agreed to dismiss this Count.

Count Three alleged a violation of SCR 3.130(1.5)(f) ("An advance fee agreement shall be in a writing signed by the client evidencing the client's informed consent, and shall state the dollar amount of the fee, its application to the scope of the representation and the time frame in which the agreement will exist[]") for Roberts' failure to have Camden sign the written fee agreement for the representation. Roberts acknowledged his guilt of this Count.

Count Four alleged a second violation of SCR

3.130(1.5)(f) for declaring in the representation agreement that $10,000 of the retainer fee was "non-refundable." Roberts denied his guilt of this Count and asserted that he earned well over the fee amount and had not failed to refund it. The Inquiry Commission agreed to dismiss it.

Count Five alleged a violation of SCR 3.130(1.16)(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred[]") for Roberts' failure to refund any unearned legal fees when he terminated the representation. Roberts admitted his guilt of this Count.

In sum, the Inquiry Commission found Roberts guilty of one count of SCR 3.130(1.5)(f) and one count of SCR 3.130(1.16)(d) in 24-DIS-0133.

B. 24-DIS-0134

Phillip Whaley was on parole for Woodford Circuit Court No. 02-CR-00033 when he was arrested for DUI and charged in Scott District Court No. 22-F-00085. The Commonwealth sought revocation of Whaley's parole, and he hired Roberts to represent him in the parole revocation proceedings. Roberts and Whaley agreed that the fee rate for the representation would be $400 per hour. The Kentucky Parole Board ultimately found that Whaley violated the terms and conditions of his parole and sentenced him to an additional eighteen months.

Whaley sold his home in anticipation of his impending incarceration. Whaley gave the $41,000 in proceeds from the sale to Roberts so that Roberts could send money to Whaley, pay Whaley's debts, and send money to other individuals, all of which Whaley would be unable to do while in prison. There was no written agreement between Roberts and Whaley regarding how Roberts would be paid for providing these services. Whaley acknowledged that Roberts performed these services and is entitled to payment of a fee in some amount. Whaley further acknowledged that Roberts disbursed approximately $18,000 of the funds at his direction.

Whaley expected Roberts to return the approximately $23,000 that remained from the original $41,000 to him. Instead, Roberts sent Whaley multiple letters in September and October 2023 indicating his intent to charge $3,600 in fees and return the remaining $19,980 to Whaley. Whaley did not understand how Roberts' fee amount had been calculated, as they never entered into an agreed fee structure. Further muddying the waters, in November 2023 Roberts sent Whaley a money order for $17,500. Whaley repeatedly asked Roberts for a detailed accounting of the funds, transactions, and fees, but Roberts never provided one to him.

Whaley filed a KBA complaint against Roberts in April 2024. The Inquiry Commission issued a formal Complaint to Roberts on May 14, 2024, and thereafter issued a four-count Charge against him as follows:

Count One alleged a violation of SCR 3.130(1.5)(a)("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses[]") for charging Whaley an unreasonable hourly fee. Roberts denied his guilt of this Count, and the Inquiry Commission agreed to dismissed it.

Count Two alleged a violation of SCR 3.130(1.5)(b)("The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation[]") for Roberts' failure to adequately communicate the basis or rate of the fee with Whaley within a reasonable time after commencing the representation. Roberts acknowledged his guilt of this Count.

Count Three alleged a violation of SCR 3.130(1.15)(a),(b) ("(a) A lawyer shall hold property of clients . . . that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. . . Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation. (b) . . . Except as stated in this Rule or otherwise permitted by law or by agreement with the client a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive and, upon request by the client, shall promptly render a full accounting regarding such property."). Robert admitted his guilt of this Count, as he failed to provide an accounting of Whaley's funds upon his request.

Count Four alleged a violation of SCR 3.130(1.16)(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred."). Roberts acknowledged his guilt of this Count for failing to return unearned funds to Whaley.

In sum, the Inquiry Commission found Roberts guilty of one violating one count of SCR 3.130(1.5)(b), one count of SCR 3.130(1.15)(a),(b), and one count of SCR 3.130(1.16)(d) in 24-DIS-0134.

II. Prior Discipline, Aggravating Factors, and Mitigating Factors

A. Prior Discipline:

Roberts has three prior disciplinary cases. In 2002 he received a private admonition for violations of SCR 3.130(1.3). In 2011 he received a private admonition for violating SCR 3.130(1.15) and (5.3). And in 2020 he received a public reprimand for violating SCR 3.130(1.5)(b). *Roberts v. Kentucky Bar Ass'n*, 599 S.W.3d 870 (Ky. 2020)

B. Aggravating & Mitigating Factors

The OBC has identified four aggravating circumstances present in this case: Roberts' prior disciplinary history, multiple offenses, substantial experience in the practice of law, and the vulnerability of his victims. However, there are numerous mitigating circumstances as well, in particular: Roberts' full and free disclosure and cooperation throughout these disciplinary proceedings; Roberts' positive character and reputation both inside and outside of the legal community; Roberts' expressed remorse; and the "sparseness" of his prior discipline over his thirty-three-year legal career.

Most significantly, though, Roberts has several significant and worsening medical conditions, some of which overlapped with the representations at issue in this case. In particular, he was diagnosed with sepsis in 2022, lower intestinal bleeding in 2023, and in 2025 he was diagnosed with metastatic prostate cancer. He has also indicated he has Type 2 diabetes and at some point suffered an acute kidney injury. Roberts has emphasized to this Court that, due to his medical issues, he has greatly reduced his overall case load and is down to six cases. He asserts that the clients in these cases are either lifelong friends or family members, and that he intends to bring his legal practice to an end.

C. OBC's Recommendation

With particular emphasis on Roberts' declining health, his reduction in case load, and his intent to wind down his practice, OBC has no objection to a negotiated sanction of a public reprimand with conditions. It has cited *Kentucky Bar Ass'n v. Thornton*, 279 S.W.3d 516 (Ky. 2009); *Lutes v. Kentucky Bar Ass'n*, 338 S.W.3d 278 (Ky. 2011); and *Kentucky Bar Ass'n v. Delahanty*, 878 S.W.2d 795 (Ky. 1994) in support of the sanction.

In *Thornton*, this Court imposed a non-negotiated sanction of a public reprimand with conditions for the attorney's violation of one count of SCR 3.130(1.5)(b) by failing to explain his fee structure to a first-time client and one count of SCR 3.130(8.1)(b) for failure to respond to a demand for information from a disciplinary authority. 279 S.W.3d at 517. The opinion does not indicate whether the attorney had received any prior discipline.

In *Lutes*, this Court imposed a negotiated sanction of a public reprimand with conditions for the attorney's violation of one count of SCR 3.130(1.3) for failing to act with reasonable diligence and promptness; one count of SCR 3.130(1.4) for failing to keep his client reasonably informed and failing to respond to requests for information; one count of SCR 1.130(1.4)(a) for failing to hold client property separate from his own; one count of SCR 3.130(1.15) for failing to provide any property or funds the client was entitled to receive and to provide an accounting of the same upon request; and one count of SCR 3.130(1.16)(d) for failing to return any unearned portion of an advanced payment of a fee. 338 S.W.3d at 278-79. The attorney's disciplinary record included private reprimand from two years prior for similar misconduct and an ongoing suspension for failure to pay bar dues. *Id.* at 279.

In *Delahanty*, this Court imposed a non-negotiated sanction of a public reprimand with conditions for the attorney's violation of one count of SCR 3.130(1.5)(a) by charging an unreasonable fee and by failing to adequately communicate the basis of the fee within a reasonable period after commencing the representation; and one count of SCR 3.130(1.16)(d) by failing to return papers and property to a client upon request. 878 S.W.2d at 795. The opinion did not state whether the attorney had any prior discipline.

D. Order

This Court concludes, with particular emphasis on Roberts' declining health and his stated intention to wind down his legal practice, that there is no reason to reject the parties negotiated sanction and remand for further proceedings. SCR 3.480(2). It is therefore hereby ORDERED:

1. Harold Wayne Roberts is adjudged guilty of violating one count of SCR 3.130(1.5)(f), two counts of SCR 3.130(1.16)(d), one count of SCR 3.130(1.5)(b), and one count of SCR 3.130(1.15)(a),(b).

2. Harold Wayne Roberts is hereby publicly reprimanded subject to the conditions enumerated herein.

3. Harold Wayne Roberts shall attend the next available Trust Account Monitoring Program (TAMP) offered by the Kentucky Bar Association.

4. Harold Wayne Roberts shall pay restitution in the amount of $3,600 to Jo Ann Bell in relation to disciplinary case 24-DIS-0133 within six months of the entry of this Opinion and Order.

5. Harold Wayne Roberts shall pay restitution in the amount of $2,000 to Phillip Whaley in relation to disciplinary case 24-DIS-0134 within six months of the entry of this Opinion and Order.

6. Harold Wayne Roberts shall pay the certified costs associated with these disciplinary proceedings in the amount of $128.99 pursuant to SCR 3.450(2) within ninety days of the entry of this Opinion and Order.

7. Harold Wayne Roberts' failure to comply with any of the conditions of this Court's Order can result in additional disciplinary charges for violation of SCR 3.130(3.4)(c).

All sitting. All concur.

ENTERED: September 18, 2025.

CRIMINAL LAW

ASSAULT IN THE FIRST DEGREE

WANTON ENDANGERMENT IN THE FIRST DEGREE

JURY INSTRUCTIONS

SELF-DEFENSE INSTRUCTION

ADMISSIBILITY OF EVIDENCE

USE OF A REPORT FROM AN ONLINE DATA BASE TO IDENTIFY THE DEFENDANT'S CELL PHONE NUMBER

OFFICER'S BODY CAMERA FOOTAGE IN WHICH THE VICTIM IMPLICATED THE DEFENDANT

PHOTOS AND VIDEOS OF THE CRIME SCENE

MOTION FOR DIRECTED VERDICT

PENALTY PHASE

POLLING OF THE JURY

UNANIMITY

VICTIM IMPACT EVIDENCE

Defendant appealed as a matter of right his convictions on two counts of first-degree assault, six counts of first-degree wanton endangerment, possession of a handgun by a felon, and of being a first-degree PFO — AFFIRMED convictions — Trial court did not abuse its discretion in declining defendant's request for a self-defense instruction — KRS 503.050(1) provides that the use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person — At trial, evidence was scarce — Only Cassandra, one of the victims, testified concerning the face-off between herself, her husband Marvin, and defendant — Cassandra testified that she and Marvin were attending a funeral with their infant when they received a text message from Marvin's younger brother, who was baby sitting their three older children at their apartment — Message indicated that two men were banging on their front door — Cassandra and Marvin rushed home — Two armed men approached them — Men spoke to Marvin while Cassandra put their baby in the apartment — When Cassandra returned outside, she saw defendant emerge from behind the tree in front of their apartment — Cassandra testified that defendant clearly had a weapon and that he pointed it at her and Marvin — Cassandra was standing on the landing of the apartment, while Marvin was standing in the doorway — At that moment, "the shots started firing" — Cassandra attempted to return fire, but was shot before she could do so — Marvin was also shot — Both Cassandra and Marvin stumbled back into their apartment — Neither party disputes that Cassandra and Marvin lawfully owned their firearms — Defendant cited video of Marvin's interview with police in which Marvin admitted that he would have fired first but for the safety, and Cassandra's equivocal testimony regarding who shot first, as sufficient evidence to warrant a self-defense instruction — However, KRS 503.050 specifically requires that the individual claiming self-defense be acting in response to the use of unlawful physical force — There is no evidence that Marvin used any unlawful physical force — Further, Marvin was engaged in presumably lawful force in the protection of his home and family under KRS 503.055(3) — The act of pointing a gun at another is sufficient to constitute "force" under KRS 503.055(3) — Defendant put forth no evidence to prove that his force was in response to any unlawful use of force by Marvin as required by KRS 503.050(1) — Trial court abused its discretion in permitting sergeant to rely on a report from an online database to identify defendant's phone number to determine ownership of a cell phone found at the crime scene; however, the error was harmless — The mere connection of defendant to a cell phone found at the scene is inconsequential compared to other evidence presented at trial — Trial court did not abuse its discretion in permitting Commonwealth to play a clip from a responding officer's body camera wherein Cassandra identified defendant as the shooter — Cassandra's statement was admissible under KRE 803(2) — In the video, Cassandra is groaning in pain and can be seen lying on the ground — Cassandra implicated defendant when officer asked her if she knew who shot her — Trial court did not abuse its discretion in admitting video and photographic evidence of the crime scene — Trial court did not err in denying directed verdicts on the three charges of first-degree wanton endangerment of Cassandra and Marvin's three elder children, who were hiding in the upstairs bedrooms of the apartment — Bullet holes from the shooting were littered throughout the home — Although the trial court erred in the manner in which it polled the jury during the penalty phase, the error did not result in manifest injustice — It is best practice for the trial court to give unanimity instruction in writing — However, where a trial court fails to do so, a juror poll may serve as a proper corrective course of action to ensure unanimity — To conduct a successful juror poll, trial court must ask each juror if it is his or her verdict — Trial court did not abuse its discretion in permitting Cassandra to testify to defendant's threats as victim impact evidence during sentencing phase —

Raiantez Shackles v. Com. (2022-SC-0560-MR); Jefferson Cir. Ct., Perry, J.; Opinion by Justice Keller, *affirming*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

A Jefferson County jury found Raiantez Shackles ("Shackles") guilty of two counts of first-degree assault, six counts of first-degree wanton endangerment, possession of a handgun by a felon, and of being a first-degree persistent felony offender. It fixed his punishment at sixty years' imprisonment. The Jefferson Circuit Court reduced the total sentence from sixty years to forty-five years pursuant to Kentucky Revised Statute ("KRS") 532.070(1). Shackles now appeals as a matter of right and challenges his convictions. *See* Ky. Const. § 110(2)(b). Having reviewed the record, the arguments of the parties, and the applicable law, we affirm the Jefferson Circuit Court.

I. BACKGROUND

Cassandra Yarbrough ("Cassandra") and Marvin Yarbrough ("Marvin") have been married since around 2014 or 2015. The pair (collectively the "Yarbroughs") have four children together. At the time of the events at issue, the children were seven years old, five years old, three years old, and eleven months old, respectively.

Marvin and Shackles grew up together and were childhood friends. Their long-term friendship began to crumble, however, in October 2020, when Marvin and Shackles travelled to Indianapolis, Indiana, together to perform at a hip-hop show. While there, the two argued about what songs each would perform. The feud only escalated when everyone returned home to Louisville. Marvin and Shackles exchanged threats. As a result of the threats, Marvin and Cassandra briefly resided with a relative in a different neighborhood. Around this time, Marvin also learned that his wife, Cassandra, had engaged in a sexual relationship with Shackles.

In 2021, Marvin and Cassandra lived across the way from Jessica Yarbrough ("Jessica") in Louisville, Kentucky. Jessica is Marvin's paternal cousin and was in a romantic relationship with Shackles. On the night of January 4, 2021, unknown individuals fired gunshots at Shackles's and Jessica's vehicles. Jessica filed a police report, where she listed her phone number and Shackles's phone number. At trial, Cassandra testified that on this night, she had people over at her home to comfort her as she grieved the recent death of her aunt, whose funeral was set for the next day. During this gathering, Marvin noticed that one of their guns was missing. The bullets fired at Shackles's and Jessica's vehicles were later tied to the Yarbroughs' missing gun.

The next morning, January 5, 2021, Marvin and Cassandra went to Cassandra's aunt's funeral. They brought their youngest child, the eleven-month-old, with them to the funeral, while Marvin's younger brother, Terrion Trotter ("Terrion"), babysat their three older children. Marvin and Cassandra were only at the funeral for approximately an hour before Cassandra began receiving a multitude of texts and calls from Terrion saying that someone was trying to break into the home. As a result, Marvin and Cassandra rushed home.

Upon their arrival back to their apartment, two armed men approached them. Cassandra could not definitively identify the men, but she could tell that they were armed. The men spoke to Marvin while Cassandra rushed to put their baby in the apartment. Marvin's and Cassandra's three older children, along with Marvin's younger brother, were inside their home. When Cassandra returned outside, she saw Shackles emerge from behind the tree in front of their apartment. She testified that Shackles clearly had a weapon and pointed it at her and Marvin. Cassandra was standing on the landing of the apartment while Marvin was standing in the doorway. It was at this moment that "the shots started firing." Cassandra attempted to return fire but was shot before she could do so. Marvin was also shot, and both individuals stumbled back into their apartment. Neither party disputes that Cassandra and Marvin lawfully owned their firearms.

Nicole Foree ("Foree"), Marvin's aunt, frequently visited Marvin and Cassandra at their home. On January 5, 2021, she decided to stop by their home to visit with the Yarbrough children. She arrived at the scene to find the wounded Yarbroughs laying in the doorway of their home. Foree attempted to help by applying pressure to Marvin's wound before emergency responders arrived.

Officer Aaron Ambers and Officer Dave Thomas arrived at the scene shortly thereafter. Officer Ambers assessed the scene and rendered aid to the gunshot wounds Marvin had sustained to his leg. Officer Thomas administered aid to Cassandra, who had sustained a gunshot wound to her pelvic area. Marvin and Cassandra were then transported by ambulance to University of Louisville Hospital.

None of the Yarbroughs' children were injured in the shooting. The eleven-month-old was located in the kitchen on the main floor of the home, while the three elder children were in a second-floor bedroom. Terrion hid in the living room on the main floor of the home.

After law enforcement secured the scene, they located multiple bullet holes in the brick surrounding the doorway and throughout the home. Vickie Williams, a neighbor of the Yarbroughs, testified that bullets had also entered her home and her bedroom.

Sergeant Joseph Fox, a detective at the time of the shooting, was assigned to investigate the case. Sergeant Fox analyzed a variety of evidence from the scene, including used shell casings and a cellphone located near the tree in front of the Yarbroughs' home. After assessing the evidence and hearing that Cassandra had identified Shackles as the shooter, Sergeant Fox arrested Shackles on January 20, 2021.

At trial, neither Shackles nor Marvin testified. Cassandra was the only witness to testify as to what occurred in the face-off between Marvin and Shackles. However, a video of Marvin's interview with police following the incident was admitted into evidence. In this video, Marvin admits that he drew his weapon first, and that he would have fired at Shackles first if the safety had not been on.

Following the guilt phase of the trial, the jury found Shackles guilty of two counts of first-degree assault, six counts of first-degree wanton endangerment, possession of a handgun by a felon, and of being a first-degree persistent felony offender. After the sentencing phase, the jury recommended that Shackles receive a sixty-year sentence. The trial court reduced that sentence to forty-five years pursuant to KRS 532.070(1).

Additional facts will be developed below as necessary.

II. ANALYSIS

Shackles raises seven allegations of error in seeking reversal. Shackles argues that the trial court erred by: (1) declining his request for a self-defense instruction; (2) permitting Sergeant Fox to rely on an online report in identifying Shackles's phone number; (3) allowing the Commonwealth to play a clip from a responding officer's body camera wherein Cassandra identified Shackles as the shooter; (4) admitting cumulative gruesome videos and photographs; (5) denying his motions for directed verdicts on the three charges of first-degree wanton endangerment related to the three elder Yarbrough children; (6) failing to issue an unanimity instruction in the penalty instructions; and (7) permitting Cassandra to testify to Shackles' threats during the sentencing phase. We address each argument in turn.

A. The trial court did not err in declining Shackles's request for a self-defense instruction.

Shackles sought and was denied a self-defense instruction. "A decision to give or to decline to give a particular jury instruction inherently requires complete familiarity with the factual and evidentiary subtleties of the case that are best understood by the judge overseeing the trial from the bench in the courtroom." *Sutton v. Commonwealth*, 627 S.W.3d 836, 848 (Ky. 2021). In turn, "[w]hen the question is whether a trial court erred by: (1) giving an instruction that was not supported by the evidence; or (2) not giving an instruction that was required by the evidence; the appropriate standard for appellate review is whether the trial court abused its discretion." *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015), *overruled on other grounds by Univ. Med. Ctr., Inc. v. Shwab*, 628 S.W.3d 112 (Ky. 2021).

A trial court is required to instruct the jury on affirmative defenses if the evidence would permit a juror to reasonably conclude that the defense exists. *Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007); *Nichols v. Commonwealth*, 142 S.W.3d 683, 689 (Ky. 2004). Self-defense is an affirmative defense. *See generally Turner v. Commonwealth*, 544 S.W.3d 610, 625–26 (Ky. 2018). While "[t]rial courts have a duty to instruct the jury on the whole law[,] . . . that duty does not extend to placing speculative theories before the jury merely because the testimony includes some basis for the speculation." *Daniel v. Commonwealth*, 607 S.W.3d 626, 644 (Ky. 2020) (citing *Lackey v. Commonwealth*, 468 S.W.3d 348, 355 (Ky. 2015)). A jury instruction on self-defense "is necessary once sufficient evidence has been introduced at trial which could justify a reasonable doubt concerning the defendant's guilt." *Hilbert v. Commonwealth*, 162 S.W.3d 921, 925 (Ky. 2005), *superseded on other grounds by* KRS 503.055, 505.050(4). In determining whether sufficient evidence exists in the record to substantiate a self-defense instruction, we have made clear that:

> It is not every assertion of such belief that is adequate to support a plea of self-defense. It is the **whole circumstances** which surround the incident that must be considered by the trial judge in deciding whether an instruction on self-defense is proper or whether an instruction on self-defense with limitations is proper.

Downs v. Commonwealth, 620 S.W.3d 604, 614 (Ky. 2020) (quoting *Stepp v. Commonwealth*, 608 S.W.2d 371, 374 (Ky. 1980)) (emphasis added).

Kentucky has codified when an individual may justifiably use force in self-defense. KRS 503.050(1) provides that "[t]he use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of **unlawful** physical force by the other person." (emphasis added). KRS 503.055(3) states:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

KRS 503.060 stipulates that an individual is not justified in using physical force upon another where the defendant is resisting arrest by a peace officer, provoking the use of physical force by the other person, or where the defendant was the initial aggressor of the conflict.

In *Berry v. Commonwealth*, Eric Berry was convicted of first-degree burglary, first-degree sexual assault, two counts of fourth-degree assault, first-degree fleeing or evading, and resisting arrest for his violent invasion into Kimberly Alford's home and ensuing assault of its occupants. 680 S.W.3d 827, 832–33 (Ky. 2023). On appeal before this Court, Berry argued that there was sufficient evidence to warrant a voluntary intoxication instruction. *Id.* at 837. While we acknowledged that there was sufficient evidence to justify an inference that Berry was intoxicated, we noted that the precise question was whether his intoxication was so excessive that he could not form the intent to commit a crime in the context of first-degree burglary. *Id.* at 838. At trial, the victim's daughter testified that she did not believe that Berry knew what he was doing when he assaulted her mother. *Id.* at 839. Berry argued that this was sufficient to trigger the voluntary intoxication instruction. *Id.* This Court disagreed, explaining that,

> Upon review, we cannot hold that one, out-of-context piece of testimony satisfies Berry's burden of proof to put forth evidence reasonably sufficient to prove he did not know what he was doing as a result of intoxication to such a degree that the failure to give an intoxication instruction was an abuse of discretion.

Id. at 840.

Turning now to the case before us, the evidence concerning the actual incident at issue is scarce. At trial, Cassandra was the only witness to testify to what occurred in the face-off between Shackles and the Yarbroughs. Cassandra testified that she and Marvin were attending a funeral with their baby when they received text messages from Marvin's younger brother, who was babysitting the Yarbroughs' three older children, that two men were banging on their front door. Cassandra and Marvin rushed home. Upon their arrival back to their apartment, two armed men approached them. The men spoke to Marvin while Cassandra rushed to put their baby in the apartment. Marvin and Cassandra's other three older children, along with Marvin's younger brother, were also in the apartment.

When Cassandra returned outside, she saw Shackles emerge from behind the tree in front of their apartment. She testified that Shackles clearly had a weapon and pointed it at her and Marvin. Cassandra was standing on the landing of the apartment while Marvin was standing in the doorway. It was at this moment that "the shots started firing." Cassandra attempted to return fire but was shot before she could do so. Marvin was also shot, and both individuals stumbled back into their apartment.

Shackles cites the video of Marvin's interview with police in which he admitted that he would have fired first but for the safety, and Cassandra's equivocal testimony regarding who shot first, as sufficient evidence to warrant a self-defense instruction. This conclusion overlooks the explicit statutory language requiring that the individual claiming self-defense be acting in response to the use of *unlawful* physical force.

It is true that the bar for the giving of an affirmative instruction is relatively low, and that "the evidence supporting [the defendant's] belief in the need for the use of force [need] not [be] strong, nor free from contradiction." *Hilbert*, 162 S.W.3d at 925. However, the complete absence of evidence differs from the existence of contradictory evidence. The language of KRS 503.050(1) plainly and unequivocally states that a criminal defendant may *only* use force to protect himself against the *unlawful* physical force of another. Simply put, there is no evidence that Marvin used any *unlawful* physical force. Further, in fact, he was engaged in presumably *lawful* force in the protection of his home and family. Our statutory language is clear: an individual who is not engaging in unlawful conduct and who is in a place where he has a right to be "has the right to stand his . . . ground and meet force with force, including deadly force, if he . . . reasonably believes it is necessary to do so to prevent death or great bodily harm to himself[.]" KRS 503.055(3). Indeed, "[w]here a statute is plain and unambiguous on its face, we are not at liberty to construe the language otherwise[.]" *Pennyrile Allied Cmty. Servs., Inc. v. Rogers*, 459 S.W.3d 339, 343 (Ky. 2015).

Here, the parties do not dispute that Marvin had legal ownership of his weapon, nor do they dispute that Marvin was standing in the doorway of his and Cassandra's apartment, where his four children were also located, when the shootout occurred. In the lead-up to the shooting, two armed men, who had aligned themselves with Shackles, acted menacingly toward Marvin, his wife, and his four young children. Shackles then jumped out from behind a nearby tree and pointed a gun at Marvin and Cassandra. The act of pointing a gun at another is sufficient to constitute "force" under KRS 503.055(3). *See Bowman v. Commonwealth*, 686 S.W.3d 230, 248 (Ky. 2024) (holding that the "act of pointing a gun at [another] was sufficient to satisfy KRS Chapter 503's definition of 'physical force' because it constituted force 'directed toward' the body of another"). In turn, given the absence of evidence produced to the contrary, Marvin's use of force was presumably lawful under KRS 503.055(3) because Shackles pointed his weapon at the Yarbroughs, Marvin stood in the doorway of his own home, and Marvin was not engaged in any otherwise unlawful activity. The defense put forth no evidence to prove that Shackles's force was in response to any *unlawful* use of force by Marvin as required by KRS 503.050(1).

In *Curry v. Commonwealth*, we assessed whether a trial court had abused its discretion when it declined to give the jury a stand-your-ground instruction due to the defendant's engagement in an unlawful activity. 620 S.W.3d 563, 569 (Ky. 2020). There, the defendant, Curry, was lawfully in the victim's apartment when the two got into an argument. *Id.* at 566. Curry alleged that he feared the victim, and that when the victim started coming toward him, he picked up a gun he saw sitting on the couch and shot the victim. *Id.* Curry claimed that he did not know where the gun came from and that it was not his. *Id.* Importantly, Curry was a convicted felon, and it is a felony under Kentucky law to be a convicted felon in possession of a firearm. *Id.* at 569–70.

Ultimately, this Court concluded that Curry was not entitled to a stand-your-ground instruction in addition to a self-defense instruction because the second he picked up the gun, Curry became a felon in possession of a firearm and was thereby engaging in an unlawful activity. *Id.* at 571. We emphasized the importance of adhering to the clear statutory language of KRS 503.055, which, in relevant part, requires that the defendant was "not engaged in unlawful activity" at the time he used the force against another. *Id.*

Curry provides prudent guidance for this Court in the matter before us. Though it concerned a trial court's refusal to give a stand-your-ground instruction in addition to a self-defense instruction, it likewise upholds the premise that all requirements of the pertinent self-defense statute must be met prior to the giving of the corresponding instruction. In *Curry*, the defendant was not entitled to a stand-your-ground instruction because he had engaged in an unlawful activity and was thus disqualified under the statute. Here, KRS 503.050(1) only permits a defendant to use force when he "believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person." Thus, KRS 503.050(1) requires that the defendant "believe such force is necessary to protect himself" *and* that his force be in response to "unlawful physical force by the other person" before the provisions of the statute apply. Even if Marvin had fired his weapon first, he was entitled to do so under KRS 503.055, as he was in the doorway of his own home protecting his wife and four children from Shackles.

Though the bar for jury instructions is low, it still requires that there be sufficient evidence in the record to substantiate the instruction. *Stepp*, 608 S.W.2d at 374. That requirement is simply not met here. Indeed, as we have noted in the past, "if the evidence in this case—which amounts to one snippet of out-of-context testimony—is enough, then there is in fact no bar at all." *Berry*, 680 S.W.3d at 840. Any alleged force used by Marvin was lawful, and the defense failed to put forth any evidence to suggest otherwise. The trial court did not abuse its discretion in deciding not to give Shackles a self-defense instruction.[1] Its decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

[1] To be clear, this is not to say that being a felon in possession of a firearm will always preclude an individual from obtaining a self-defense instruction. *See Curry*, 620 S.W.3d at 575 (Keller, J., concurring in part, dissenting in part).

B. While the trial court erred in permitting Sergeant Fox to rely on the online report in identifying Shackles's phone number, the error was harmless.

Shackles argues that Sergeant Fox's testimony that he relied upon a report from an online database identifying Shackles's phone number in determining the ownership of a cell phone recovered from the scene of the crime should have been excluded as impermissible hearsay. Shackles properly preserved this issue through his contemporaneous objection to Sergeant Fox's testimony. We therefore review this issue under the abuse of discretion standard. "Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion." *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

Pursuant to Kentucky Rule of Evidence ("KRE") 801(c), "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky." KRE 802.

At trial, the Commonwealth sought to admit evidence attributing a specific phone number as belonging to Shackles. The Commonwealth began its endeavor by calling Officer Phillip Renaud. On January 5, 2021, Jessica called 911 to report that someone had fired multiple rounds into her and Shackles's cars. Officer Renaud responded to the call and spoke with Jessica at the scene. Officer Renaud testified that in the corresponding police report, Jessica identified Shackles as the owner of one of the damaged vehicles and provided his phone number.

Later, the Commonwealth then called Sergeant Fox, the lead detective in the case. Sergeant Fox testified that he retained possession of a cell phone that had been recovered by police officers from the scene following the shootout between Shackles and the Yarbroughs. Based upon Cassandra's identification of Shackles as the shooter, Sergeant Fox searched for Shackles in an online database, and located the phone number that Jessica had attributed to Shackles in the January 2021 police report. Sergeant Fox called the phone number, and the cell phone that police had recovered from the scene rang. Sergeant Fox testified that the identification of that phone number as belonging to Shackles in the online database constituted the basis for his belief that the cell phone belonged to Shackles.

We faced similar circumstances in *Wiley v. Commonwealth*, 348 S.W.3d 570 (Ky. 2010). There, this Court held that a trial court abused its discretion when it permitted a detective to testify that a Social Security number belonged to the defendant, Allen Wiley, III. *Id.* at 580. Wiley entered a U.S. Bank, and when asked for his account number, gave the teller his Social Security number instead. *Id.* at 573. The teller informed Wiley that he did not have an account with the bank. *Id.* In response, Wiley forced the teller to give him all the money in the teller drawer. *Id.* The teller was the only witness to the robbery and could not identify Wiley. *Id.*

The detective then testified that the Social Security number that the robber gave to the teller belonged to Wiley. *Id.* at 580. While the trial court sustained defense counsel's objection to the detective citing the National Crime Information Center as his source, it later overruled a subsequent objection to the detective's testimony that he had attributed the Social Security number to Wiley through unnamed "other sources." *Id.* This Court held that the detective's assertion that the Social Security number belonged to Wiley based on "other sources" was impermissible hearsay, as it was offered to prove the truth of the matter asserted and no business records were introduced to support the testimony. *Id.*

Here, Sergeant Fox's testimony that he relied upon a police report from an online database in determining that the cell phone recovered from the scene belonged to Shackles constitutes hearsay, as it involves an out of court statement (the identification of Shackles's phone number in the online report) that is offered to prove the truth of the matter asserted (that the phone number, and the corresponding cell phone, do in fact belong to Shackles). KRE 801(c). Akin to the detective in *Wiley*'s attribution of the Social Security number to the defendant based on unnamed "other sources," Sergeant Fox's testimony that he identified the ownership of the cell phone through a report on an online database likewise constitutes hearsay. Indeed, "[t]he assertion that the information was 'gleaned' from 'other sources,' assumedly online databases, does not exclude it from being a statement for the purposes of the hearsay rule." *Wiley*, 348 S.W.3d at 580.

The Commonwealth proffers no exception under which this hearsay may be permitted, nor can we discern one. Accordingly, we must hold that the trial court erred when it allowed Sergeant Fox to testify that he had relied upon a report from an online database in determining that the cell phone recovered from the scene belonged to Shackles.

However, per Kentucky Rule of Criminal Procedure ("RCr") 9.24, this Court "will deem an error in the admittance of evidence harmless 'if [it] can say with fair assurance that the judgment was not substantially swayed by the error.'" *Saxton v. Commonwealth*, 671 S.W.3d 1, 14 (Ky. 2022) (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010)). "Our inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" *Brown*, 313 S.W.3d at 595 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

Here, it is evident that Sergeant Fox's testimony connecting Shackles to the cell phone found at the scene of the crime did not substantially sway the judgment. Cassandra's testimony explicitly identified Shackles as the shooter and placed him at the scene of the crime. Further, in the video of his interview with police, Marvin also identified Shackles as the shooter. The mere connection of Shackles to a cell phone found at the scene of the crime is inconsequential compared to the other evidence presented by the Commonwealth. This error, therefore, was harmless.

Because we deem Sergeant Fox's testimony to violate the hearsay prohibition, we need not reach the merits of Shackles's argument that Sergeant Fox's testimony violated his rights under the Confrontation Clause.

C. The trial court did not err in permitting the Commonwealth to play a clip from a responding officer's body camera wherein Cassandra identified Shackles as the shooter.

Shackles argues that the footage from Officer Thomas' body camera was inadmissible hearsay that improperly bolstered Cassandra's identification of Shackles. Shackles preserved this issue at trial, and we therefore review it under the abuse of discretion standard. "Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion." *Simpson*, 889 S.W.2d at 783. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

At trial, Officer Thomas testified that he was one of the officers who responded to the initial 911 call regarding the exchange of gunfire between Shackles and the Yarbroughs. Officer Thomas testified that he assessed the scene and rendered aid to Cassandra. The Commonwealth then played footage from Officer Thomas' body camera. The footage showed his approach to the scene of the crime and his administration of aid to Cassandra as she laid bleeding in her home's foyer. As Officer Thomas cut away Cassandra's clothing to assess her gunshot wound, Cassandra can be heard groaning in pain and stating "it hurts so bad" repeatedly. Officer Thomas then asked Cassandra what had happened, to which she responded that "Somebody came over here, and they had guns. We just left the funeral, and they started shooting." Officer Thomas then asked Cassandra if she knew who it was and what their name was. Cassandra responded, "Raiantez Shackles."

Pursuant to KRE 803(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is excepted from the hearsay prohibition. The rationale for this exception is that "statements made under the stress of the excitement caused by a startling occurrence are more likely the product of that excitement and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and to fabricate." *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002). Accordingly, for an out-of-court statement to qualify for admission under KRE 803(2), "it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation." *Id.* (quoting *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980)).

Whether an out-of-court statement is "spontaneous" for purposes of KRE 803(2) depends on the specific circumstances under which it was made, with the following circumstances "most significant":

> (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Souder v. Commonwealth, 719 S.W.2d 730, 733 (Ky. 1986); *see also Noel*, 76 S.W.3d at 926; *Jarvis v. Commonwealth*, 960 S.W.2d 466, 470 (Ky. 1998). These criteria serve only as a guideline for admissibility and are not a bright-line test. *Jarvis*, 960 S.W.2d at 470. Simply put, the statement must be made in response to an occurrence which is "startling enough to halt reflective faculties." Robert Lawson, *The Kentucky Evidence Law Handbook* § 8.60[3][b] (LexisNexis Matthew Bender 2023) (quoting Paul C. Giannelli, *Understanding Evidence* 485 (3d ed. 2009)).

Cassandra's statements in Officer Thomas' body camera footage clearly satisfy the requirements for admission pursuant to KRE 803(2). Cassandra suffered an occurrence "startling enough to halt reflective faculties" when she was shot. *See Soto v. Commonwealth*, 139 S.W.3d 827, 860–61 (Ky. 2004) (holding that sustaining a gunshot wound is a sufficiently startling event under the excited utterance exception). There was little time between Cassandra experiencing the gunshot wound and her statements. Cassandra can be heard groaning in pain and can be seen laying on the ground as she clearly presents the "visible results of the act or occurrence to which [her] utterance relates[.]" *Souder*, 719 S.W.2d at 733.

While the fact that Cassandra's statement was made in response to Officer Thomas's inquiry certainly bears on its spontaneity, such a circumstance is not determinative. *Estes v. Commonwealth*, 744 S.W.2d 421, 426 (Ky. 1987). Indeed, where "the questions were brief and not suggestive, and the declarant remained agitated[,]" the declarant's responsive statement may still very well qualify as an excited utterance pursuant to KRE 803(2). *Ernst v. Commonwealth*, 160 S.W.3d 744, 755 (Ky. 2005). Here, Officer Thomas' questions were open-ended and operated simply to discern what had happened. Further, Cassandra clearly remained in an agitated state. Her statements in Officer Thomas's body camera footage clearly fall under KRE 803(2).

Shackles further takes particular issue with Cassandra's identification of Shackles as the shooter, claiming that its admission was improper under KRE 801A(a)(3), and even if it was admissible under KRE 803(2), its prejudicial value substantially outweighed any probative value. Alleged hearsay need only satisfy one exception to the hearsay prohibition for proper admissibility. Here, Cassandra's statements satisfy the requirements of KRE 803(2) and therefore were properly admitted. Furthermore, we are satisfied that the probative value of their admission substantially outweighs their prejudicial value. KRE 403. Officer Thomas' body camera footage was relevant to show the extent of the blood splattering and condition and placement of the victims. *See Wheeler v. Commonwealth*, 121 S.W.3d 173, 183 (Ky. 2003). The only prejudice alleged here was that Cassandra's statements in the video identified Shackles as the shooter. Cassandra testified to this very fact earlier in the trial. We perceive no reality in which this video's alleged prejudice substantially outweighs its probative value. The trial court did not abuse its discretion in permitting the admission of Cassandra's statements in Officer Thomas' body camera footage.

D. The trial court did not err in admitting video and photographic evidence of the crime scene.

As his final evidentiary concern, Shackles alleges that the trial court erred when it permitted the admission of body camera footage of the wounded Yarbroughs and eight photographs of the crime scene. He argues that the audio of Nicole Foree's cries in the body camera videos and the depictions of the bloody aftermath of the gun fight were unnecessarily gruesome and cumulative such that their probative value was substantially outweighed by the danger of undue prejudice. KRE 403. Because Shackles properly preserved these issues, we review for abuse of discretion.

While evidence depicting portrayals of a crime or of a victim may often be gruesome and thereby prejudicial to the defendant, it is generally admissible so long as it is relevant. *Parker v. Commonwealth*, 952 S.W.2d 209, 212–13 (Ky. 1997); *see also Carson v. Commonwealth*, 382 S.W.2d 85, 90 (Ky. 1964) ("Even though the admission of a photograph may arouse passion, or bring to mind vividly the details of a shocking crime, if the picture serves to illustrate a material fact or condition, it is considered admissible."). Because the Commonwealth must prove the *corpus delicti*, such evidence is frequently relevant to show the nature of the injuries inflicted by the defendant upon the victim. *Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003). However, even where gruesome evidence is relevant, the trial court is not relieved of its gatekeeper role under KRE 403. "The trial judge is always required to weigh the probative value of the gruesome [evidence] in question against the harmful effects that might flow from its admission to determine whether the [evidence] should be excluded notwithstanding the general rule." *Hall v. Commonwealth*, 468 S.W.3d 814, 823 (Ky. 2015) (citing *Adkins*, 96 S.W.3d at 794).

Here, Shackles objects to the trial court's admission of two videos and eight photographs. The two videos consist of Officer Ambers' body camera footage and Officer Thomas' body camera footage.

Officer Ambers' body camera footage is two minutes and seven seconds long. It begins with Officer Ambers pulling up to the scene, exiting his patrol vehicle, and running up the steps of the Yarbroughs' home. Marvin and Cassandra appear in the clip approximately one minute into the footage. Both are laying on the floor just inside the entryway of their home. Marvin lays on his back and clutches the wound on his thigh. Cassandra lays on her side and clutches the wound in her pelvic area. Both Cassandra and Marvin are wearing black clothing, and thus any blood coating their clothing is not discernible. As Officer Ambers enters the Yarbroughs' home, blood splatter can be seen smeared on the walls behind Marvin and Cassandra. Foree can be seen tending to Marvin and crying. At the very end of the video, Officer Ambers asks Marvin where he was injured and begins to render aid by pulling down Marvin's black sweatpants. Though red blood can be seen on Marvin's leg briefly, his actual gunshot wound does not appear in the video.

While Officer Thomas' body camera footage also details his response to the shooting and appraisal of the scene, the focus centers around Officer Thomas' assessment of Cassandra rather than Marvin. It is five minutes and twenty seconds long. It begins with Officer Thomas arriving at the scene. Approximately two minutes in, the video shows Cassandra and Marvin lying inside the doorway of their apartment. Foree can be heard crying in the background as Cassandra groans in pain. Officer Ambers can be seen pulling off Marvin's black sweatpants to administer aid to Marvin's wound. As Officer Ambers places his hand over Marvin's wound, Marvin's exposed genitals are briefly visible. The focus of the footage then turns back to Cassandra, and Officer Thomas can be heard asking her basic questions about what had happened. Cassandra responds between grunts of pain. Officer Thomas cuts off her black sweatshirt and sweatpants to render aid. Cassandra's bare stomach and gray underwear are visible. Blood can be seen in her groin area. Officer Thomas tells Cassandra where to apply pressure. She complies. Due to the angle of the camera, Cassandra's wound is never clearly visible.

The eight photographs at issue include various depictions of the entryway of the Yarbroughs' home following the shooting. The photographs were admitted as Commonwealth's Exhibits 51–56 and 58–59. Exhibit 51 is taken from the Yarbroughs' front door and shows the area where the Yarbroughs laid injured following the shooting. Their front door is open. On the left, a staircase leads to the second floor of the home. On the right is a hallway that leads to the back portion of the home. There is a narrow wall that separates the staircase from the hallway. In the small area in front of the stairs and the hallway, there are clothes and trash strewn haphazardly across the floor. Blood splatter is visible on the bottom step of the staircase, on the wall separating the staircase from the hallway, on the base of the hallway wall, and on the floor immediately in front of and next to the staircase. The blood present on the floor is not so voluminous that it covers the entire floor, nor is there enough for it to have pooled anywhere. Exhibit 52 shows the Yarbroughs' entryway from the same perspective but provides a more zoomed-in portrayal of the bloody area at the base of the staircase. Exhibit 53 is also taken from the entry door, but it does not show the floor and instead focuses on the entirety of the staircase. Exhibit 54 shows a closer perspective of the bottom half of the staircase and the base of the stairs. Exhibit 55 provides a closer perspective of the clothes, shoes, trash, and blood located on the floor of the Yarbroughs' home. Exhibit 56 shows the blood smeared on the wall separating the staircase from the hallway and a different perspective of the hallway such that additional blood can be seen on a far wall leading away from the front of the home. Exhibit 58 shows the base of the staircase, with the aforementioned blood, clothes, and trash, from directly above the scene rather than from the front door. Finally, Exhibit 59 is taken from the perspective of a person standing in the Yarbroughs' back hallway and looking toward the front of the home. On the right, the photograph shows blood smeared on the wall and blood located on the floor amongst various pairs of shoes. On the left, in what appears to be an adjoining room, a pool of blood is visible.

The trial court did not abuse its discretion in admitting the above evidence. The officers' body camera footage was clearly relevant to illustrate the immediate aftermath of the crime. The fact that Foree can be heard crying in the background is de minimis and cannot be said to unfairly prejudice Shackles in any way. Foree's cries were a natural part of the crime scene as it unfurled. Neither the officers' body camera footage nor the photographs were unduly gruesome. The officers' body camera videos never explicitly showed the Yarbroughs' injuries. While Officer Ambers could briefly be seen applying pressure to Marvin's wound in Officer Thomas' body camera video, and both videos featured visible blood smeared on the walls and floor, the videos did not linger on the minimal gore and instead simply portrayed what occurred in the immediate aftermath of the shooting.

Furthermore, the photographs at issue served as accurate depictions of the crime scene that showed the location and relationship of the evidence. Each photograph portrayed a different angle of the crime scene, and each had a separate focal point. Shackles's argument that this evidence ran afoul of KRE 403 simply because there was no dispute that the Yarbroughs were shot lacks merit. It was incumbent upon the Commonwealth to prove all elements of the charged crimes, notably that the Yarbroughs sustained "serious physical injur[ies]" under the first-degree assault charge. The photographs and the body camera footage were clearly necessary to prove this element. Accordingly, the evidence was directly probative of a material fact at issue, and we cannot say that the blood splatter and minimal exposure to the Yarbroughs' wounds were "so inflammatory that their probative value is substantially outweighed by their prejudicial effect." *Adkins*, 96 S.W.3d at 794. We affirm the trial court on this ground.

E. The trial court did not err in denying directed verdicts on the three charges of first-degree wanton endangerment of the three elder Yarbrough children.

Shackles argues that the trial court erred in denying his motion for a directed verdict on the three counts of wanton endangerment in the first degree. This Court stated the standard for directed verdicts in *Commonwealth v. Benham*:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

816 S.W.2d 186, 187 (Ky. 1991). "So long as the Commonwealth produces more than a mere scintilla of evidence to support the charges, a defendant's motion for directed verdict should be denied." *Taylor v. Commonwealth*, 617 S.W.3d 321, 324 (Ky. 2020). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Benham*, 816 S.W.2d at 187.

Under KRS 508.060(1), "[a] person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he or she wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." "Firing a weapon in the immediate vicinity of others is the prototype of first-degree wanton endangerment." *Swan v. Commonwealth*, 384 S.W.3d 77, 102 (Ky. 2012) (quoting Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 9–4(b)(2) at 388, and n. 142 (1998)) (internal quotation marks omitted). And "[t]his would include the firing of weapons into occupied vehicles or buildings." *Id.* As we have cautioned, however, these are simply examples of the severity of behaviors necessary to be considered first-degree wanton endangerment. *See id.* at 103. To be convicted, the defendant must have both acted with the requisite mental state and created the danger prohibited by the statute.

Shackles avers that because he fired gun shots into the living room of the Yarbroughs' dwelling, and not directly into the upstairs bedrooms where the three Yarbrough children were hiding, there was insufficient evidence to support the three first-degree wanton endangerment charges. In reaching this conclusion, Shackles relies upon *Swan* and asserts that the Commonwealth could not have established that Shackles created a "substantial danger of death or serious physical injury" to the three children.

In *Swan*, Marcus Swan and D'Andre Owens, armed with handguns, fired shots upward into the ceiling of a home, directly into the fireplace connected to an outside wall, and toward specific victims in the living room located in the front of the home. 384 S.W.3d at 84–86. On appeal, Owens argued that he was entitled to a directed verdict as to the first-degree wanton endangerment charge related to Lumpkins's mother, as she was not located with the other victims in the living room and instead hid in a back bedroom of the home. This Court agreed with Owens, stating that "[n]o evidence showed that a bullet was fired in Ms. Lumpkins' direction[.]" *Id.* at 103. As a result, we held that the trial court in *Swan* erred in failing to grant a directed verdict on the charge of first-degree wanton endangerment as to the hidden victim. *Id* at 104.

Shackles's reliance upon *Swan* is misplaced, and we note that the facts of this case align more closely with those of *Hall*. There, a defendant shot a high-powered rifle multiple times at his next-door neighbors on their front porch while the neighbors' four children "were somewhere inside the house at the time of the shootings." 468 S.W.3d at 817–18. We distinguished *Swan*, noting that "given the nature of the weapon used and the direction in which the shots were fired, *i.e.*, a high-powered rifle fired through a glass storm-door into the interior of the occupied home, the wanton endangerment issue cannot be resolved by our holding in *Swan*." *Id.* at 829. Instead, this Court held *Paulley v. Commonwealth*, 323 S.W.3d 715 (Ky. 2010) to be more instructive and explained that in *Paulley*, "the Court did not consider the precise location of each of the victims inside [the] home in affirming the denial of the directed verdict." *Id.* at 829. This distinction is relevant when analyzing the criminal liability of a defendant who fires into an occupied home indiscriminately from outside (*Hall*, 468 S.W.3d at 829; *Paulley*, 323 S.W.3d at 724), rather than that of a defendant who targets specific victims after entering the home (*Swan*, 384 S.W.3d at 103). Following this principle, we held that the trial court did not err in denying directed verdicts on the four charges of first-degree wanton endangerment related to the four children inside the home. *Hall*, 468 S.W.3d at 830.

As in *Paulley* and *Hall*, Shackles fired a multitude of shots indiscriminately "into an occupied house." *Id.* During the shooting, the Yarbroughs' baby was in the kitchen, Marvin's brother hid in the living room, and the Yarbroughs' three other children hid in an upstairs bedroom. Bullet holes from the shooting were littered throughout the home. These facts contrast to those in *Swan*, wherein we noted that "Owens and Swan were not firing blindly into an occupied house, such as through a locked door. . . . No evidence showed that a bullet was fired in Ms. Lumpkins's direction or that Owens pointed a gun at her." 384 S.W.3d at 103. Here, the bullet holes located throughout the home indicate that Shackles likely fired in the direction of the three Yarbrough children's hiding place. The danger to the children was substantial. Thus, *Swan* does not mandate the result Shackles seeks.

The only requirement to withstand directed verdict is a "mere scintilla" of evidence. *Taylor*, 617 S.W.3d at 324. In light of the evidence in this case and the reasonable inferences associated with that evidence in the light most favorable to the Commonwealth, there was enough evidence, that is, more than a mere scintilla, to justify presenting the wanton endangerment charges to the jury. *Benham*, 816 S.W.2d at 187. The trial court did not err in denying Shackles's motions for directed verdicts as to the wanton endangerment charges related to the three elder Yarbrough children.

F. Although the trial court erred in the manner in which it polled the jury, the error did not result in manifest injustice.

Shackles next alleges that his penalty verdict and persistent felony offender conviction lacked unanimity. During the sentencing phase of Shackles's trial, the trial court read the penalty phase instructions to the jury, which did not appear to contain a unanimous verdict instruction. Defense counsel requested to approach the bench and brought this issue to the trial court's attention.

During the bench conference, the following exchange occurred:

> **Defense Counsel**: When we were up here earlier before we did the typos, I'm pretty sure the copy that the court had had the instruction, the presumption of innocence instruction, and . . . also had the right to remain silent and the unanimous verdict . . . version in there. It's not in this version and I don't think it was in the version that the court just read.
> **Trial Court**: How about I just tell them that . . . at all stages . . . and remind them of that?
> **Defense Counsel**: That's fine.

The trial court then addressed the jury and stated:

> Alright, ladies and gentlemen, we were going fast so this is my fault. I omitted something but I want to instruct you. The defendant has a right to remain silent at all stages of the trial, whether it's the guilt phase or the sentencing phase. That's his right, and he exercised that right. And I am instructing you and directing that you can't hold that against him in any way. Do you understand? I need a head nod from everybody.

The trial court then permitted defense counsel to begin closing argument. It did so without objection.

Defense counsel and the Commonwealth then each delivered their closing arguments, and the jury was sent away for deliberation. When the jury returned with its verdict, there was some confusion as to what the jury had marked on the instructions. The trial court conferred with counsel at the bench and all parties agreed about how the verdict should be interpreted. The trial court then directed the following inquiry to the jury foreperson,

> I want to ask you a question, Madam Foreperson, because I want to be sure about what you're requesting. The two assault verdicts were thirty years you've said to serve consecutively, in other words, for a sixty-year sentence. Everything else was a ten-year sentence to be served concurrently. You didn't say it, but I'm assuming concurrently with the sixty-year sentence. So, my question to you, and this is yes or no, I'm interpreting this to be a sixty-year sentence. Was that your intent?

The foreperson responded affirmatively. Nevertheless, in exercising an abundance of caution, the trial court decided to poll the jury, stating, "Okay. Let me poll everyone just in case. Alright, I am going to ask each of you if this is your recommended sentence, was a sixty-year sentence for Mr. Shackles." The trial court began by pointing at the first juror, and asking "So, Chair 1?" The juror responded in the affirmative. The trial court pointed at jurors two through six individually and stated their chair number. Each juror responded affirmatively. For jurors seven through twelve, the trial court simply pointed at each juror when it was their turn to answer. Each of those jurors also affirmed that they had recommended a sixty-year sentence for Shackles.

Pursuant to RCr 9.54(2),

> No party may assign as error the giving or failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The failure to comply with this provision precludes review of any claimed error in the instructions where the aggrieved party failed to preserve the alleged error. *Commonwealth v. Thurman*, 691 S.W.2d 213, 216 (Ky. 1985).

At no point did Shackles object to the trial court's reminder to the jury regarding the missing instructions, nor did he object to the manner in which the jury was polled. Furthermore, Shackles did not request that the trial court specifically ask each juror "was that your verdict?" Accordingly, we hold that this issue is unpreserved. *See Bowman*, 686 S.W.3d at 249 (holding error unpreserved where defendant did not object to manner of jury poll nor request that the judge verbally ask each juror for confirmation of the verdict).

Nevertheless, Shackles's allegation of error implicates his constitutional right to a unanimous verdict. Ky. Const. § 7. "[A]lleged constitutional errors, if unpreserved, are subject to palpable error review." *Walker v. Commonwealth*, 349 S.W.3d 307, 313 (Ky. 2011). We will thus review for palpable error pursuant to RCr 10.26.

It is best practice for the trial court to give an unanimity instruction in writing. *Williams v. Commonwealth*, 464 S.W.2d 806, 808 (Ky. 1971); *Bradley v. Commonwealth*, 439 S.W.2d 61, 64 (Ky. 1969). However, where a trial court fails to do so, a juror poll may serve as a proper corrective course of action to ensure unanimity. *See Powell v. Commonwealth*, 346 S.W.2d 731, 733 n.1 (Ky. 1961) (purpose of polling is to determine that "the jury's verdict reflects the conscience of each of the jurors"). To conduct a successful juror poll, the trial court must "ask[] *each juror* if it is his or her verdict." RCr 9.88 (emphasis added). "While a non-verbal response to the court's queries can be sufficient . . . the response must be to a question specifically posed to that responding juror and to him alone." *Miles v. Commonwealth*, 256 S.W.3d 46, 47 (Ky. App. 2008) (internal citation omitted). Mere gestures by the trial court to each juror are insufficient; the trial court must specifically ask each juror whether it was his or her verdict. *Bowman*, 686 S.W.3d at 250.

This Court addressed circumstances similar to those before us in *Bowman v. Commonwealth*. There, the Appellant requested three separate jury polls at various points throughout the proceeding. *Id.* at 249. For each poll, the trial court began by asking the jury if the previously-read verdict was their verdict. *Id.* Instead of individually asking each juror this question, the trial court simply gestured to each juror and each juror verbally responded "yes." *Id.* While this Court noted that it was error for the trial court to fail to ask each juror individually about the verdict, we held that it did not constitute palpable error. *Id.* at 250. We explained that in order to have found this error palpable,

> [W]e would have to believe that there is a substantial possibility that one or more jurors would have changed their answer from "yes" to "no" if the trial court had asked "was that your verdict" instead of stating that it was going to poll the jury, explaining what that meant, and then gesturing to each individual juror to elicit a response.

Id.

Accordingly, we agree with Shackles that the trial court erred in the manner in which it polled the jury. However, as in *Bowman*, we cannot say that this error "resulted in manifest injustice or that there 'is a "substantial possibility" that the result in the case would have been different[.]'" *Id.* (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). We do not believe that any of jurors seven through twelve "would have changed their answer from 'yes' to 'no' if the trial court had asked 'was that your verdict'[.]" We are assured that Shackles's recommended sixty-year sentence was unanimous. In reaching this holding, we also dispose of Shackles's argument that his persistent felony offender conviction lacked unanimity. The jury could not have reached its sixty-year sentence without unanimously agreeing on the persistent felony conviction.

G. The trial court did not err in permitting Cassandra to testify to Shackles's threats as victim impact evidence during the sentencing phase.

For his final assertion of error, Shackles argues that Cassandra should not have been permitted to testify to the impact of statements made by Shackles in recorded phone calls on her related fear of retaliation. Shackles properly preserved this issue, and we therefore review under the abuse of discretion standard.

The Supreme Court of the United States has held, "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Pursuant to Kentucky's truth-in-sentencing statute, KRS 532.055(1),

> (a) Evidence may be offered by the Commonwealth relevant to sentencing including:
>
> > . . .
> > 7. The impact of the crime upon the victim or victims, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim or victims[.]

The purpose of victim impact testimony is "to give the jury an understanding of the impact of the crime being tried, not the defendant's bad character or overall negative effect on society." *St. Clair v. Commonwealth*, 451 S.W.3d 597, 625 (Ky. 2014). "[T]he phrase 'the crime' as used in this statute refers to the tried crime, not any and all crimes the defendant may have committed." *Id.*

Here, following the guilt phase of the trial, the Commonwealth acquired possession of Shackles's jailhouse phone calls, in which he stated to an unknown recipient that, "it took all he had not to turn around after the verdict and tell [Cassandra] she was going to die," and told another unknown recipient that "one of his friends saw her walking down the street and didn't do anything about it. That's not a very good friend." Cassandra was unaware of the phone calls. The trial court permitted her to listen to them.

During her testimony at the sentencing phase, the Commonwealth asked Cassandra how her life had changed after the shooting, and the following exchange occurred:

> **Cassandra**: I can't even live in my own home peacefully because I'm afraid that someone is going to come and do something to us.
> **Commonwealth**: Have there been specific instances of events that made you scared?
> **Cassandra**: Yes.
> **Commonwealth**: And what was that?
> **Cassandra**: I get threats if not daily, then every other day. Most people know where I live at, so that's a struggle. Also, I have to look over my shoulder every time I step outside. It's just hard. . . .
> **Commonwealth**: And did you become aware of a specific fear on Friday?
> **Cassandra**: Yes.
> **Commonwealth**: What happened there?
> **Cassandra**: I had listened to some phone calls, and it's stated that Mr. Shackles had said in one of the phone calls that it took everything to not turn around and tell me that I'm going to die.
> **Commonwealth**: As a result of that have you all been staying somewhere else?
> **Cassandra**: Yes.

Shackles alleges that the latter part of the testimony, wherein Cassandra references statements made by Shackles in a series of phone calls, amounts to the admission of evidence of Shackles's uncharged bad acts. We disagree. Cassandra's testimony relates directly to the impact of the shooting, *i.e.*, "the tried crime," on her life. The threats that Shackles made in the phone calls were inherently intertwined with the crimes in question. Furthermore, regardless of whether Cassandra was permitted to testify to the threats in the phone calls, we have no doubt that the Commonwealth would have informed her of their existence to ensure that she could take steps to safeguard her own safety and that of her family. It would be nonsensical to permit the first part of Cassandra's testimony related to threats on her life, but thereafter disallow her latter statements simply because the threats came directly from Shackles. This is the very victim impact evidence that KRS 532.055(1)(a)(7) intended to permit. The trial court did not err in allowing Cassandra's testimony on this matter.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

All sitting. Conley, Goodwine and Nickell, JJ., concur. Bisig, J., concurs in result only by separate opinion, in which Lambert, C.J., and Thompson, J., join. Thompson, J., dissents by separate opinion.

CRIMINAL LAW

MURDER

JURY SELECTION

STRIKE OF JUROR FOR CAUSE

ADMISSIBILITY OF EVIDENCE

EVIDENCE OF PRIOR DRUG ACTIVITY

RIGHT TO COUNSEL

MOTION FOR A NEW TRIAL

ALLEGEDLY DISRUPTIVE BEHAVIOR BY A POLICE SERGEANT WHILE SITTING AT THE PROSECUTOR'S TABLE

Defendant appealed as a matter of right his convictions on two counts of murder — AFFIRMED convictions — Trial court did not abuse its discretion in denying defendant's motion to strike Jurors Harper, Page, and Wright for cause — Juror Harper did not respond when trial court asked a pool of jurors containing Juror Harper whether sitting for a two-week trial could pose a potential hardship for reasons such as doctor appointments, health problems, or other prior commitments which could not be rescheduled — However, on her juror questionnaire form, Juror Harper indicated that she has diverticulitis, which might make it difficult for her to sit for trial without frequent breaks — When questioned during individual *voir dire*, Juror Harper stated that her condition causes her to go to the bathroom between two and six times within the first four hours of the morning — When asked whether it could disrupt her ability to sit on the jury, Juror Harper stated that she was "afraid so," but that she "didn't go so far as to get a doctor's note or anything like that for it" — Juror Harper indicated that she was familiar with the prosecutor because the prosecutor had prosecuted a case 14 years earlier involving spousal abuse of her daughter — Juror Harper stated that prosecutor "did a great job and made sure he stayed in prison longer" — Juror Harper was not in courtroom for spousal abuse case since she stayed home to babysit — Juror Harper indicated that nothing about that prior case would affect her ability to sit in the jury pool and listen to evidence presented — Defendant moved to strike Juror Harper due to her health condition — Prosecutor suggested that taking breaks once an hour would accommodate her condition — Trial court declined to strike Juror Harper — On appeal, defendant argued Juror Harper's medical condition and the prior spousal abuse case required trial court to strike Juror Harper — There is no indication that Juror Harper's medical condition would have caused her to unfairly align with or against either defendant or Commonwealth or that taking frequent breaks would limit her ability to objectively and carefully weigh evidence — There was no suggestion that Juror Harper ever spoke to prosecutor about her daughter's case and she stated that prior case would not affect her ability to sit on this jury — Juror Page taught at public high school — Juror Page had served on a prior jury in which the criminal defendant was acquitted of misdemeanor marijuana charges — Juror Page indicated that her experience on that jury was not good because a student in her class whose father was a sheriff asked her "why did you let him go" — Juror Page disclosed that she currently has the prosecutor's child in her class and had previously taught another child of prosecutor — Juror Page stated that she had never interacted with or been introduced to the prosecutor, but had probably emailed her — Juror Page expressed concern about being away from her job for two weeks since she taught half of the students in the high school and she would miss her students — Trial court declined to strike Juror Page because nothing she said rose to the level of excusing her for cause — Juror Page indicated that her past experience as a juror and currently teaching one of prosecutor's children would not prevent her from doing her service — On first day of *voir dire*, Juror Wright stated that she cares for her elderly mother and must leave at 4 p.m. every day to relieve the sitter — Juror Wright also disclosed that her husband was friends with the female victim's predeceased husband, but that she had met female victim only two or three times and was "not really" acquainted with her — Further, Juror Wright worked with city police and her husband was related to a Kentucky State trooper — Juror Wright stated that those relationships would not impede her ability to listen to the evidence and witnesses — Trial court found there was no reason to excuse Juror Wright — There was insufficient evidence to conclude that Juror Wright was inherently biased — Trial court did not abuse its discretion in admitting drug-related evidence, which defendant contested under KRE 404(b) — Commonwealth's entire theory of instant case was that defendant and male victim's drug activity was the motive behind the murders — Commonwealth would have suffered serious adverse effect in proving its case absent drug-related evidence — After murders, defendant was eventually found walking along a highway in California, which is illegal in California — Officers stopped and handcuffed defendant — California officers learned that defendant had a warrant for drug charges and was wanted for questioning in instant double homicide case — Kentucky officers went to California to question defendant — Officers read defendant his *Miranda* rights and began questioning him — After informing defendant about drugs found in victim's home and shooting death of two people in that home, defendant stated, "I think it would probably be safe for me to have a lawyer. I kind of see where this is going." — Questioning continued until defendant stated, "I would really want to talk to a lawyer, at this point." — Officers ended interrogation at that time — Defendant did not invoke his right to counsel with his first statement since this statement was ambiguous and equivocal in light of the circumstances — Trial court did not abuse its discretion in admitting statements made by defendant after his first statement, but prior to his second statement when officers ended interrogation — Trial court did not abuse its discretion in denying defendant's motion for a new trial — On sixth day of trial, defense counsel informed trial court that sergeant, who was seated at Commonwealth's table during the trial, had made facial expressions, or rolled his eyes, smiled, smirked, etc., as other witnesses testified — Defense counsel argued this behavior was a form of non-verbal communication commenting on the credibility of witnesses — Commonwealth denied noticing the behavior but promised to talk to sergeant — Two days later, after defense counsel delivered his closing arguments, defense counsel informed trial court that numerous people confirmed that sergeant continued to "act out" — Trial court commented on its inability to observe witness from the bench, as there was a lamp blocking the view — After trial, defendant moved for new trial based on sergeant's behavior — Trial court conducted a hearing on the motion and heard testimony from nine witnesses, most of whom were aligned with defendant and none of whom were jurors — Trial court found that defendant failed to meet his burden of proof in showing influence on the jury — Kentucky Supreme Court urged trial courts to make every effort to personally observe potentially disruptive conduct brought to their attention and, if such conduct is indeed validated by the trial court, a strong admonition to the offending party is warranted — If courtroom decorum is significantly breached, then an admonition to the jury regarding same, whether requested or not by a party, may be warranted —

Landon Stinson v. Com. (2024-SC-0108-MR); Trigg Cir. Ct., White, J.; Opinion by Justice Keller, *affirming*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

Following an eight-day trial, a Trigg County jury found Landon Stinson guilty of two counts of murder. He was sentenced to life imprisonment without the possibility of parole. Stinson now appeals as a matter of right and challenges his convictions. *See* Ky. Const. § 110(2)(b). Having reviewed the record, the arguments of the parties, and the applicable law, we affirm the Trigg Circuit Court.

I. BACKGROUND

Appellant Landon Stinson often spent time with his cousin, Matthew Blakely, at the home of Stinson's aunt, Sue Farris. Through the years, Stinson resided intermittently with Sue and had occupied a bedroom at her home. In June or July 2021, Stinson moved into his own apartment. On July 2, 2021, when Matthew's wife, Bobbi Jo, had not heard from Matthew, she drove by Sue's home and saw Matthew's vehicle in the driveway. Bobbi Jo assumed that her husband was either inside the home or with Stinson. After neither Bobbi Jo nor Mary Hargrove, Matthew's sister, had heard from Matthew by the following morning, Bobbi Jo and Mary returned to Sue's home. Mary called Sue's phone and could hear it ring from inside the home, but no one answered. Mary then contacted Sue's niece, Kathy Farris, and Kathy brought a key over to Sue's home. The three entered the home. Inside, Matthew was observed slumped over in a chair and Sue was lying on the floor in a pool of blood. Both appeared dead. Bobbi Jo, Mary, and Kathy exited the home, and Kathy called 911.

Responding officers confirmed that Matthew and Sue were deceased. An autopsy later confirmed that Matthew was shot three times, twice in the chest and once in the head. Sue was shot once in the head. Law enforcement began collecting evidence. Kentucky State Police Detective Brian Hill discovered multiple spent Hornady 9mm casings and projectiles which were later determined to have been fired from a Smith & Wesson handgun. Inside of the bedroom previously occupied by Stinson, detectives found a 9mm Smith & Wesson magazine and a plastic bag with cocaine residue. Detective Hill searched Matthew's truck but collected no evidence from it. Detective Sergeant David Dick assisted the other officers in processing the scene. He noted that Sue's purse and Matthew's wallet were untouched and that there were no signs of robbery. A can of Dr. Pepper located at the scene was later determined to have Stinson's DNA on it.

Stinson was not present at the scene nor was he able to be contacted by his family members. His family members feared that he had also been victimized. In an attempt to locate Stinson, Sergeant Dick contacted Stinson's employer, sent a deputy sheriff to Stinson's home, and attempted to obtain a "ping" of Stinson's cell phone location, all to no avail. Detective Hill and Sergeant Dick accompanied Stinson's mother, Rhonda Neighbors, and her husband to Stinson's apartment in hopes of finding Stinson. They did not find Stinson there. Instead, Rhonda advised the officers that she saw a broken cell phone she believed to belong to Stinson in the wood line near the property. The officers retrieved the phone, along with a container holding a glass pipe with drug residue and other drug paraphernalia, in the wood line. After obtaining a search warrant for Stinson's apartment, officers found two empty 9mm Smith & Wesson handgun boxes along with a fully intact Hornady 9mm cartridge inside the apartment. Officers also found another broken cell phone inside a trash can.

After adding a description of Stinson's vehicle and license plate number to the National License Plate Reader Program, Sergeant Dick learned that a license plate reader had captured Stinson's vehicle near Amarillo, Texas, on 8:12 a.m. on July 3, 2021. The following day, on July 4, 2021, Stinson contacted his mother, Rhonda, using a new cell phone number. Using this new number, Sergeant Dick sought a "ping" for the location of the new phone and learned that the phone was in California. Sergeant Dick also learned that Stinson had nearly drained his bank account prior to leaving Kentucky. Sergeant Dick obtained a warrant for Stinson for drug related charges based on the evidence of drug use found in Sue's home.

On July 5, 2021, California Highway Patrol observed a person later determined to be Stinson walking along the freeway in Los Angeles. Because walking along the freeway is illegal in California, the officer stopped and handcuffed Stinson, put Stinson inside his patrol vehicle, and went to the next exit to drop Stinson off. Stinson originally told the officer his name was Reece but later admitted that his real name was Landon Stinson. Stinson did not have a phone, car keys, identification, or wallet with him. He claimed that he had driven to California a few days prior for work, but that his truck had run out of gas some distance away from where he was picked up by police. After the officer learned that Stinson had a warrant for drug charges and was wanted for questioning in a double homicide case in Kentucky, arrangements were made for Sergeant Dick and Detective Hill to fly to Los Angeles to question Stinson and extradite him back to Kentucky for the drug charge.

Once in Los Angeles, Sergeant Dick read Stinson his *Miranda*[1] rights and began questioning Stinson about the drugs and drug paraphernalia found in Sue's home. The officers then informed Stinson that Sue and Matthew were found dead in the home and had been shot to death. Soon thereafter, Stinson stated, "I think it would probably be safe for me to have a lawyer. I kind of see where this is going." The questioning continued until Stinson stated, "I would really want to talk to a lawyer, at this point." The officers concluded the interrogation at this point.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

On December 14, 2021, Stinson was indicted by the Trigg County Grand Jury for two counts of capital murder. Pretrial motion practice included motions in limine in which Stinson sought to exclude KRE[2] 404(b) evidence and statements made to officers in Los Angeles following his first mention of obtaining counsel. After hearings on the motions, the trial court ruled that all disputed 404(b) evidence and the contested statements may come in at trial.

[2] Kentucky Rules of Evidence.

Because the Commonwealth sought the death penalty in this case, RCr[3] 9.38 mandated the jurors be subjected to individual voir dire out of the presence of other prospective jurors. During the voir dire process, the trial court denied three motions from Stinson to exclude jurors for cause. The case proceeded to trial, where Stinson twice alleged that Sergeant Dick was demonstrably reactive to statements made by witnesses with whom he disagreed, and that his actions may have influenced the jury. Both times, the trial court instructed the Commonwealth to reign in Sergeant Dick, but the trial court's ability to observe his actions for itself was blocked by a lamp.

[3] Kentucky Rules of Criminal Procedure.

Following an eight-day trial, the jury found

Stinson guilty of two counts of intentional murder and recommended a sentence of life without the possibility of parole. Stinson moved for a new trial, and his motion was heard on January 3, 2024. The trial court ultimately denied Stinson's motion and Stinson was sentenced in accordance with the jury's recommendation. This appeal followed.

Additional facts will be developed below as necessary.

II. ANALYSIS

On appeal to this Court, Stinson alleges the trial court made various errors which require reversal. First, he alleges that the trial court erred when it refused to strike three jurors for cause. Second, he alleges that the trial court erred in allowing improper KRE 404(b) evidence to be admitted. Third, he alleges that he invoked his right to counsel and was ignored. Fourth, he alleges that Sergeant Dick physically demonstrated either his approval or disapproval of witness testimony and defense's closing arguments while seated with the Commonwealth at counsel table. Last, he argues that this Court should reverse for cumulative error. Each of Stinson's arguments will be addressed in turn.

A. The trial court did not err when it failed to strike three jurors for cause.

Stinson alleges that the trial court's failure to grant Stinson's motion to strike Jurors Harper, Page, and Wright for cause, forcing Stinson to use his peremptory strikes on these three jurors instead of striking three other jurors who each ultimately served as the final twelve jurors, amounted to reversible error. Stinson's counsel preserved the issue in compliance with *Floyd v. Neal*, 590 S.W.3d 245, 252 (Ky. 2019), by identifying on the strike sheet those jurors counsel would have struck instead had Jurors Harper, Page, and Wright been struck by the trial court and submitting the strike sheet to the trial court prior to the jury being empaneled. All three jurors that Stinson's counsel would have struck ended up serving on the jury.

"[W]hether to excuse a juror for cause rests upon the sound discretion of the trial court and on appellate review, we will not reverse the trial court's determination 'unless the action of the trial court is an abuse of discretion or is clearly erroneous.'" *Sturgeon v. Commonwealth*, 521 S.W.3d 189, 192 (Ky. 2017).

> RCr 9.36(1) plainly and succinctly establishes the standard by which trial courts are to decide whether a juror must be excused for cause. The rule says: "When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Rule 9.36(1) is the only standard for determining whether a juror should be stricken for cause.

Id. at 193 (citing *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013)). "The central inquiry is whether a prospective juror can conform his or her views to the requirements of the law, and render a fair and impartial verdict based solely on the evidence presented at trial." *Wood v. Commonwealth*, 178 S.W.3d 500, 516 (Ky. 2005). Trial courts are deserving of deference because they are in the best position to "observe the demeanor of the prospective jurors and understand the substance of their answers to voir dire questions." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 535 (Ky. 2004) (quoting *Stopher v. Commonwealth*, 57 S.W.3d 787, 797 (Ky. 2001)).

> Doubts about a prospective juror's ability to "render a fair and impartial verdict on the evidence" can arise for a host of reasons, but they often arise from a juror's having prejudged the defendant based on information, or supposed information, acquired outside of court; or from the juror's having some personal reason, such as a relationship with a trial participant or personal experience of a crime like the one alleged, to lean one way or the other.

Futrell v. Commonwealth, 471 S.W.3d 258, 272 (Ky. 2015).

Juror Harper

At the beginning of voir dire, Juror Harper did not respond when the trial court asked a pool of jurors containing Juror Harper whether sitting for a two-week trial would pose a potential hardship on anyone for reasons such as doctor appointments, health problems, or other prior commitments which could not be rescheduled. However, on her juror questionnaire form, Juror Harper indicated that she has diverticulitis, a health condition which might make it difficult for her to sit for the trial without frequent breaks. When Juror Harper was questioned during individual voir dire, she stated that her condition causes her to go to the bathroom between two and six times within the first four hours of the morning. She described this condition as "problematic." When asked whether it could disrupt her ability to sit on the jury, she stated that she was "afraid so," but that she "didn't go as far as to get a doctor's note or anything like that for it."

Juror Harper also indicated that she was familiar with the prosecutor from a case the prosecutor had prosecuted fourteen years prior involving spousal abuse against Juror Harper's daughter. She commented that the prosecutor "did a great job and made sure he stayed in prison longer." Juror Harper stated that she was not aware of which county it was prosecuted in, as her husband and daughter handled it while she stayed home and babysat. When she was asked whether anything about that case would affect her ability to sit in the jury pool and just listen to the evidence presented, Juror Harper replied, "no."

Stinson moved to strike Juror Harper due to her health condition. The prosecutor suggested that taking breaks once an hour would accommodate her condition, while counsel for Stinson maintained that breaks would be insufficient given the urgency of the condition. Counsel for Stinson explained that "it's something that hits you real soon . . . just hits you instantly. You got to go within the next three or four minutes or there's going to be a real problem." The trial court questioned why, if the condition was so problematic, the juror did not indicate so earlier when originally questioned about medical hardships. Ultimately, the trial court declined Stinson's motion to strike Juror Harper for cause, stating, "I believe I'm going to keep her in. I think if it was that serious of a condition, she would have said something earlier. I think I've given a lot of time for her to do that. I think I'm going to keep her in the original pool."

On appeal, Stinson argues that the failure to strike Juror Harper was error because "she would be more worried about her diverticulitis and having to use the bathroom many times in the morning than rendering a fair and impartial verdict." Stinson acknowledges that the trial court believed that the condition must not have been serious, given that the juror had not mentioned it at an earlier time despite opportunities to do so, but argues that the trial court made no effort to discern whether hourly breaks would have been sufficient to accommodate Juror Harper's condition. Stinson also now argues on appeal that the trial court should have struck Juror Harper for apparent bias based on her comment that the prosecutor "did a great job" in the case involving her daughter.

Stinson's arguments fail. While Juror Harper's medical condition may have made it difficult for Juror Harper to sit for the trial and may have been an inconvenience to the trial court, there is no evidence that her condition would have caused her to be biased toward either party or that it would have compromised her ability to listen to and understand the evidence presented. At most, Juror Harper's condition would have forced the court to take more frequent breaks, perhaps at short notice, but a trial court willing to accommodate these breaks would certainly be no bar to affording the defendant a right to a jury composed of a fair cross-section of the community. *See Meece v. Commonwealth*, 348 S.W.3d 627, 697 (Ky. 2011) (discussing a judge's power to control the progress and shape of trial); *Miller v. Commonwealth*, 394 S.W.3d 402, 409 (Ky. 2011) ("The Sixth Amendment right to a jury trial includes the right to a petit jury selected from a representative cross-section of the community."). There is no indication that Juror Harper's condition would have caused her to unfairly align with or against either Stinson or the Commonwealth, or that taking more frequent breaks would have limited her ability to objectively and carefully weigh the evidence. In short, Stinson would not have been prejudiced by Juror Harper's health condition.

Further, Juror Harper's familiarity with the prosecutor's involvement in a prior case concerning the juror's daughter was not adequate reason to find error with the trial court's decision to keep Juror Harper in the jury pool. In *Cochran v. Commonwealth*, 114 S.W.3d 837, 840 (Ky. 2003), this Court found no abuse of discretion where the trial court declined to strike a juror who had been a victim in another case handled by the same Commonwealth's Attorney, but where the juror only spoke with the Commonwealth's Attorney a couple of times in connection with the case because the juror worked mainly with a victim's advocate and where the juror stated that she could put her past dealings with the Commonwealth's Attorney aside and be fair and impartial.

Here, the relationship between Juror Harper and the prosecutor is even more attenuated. Juror Harper was not the victim in a case handled by the prosecutor; instead, she was the victim's mother. Juror Harper did not observe the proceedings. Instead, she stayed home and let her husband and daughter handle the matter and was not even aware of the county in which the case was brought. The case involving Juror Harper's daughter was fourteen years prior to the trial of this case. There was no suggestion that Juror Harper had ever spoken with the prosecutor in this case, but merely that she recognized that the prosecutor involved in her daughter's case was the same prosecutor involved in the case at hand. Juror Harper stated unequivocally that nothing about the prior case would affect her ability to sit "in this jury pool and just listen to the evidence that comes from the witness stand." In light of our holding in Cochran, and the more attenuated relationship at issue here, there is nothing here that should convince us to find an abuse of discretion in the trial court's failure to strike Juror Harper.

Juror Page

Juror Page is a teacher at a public high school. She had served on a prior jury for a case involving a criminal defendant that was ultimately acquitted of misdemeanor marijuana charges. She was asked about her experience serving on this jury:

> **Commonwealth**: Anything about that experience serving on that jury trial that you think would interfere with you sitting in this jury if you were picked?
>
> **Juror Page**: Well, it didn't really go well for me after that. I had a student in my class whose father was a sheriff in that jurisdiction, and the kid asked me the next day, "why did you let him go?" And I said, "it wasn't me; it was the whole jury." I felt very threatened by that, so I didn't drive through that area very often.
>
> **Commonwealth**: So that was not a good experience?
>
> **Juror Page**: No. No, not at all. No, not at all.
>
> **Commonwealth**: And does that cause you pause in being picked as a juror?
>
> **Juror Page**: A little bit. A little bit.

Juror Page then disclosed that she currently has the prosecutor's child in class and had previously taught another child of the prosecutor. Juror Page indicated that she had never interacted with or been introduced to the prosecutor but had probably emailed her. When asked if there was anything else that might interfere with her ability to sit as a juror and listen to the evidence that is presented in the courtroom, Juror Page expressed concern about being away from her job for two weeks. She stated that she taught half of the students in the high school and that their education would suffer if she were absent for two weeks.

Counsel for Stinson asked Juror Page several follow-up questions. First, he asked her if potentially serving as a juror in this case would make her uncomfortable given her previous experience serving on a jury. She stated, "No, I'd just, I miss my kids. I teach a hundred and sixty kids every day, and I just miss each one of them. That's all." He then asked her if the fact that she would miss her students would play on her mind some if she were to sit for the rest of the trial, to which she responded, "not really, but maybe a little bit, not really though." He asked whether it would interfere with her ability to sit and listen to whatever goes on in the courtroom, to which she responded, "No, I could do it, but I'd still miss them, yeah. A little bit I guess." He then asked whether having the prosecutor's child in her class would make her uncomfortable to return a "not guilty" verdict if she felt that is what she should do, knowing that would be against the prosecutor's wishes. Juror Page responded, "No, it'd be alright, that would be fine. I mean, I would just have to do my service."

Counsel for Stinson then moved to strike Juror Page for cause "because of the position she's in with [the prosecutor]'s child, based on that and her previous experience, the fact that she's teaching one hundred and sixty students and she'd rather be there, and someone is having to fill in for her." The prosecutor responded by saying that Juror Page has demonstrated that she can be fair and base her decision on the evidence presented in the courtroom, and that neither she (the prosecutor) nor Juror Page recall ever having interacted with each other. The trial court declined to strike Juror Page, stating that nothing Juror Page said rose to the level of excusing her for cause from the jury pool.

On appeal, Stinson argues that the trial court abused its discretion by failing to strike Juror Page. In support, Stinson argues that Juror Page's past bad experience with serving on a jury in which she was questioned by a student whose father was a sheriff, particularly in light of the fact that Juror Page now teaches the prosecutor's child, warranted a for-cause strike. Specifically, Stinson states that, "Her fear of retribution if the jury were to find a defendant not guilty was an explicit statement that she could not be impartial." Additionally, Stinson argues that a for-cause strike was warranted because Juror Page "unequivocally stated that being away from her kids for two weeks would interfere with her sitting as a juror 'a little bit.'"

Particularly in cases where a trial court is making inferences about a juror's ability and willingness to render a fair and impartial verdict on the evidence in conformity with RCr 9.36 from body language, tone of voice, and vocal inflections, we have generally afforded the trial courts much deference. *See Gabbard v. Commonwealth*, 297 S.W.3d 844, 853 (Ky. 2009) (finding deference to trial court appropriate when juror hesitated after asked a question, but deference less appropriate when a juror clearly stated they already formed an opinion about the case and thought the defendant was guilty). "It is largely because of the familiarity both with what occurs during voir dire and the community that '[t]he law recognizes that the trial court is vested with broad discretion to determine whether a prospective juror should be excused for cause.'" *Id.*

Here, Juror Page had the unpleasant experience of being questioned by a student of hers whose father was a sheriff following an acquittal in a case on which she served as a juror. Yet, when asked if this experience, coupled with the fact that she is currently teaching one of the prosecutor's children, would make her uncomfortable to return a verdict of acquittal if she felt that was the right thing to do, she indicated that the situation would not prevent her from doing her service. In *Stopher*, 57 S.W.3d at 797 (Ky. 2001), we found no error where the trial court failed to strike a juror for cause based on the juror's unpleasant prior experience serving on a jury. In that case, a potential juror "voiced concern about an unpleasant experience serving as a juror in 1981. Specifically, she felt that she had been coerced by the jury foreperson to acquit a defendant who later committed a murder." *Id.* In "[g]iving due deference to the opportunity of the trial court to observe the demeanor of the prospective jurors and understand the substance of their answers to voir dire questions," and noting that the juror did not express any opinion as to the guilt of the appellant or any prejudged beliefs about the case, this Court found no error. *Id.* Both Juror Page and the juror in *Stopher* had unpleasant consequences from acquitting a criminal defendant but nevertheless indicated that they would be able to render a fair and impartial verdict based on the evidence before them, even should that verdict be acquittal.

Similar to the reasoning above regarding Juror Harper, Stinson's argument that Juror Page should have been stricken for cause based on her indications that she would miss her students and their education would suffer is meritless. The standard under RCr 9.36(1), which is the only standard for determining whether a juror should be stricken for cause, is whether the prospective juror can "render a fair and impartial verdict on the evidence." *Sturgeon*, 521 S.W.3d at 193. Stinson fails to show how missing work would cause Juror Page to be unfair or partial to either Stinson or the Commonwealth. While missing work would pose some inconvenience to Juror Page, there is no indication that this inconvenience would translate to prejudice against Stinson. We hold that the trial court did not abuse its discretion in denying Stinson's motion to strike Juror Page for cause from the jury pool.

Juror Wright

On the first day of voir dire, Juror Wright disclosed that she cares for her elderly mother in Bowling Green and must leave at 4 p.m. every day to relieve the sitter. She also disclosed that her husband was friends with Jerry Farris, victim Sue Farris' predeceased husband. Juror Wright stated that her husband conducted Jerry Farris' eulogy. Juror Wright also disclosed that she worked with the city police and her husband was related to a Kentucky State Police trooper. When asked whether those relationships would impede her ability to listen to the evidence and the witnesses, Juror Wright replied, "no." She was then asked whether she could be fair and impartial, to which she responded, "I think so."

During individual voir dire, Juror Wright was asked whether she was personally acquainted with either victim, Sue Farris or Matthew Blakely. Juror Wright answered, "No." The trial court then asked whether she was acquainted with any of the victims' relatives. Juror Wright explained that her husband was friends with Jerry Farris and "did his eulogy." Juror Wright denied being friends with Sue Farris and stated that she "really didn't know her." Juror Wright explained that her husband was a basketball coach, and he met Jerry because Jerry attended all the sporting events. Juror Wright disclosed that she started a new job with the city of Cadiz three weeks prior and was still in training.

In response to questions from defense counsel, Juror Wright explained that, although she and her husband were friends with Jerry Farris, she had personally only met Sue Farris two or three times and was "not really" acquainted with her. Defense counsel asked whether Jerry attended their church, and Juror Wright answered in the negative. Juror Wright then acknowledged that she worked with city police officers through her new employment but denied that this would cause her to favor their testimony over other witnesses. Juror Wright likewise denied that her husband being cousins with a Kentucky State Police Trooper would cause her to

PLEASE SEE NOTE ON PAGE 86 CONCERNING FINALITY OF DECISIONS DIGESTED.

favor Kentucky State Police's testimony.

Defense counsel moved to strike Juror Wright for cause on the grounds that she worked with city police officers, her husband was related to a Kentucky State Police trooper, that she had prior commitments to provide care to her elderly mother, and that she had mentioned having a medical appointment for her thyroid. The trial court declined to strike Juror Wright for cause, stating that there was no reason to excuse her.

On appeal, Stinson argues that the trial court abused its discretion in overruling his motion to strike Juror Wright for cause, claiming that Juror Wright's "close relationships" called "into doubt her impartiality." In support, Stinson claims that Juror Wright's husband's friendship with Sue Farris' husband, her husband's acquaintanceship with Sue Farris, her employment with the city which facilitated familiarity with the city police, and her husband's relation to a Kentucky State Police trooper provided sufficient grounds to doubt her impartiality.

The question we are presented with is whether Juror Wright's relationships were sufficiently close that the trial court's refusal to strike for cause was an abuse of discretion. "There are occasions when, despite the juror's answers, a juror's 'familial, financial or situational' relationship with the parties will be sufficient to sustain a motion to strike for cause, where such relationships are likely to 'subconsciously affect [the juror's] decision in the case.'" *Little v. Commonwealth*, 422 S.W.3d 238, 242 (Ky. 2013). "[I]rrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims, or witnesses." *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985). In determining whether a relationship is so close as to be presumptively prejudicial, we have also said:

> As for jurors with some relationship to the case, the trial court must distinguish between those whose objectivity, whose "indifference," remains intact and those so closely related to the case or so susceptible to the relationship as to be predisposed to be more (or less) critical of one side's evidence than the other's. In all cases these distinctions are to be based on the totality of the voir dire circumstances: the juror's demeanor, the context of any questions, and the entirety of the juror's responses. Where the juror's responses and the rest of the circumstances have created a genuine doubt as to the juror's impartiality, further questioning meant to resolve the doubt by eliciting further information is certainly appropriate, but leading questions calling for "impartial" answers do not "cure" or "rehabilitate" prospective jurors whose relationship to some important aspect of the case is so close as to be presumptively disqualifying, or who in some other way have already made their disqualification apparent. Again, "where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused."

Futrell, 471 S.W.3d at 272–73 (internal citations omitted). Here, again, the trial court must use its discretion to evaluate the conduct of and answers given by prospective jurors to determine their ability and willingness to be fair and impartial. That discretion is afforded deference.

In *Sanders v. Commonwealth*, 801 S.W.2d 665, 669 (Ky. 1990), we found no abuse of discretion where the trial court failed to strike a juror who was business acquaintances with the victim and who stated they liked the victim but who described the relationship as a casual one. The potential juror disclaimed any preconceived notion of guilt or innocence towards the accused and indicated to the court that they could remain fair and impartial despite their relationship with the victim. *Id.* This Court stated that, "[t]he record does not persuade us that this juror had such a close situational relationship with the victim as to compel a presumption of bias." *Id.* at 670.

Here, the relationship between Juror Wright and Sue Farris was likewise distant. Juror Wright stated that she "didn't really know" Sue, would not consider Sue a friend, and had only met Sue two or three times. "[A] casual acquaintance [is] not the close relationship needed to imply bias on the part of the juror." *Graham v. Commonwealth*, 319 S.W.3d 331, 338 (Ky. 2010). Given that Juror Wright in no way indicated that her relationship with Sue Farris or Jerry Farris would influence her ability to remain impartial and fair, the trial court did not abuse its discretion in declining to strike Juror Wright for cause based on any ties to Sue Farris.

For similar reasons, the trial court did not abuse its discretion in failing to strike Juror Wright for cause based on her husband having a cousin who is a Kentucky State Police trooper or her working for the city of Cadiz and having some sort of exposure to the city police. Juror Wright's husband's cousin, the Kentucky State Police trooper, was not a party to this case or involved in any way. Merely knowing *any* police officer, even one that works for an agency involved in a criminal case, is not enough to presumptively bias a juror where the juror insists that they can be fair and impartial. In the same vein, merely working for the city, which also employs police officers, is insufficient alone to establish bias, particularly where any working relationship began at most three weeks prior. Again, Juror Wright indicated that this working relationship would not influence her evaluation of the evidence. While the nature of Juror Wright's employment with the city was unclear from the record, and we could speculate situations in which the working relationship would be so close as to presumptively bias the juror, here, that evidence is lacking. The burden of proving bias and the resulting prejudice is on the party alleging bias. *Cook v. Commonwealth*, 129 S.W.3d 351, 357 (Ky. 2004). Stinson has failed to meet this burden. There is insufficient evidence to conclude that Juror Wright was inherently biased. Therefore, the trial court did not err in failing to strike Juror Wright for cause.

B. The trial court did not err in allowing evidence contested by defendant under KRE 404(b) to be admitted.

Prior to trial, the Commonwealth provided notice and a supplemental notice of its intent to introduce KRE 404(b) evidence, specifically:

> a. Evidence the defendant was observed snorting white powder by his ex-girlfriend, Taylor Creed, two (2) days prior to the murders.
>
> b. [Testimony by Stinson's mother that] the defendant used cocaine and marijuana prior to July 2, 2021, . . . and [that this led to] disagreements with the victim, Sue Farris.
>
> c. Evidence the defendant and the victim, Matthew Blakely, communicated via text messages which indicate the victim and the defendant intended to obtain controlled substances and split between them. Additionally, text messages proving drug usage (marijuana and cocaine) between the defendant and the victim, Matthew Blakely.
>
> d. Evidence, from the defendant's statement, that the defendant went to victim's residence to obtain marijuana from Matthew Blakely. Statement from defendant he left the residence without the marijuana. Evidence of marijuana that was later found in Matthew Blakely's truck on July 31, 2023. Text messages received from a drug dealer named "Fin" and an interview with "Fin" indicating the victim, Matthew Blakely, received marijuana from "Fin" just prior to the murders but was unable to obtain the cocaine requested.
>
> e. Evidence of the defendant's drug use at the crime scene and outside his residence. Cocaine residue located in the bedroom at the victim's residence and paraphernalia with residue in the wood line near defendant's home near his cell phone.

A hearing was held on July 31, 2023. Stinson objected to the introduction of this evidence, arguing that there had been no evidence to show that he was under the influence of any controlled substances at the time the murders were committed. Stinson argued that these prior bad acts had "failed to establish or contribute to the murder of [Sue] Farris or [Matthew] Blakely" and therefore had no direct connection to a motive.

The trial court initially issued an order allowing all the evidence to be admitted except evidence that Kathy Farris found marijuana in Matthew's truck two years after the murders. The trial court ruled that the evidence that Stinson snorted white powder two days prior to the murder is relevant and probative to show state of mind at the time of the murders and motive. The trial court ruled that Rhonda Neighbors' testimony concerning Stinson's cocaine and marijuana use prior to July 2, 2021, was relevant and probative to show that Stinson only exhibited anger issues with Sue Farris when he was using substances. The trial court ruled that the text messages between Stinson and Matthew were relevant and probative "in that it establishes drug procurement activity between the defendant and the victim prior to the murders," and could be offered to prove motive. The trial court ruled that Stinson's statements that he went to the victim's residence without getting marijuana were relevant and probative and could be offered as a motive. The trial court ruled that the statements from "Fin" and text messages indicating Matthew received marijuana but not cocaine from "Fin" prior to the murder were relevant and probative and could be used to prove motive. Lastly, the trial court ruled that evidence of Stinson's drug use at the crime scene and outside of his residence was relevant and probative of motive and his behavior when using substances. For each piece of evidence the trial court ruled admitted, the trial court found each to be so "inextricably intertwined with the other evidence that separation would offer serious adverse effect to the Commonwealth."

The trial court excluded the evidence regarding the marijuana in Matthew's truck out of concern about the amount of time that had passed from the time of the murders to the discovery of the marijuana and, because during this time, there was a timespan of about a week when the truck was not fully secured. However, Stinson filed a motion to reconsider, arguing that if the evidence of Matthew procuring the marijuana and evidence that Stinson later told police he did not obtain the marijuana from Matthew is admitted, the evidence that marijuana consistent with the marijuana Matthew picked up that day was later found in Matthew's truck should also be admitted. Stinson argued that he should be afforded the opportunity to admit the evidence to support his assertion that he did not obtain the marijuana from Matthew and to question the credibility of the Kentucky State Police's search of Matthew's truck. The trial court ultimately admitted this evidence, finding that the evidence could be considered exculpatory in that it allowed Stinson to present evidence to break the inference that he killed the victims to steal or take the marijuana.

On appeal, Stinson argues that the trial court abused its discretion by allowing the KRE 404(b) evidence. Like in the trial court, Stinson claims that there was nothing linking the murders to the evidence concerning drugs, and that the evidence "was only brought in for the improper purpose of showing he was of bad character" in contradiction of *Chavies v. Commonwealth*, 374 S.W.3d 313, 321 (Ky. 2012). Stinson argues that "At most, the Commonwealth proved that [Stinson] and Matthew obtained some marijuana together and were unable to get any cocaine. Whatever little relevance that evidence the drugs had to the murders was greatly outweighed by the prejudicial effect of casting [Stinson] in a bad light." As a result, Stinson argues that his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 2, 7, and 11 of the Kentucky Constitution have been violated. On this theory, Stinson requests reversal of his conviction and a new trial.

The Commonwealth, on the other hand, argues that "considering that Stinson and Matthew were entrenched in buying and using drugs, and Stinson was going to pick up drugs from Matthew at the time of the murders, 'there was clearly a sufficient inferential connection to allow the introduction of the drug evidence under the motive exception.' [*White v. Commonwealth*, 178 S.W.3d 470, 477 (Ky. 2005)]."

KRE 404(b) states:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

"[T]he unaltered proposition of [KRE 404(b)] is that 'evidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character.'" *Bell v. Commonwealth*, 875 S.W.2d 882, 888–89 (Ky. 1994). "Because the degree of potential prejudice associated with evidence of this nature is significantly higher, exceptions allowing evidence of collateral criminal acts must be strictly construed" and are "well-defined in the rule itself." *Id.* at 889 (internal quotation marks omitted).

"We review a trial court's decision to admit prior bad acts evidence for an abuse of discretion." *Lopez v. Commonwealth*, 459 S.W.3d 867, 874 (Ky. 2015) (citing *Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997)). "A court abuses its discretion if its decision 'was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* (citing *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007)).

In *Bell*, we set out a three-part inquiry "which together, provide a useful framework for determining the admissibility of other crimes evidence." 875 S.W.2d at 889–91. The first question, referred to as the "relevance" inquiry, is whether "the other crimes evidence [is] relevant for some purpose other than to prove the criminal disposition of the accused." *Id.* at 889. The next question, referred to as the "probativeness" inquiry, is whether "evidence of the uncharged crime [is] sufficiently probative of its commission by the accused to warrant its introduction into evidence." *Id.* at 890. The last question, referred to as the "prejudice" inquiry, is whether "the potential for prejudice from the use of other crimes evidence substantially outweigh[s] its probative value." *Id.*

Concerning the relevance inquiry, the evidence the Commonwealth sought to introduce was highly relevant — in fact, the Commonwealth's entire theory of the case was that Stinson and Matthew's drug activity was the motive behind the murders. This situation falls squarely under *Webb v. Commonwealth*, 387 S.W.3d 319, 326 (Ky. 2012), in which we said:

> There are certain aspects of the case that are so intertwined with the other evidence that they must be admitted in order to paint an accurate picture of the events in question. One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the "res gestae," or the uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other, and is thus part of the res gestae of the crime charged.

(cleaned up). Likewise, here, the Commonwealth would have suffered serious adverse effect in proving their case absent the drug-related evidence.

Concerning the probativeness inquiry, the evidence sought to be admitted by the Commonwealth was sufficiently probative of its intended purpose to show that Stinson used drugs, was hostile around Sue when he used drugs, and that Stinson and Matthew had planned to purchase drugs together on the day of the murders. This evidence, in combination with the circumstances surrounding the murders and taken in combination with the other evidence, is sufficiently probative of a motive for Stinson to murder his aunt and cousin.

Concerning the prejudice inquiry, Stinson claims that the evidence of drug use was unduly prejudicial. However, not all evidence that is prejudicial is unduly prejudicial. In *Wilson v. Commonwealth*, 199 S.W.3d 175, 181 (Ky. 2006), we stated that "[w]hile possession of marijuana is a serious crime, evidence of such a crime is not so prejudicial as to preclude its introduction for the purpose of establishing a motive for a murder." While other crimes may always be viewed prejudicial against a criminal defendant, there is no indication that the evidence in question here was unduly prejudicial when viewed in light of its probativeness of a motive for murder and its inseparability from the remaining evidence.

Stinson's argument that even if he and Matthew were engaged in buying and using drugs together, there was no connection between this drug use and a motive to kill Matthew and Sue lacks merit. In applying the motive exception in KRE 404(b) to the exclusion of evidence, we have allowed the other crime to fall under the motive exception even when the connection between the other crime as a motive for the charged crime was deduced by a reasonable inference as opposed to direct witness testimony. *White*, 178 S.W.3d at 476. That drugs would have been the motive behind the murder of a co-drug user by the last person known to have seen the victims alive, who had planned to stop by the home to complete the drug exchange but discovered that the victim was unable to acquire cocaine as previously agreed, is a "sufficient inferential connection to allow the introduction of the drug evidence under the motive exception." *Id.* at 477. The trial court did not abuse its discretion by allowing this evidence to be admitted.

C. Stinson did not invoke his right to counsel when he stated, "I think it would probably be safe for me to have a lawyer. I kind of see where this is going."

After Stinson was found walking along the highway by California officers, Sergeant Dick flew to Los Angeles, California to question Stinson about the murders and extradite him back to Kentucky on the drug charges. During the questioning, Stinson mentioned obtaining counsel two separate times. The first time, Stinson stated, "I think it would probably be safe for me to have a lawyer. I kind of see where this is going." Sergeant Dick continued questioning Stinson until Stinson unambiguously stated, "I would really want to talk to a lawyer, at this point." At this point, Sergeant Dick ceased the questioning.

Prior to trial, Stinson moved to suppress the statements he made to Sergeant Dick after his first mention of a lawyer, alleging that Sergeant Dick's failure to cease all questioning at this point violated his United States Constitution Fifth Amendment and Kentucky Constitution Section 11 rights against self-incrimination. In denying this motion, the trial court ruled that Stinson did not invoke his right to an attorney until he stated, "I would really want to talk to a lawyer, at this point," and that his prior statements regarding counsel were equivocal and ambiguous.

On appeal, Stinson asserts that the failure to stop all questioning after he first mentioned speaking with an attorney violated his Fifth Amendment[4] right against self-incrimination and Sections 2 and 11 of the Kentucky Constitution.[5] Properly preserved motions to suppress are subject to review as a mixed question of law and fact. *Ellis v. Commonwealth*, 694 S.W.3d 294, 300 (Ky. 2024). "We review the trial court's findings of fact for clear error and the application of law *de novo*." *Id.*

[4] Fifth Amendment to the United States Constitution, incorporated to the states through the Fourteenth Amendment.

[5] Stinson focuses his arguments on case law, both federal and state, interpreting the application of *Miranda v. Arizona*, 384 U.S. 436 (1966), and fails to expand on his claims regarding the Kentucky Constitution beyond the mere allegation that Sections 2 and 11 had been violated. Nevertheless, "Kentucky decisions generally hold Section 11 to be coextensive with the Fifth Amendment." *Welch v. Commonwealth*, 149 S.W.3d 407, 410 (Ky. 2004). Presumably, Stinson intends a claim that his rights under Section 2 of the Kentucky Constitution were violated to piggyback off of any Section 11 violation through Section 2's protections against absolute and arbitrary governmental power. In this regard, we base our analysis on state and federal authority interpreting Amendment 5 to the United States Constitution.

Miranda v. Arizona, 384 U.S. 436, 444–45 (1966), sets forth the standard for the Fifth Amendment to the United States Constitution right to counsel:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

"Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Davis v. United States*, 512 U.S. 452, 459 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)). "'[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, . . . the cessation of questioning' is not required." *Smith v. Commonwealth*, 520 S.W.3d 340, 350 (Ky. 2017) (quoting *Davis*, 512 U.S. at 459). "If the statement fails to meet the requisite level of clarity," officers do not have to stop questioning the suspect. *Davis*, 512 U.S. at 459.

Stinson's statement was that "I think it would probably be safe for me to have a lawyer. I kind of see where this is going." Applicable precedent instructs us to find this statement ambiguous and equivocal in light of the circumstances. *Compare Davis*, 512 U.S. at 459 (finding "[m]aybe I should talk to a lawyer" to be equivocal and ambiguous, not invocation of counsel), *and Brown v. Commonwealth*, 416 S.W.3d 302, 308 (Ky. 2013) (holding "If I want a lawyer how soon could you make that happen?" and "So is that gonna take like a long time or weeks or months, or can you make one happen like ASAP?" not invocation of right to counsel), *and Smith*, 520 S.W.3d at 349–50 (finding "I'd just rather have my lawyer present" not invocation of right to counsel), *and Quisenberry v. Commonwealth*, 336 S.W.3d 19, 33–34 (Ky. 2011) (holding "can I tell my lawyer the real story and he tell y'all?" not invocation of right to counsel), *with Bradley v. Commonwealth*, 327 S.W.3d 512, 518 (Ky. 2010) (holding "I need a lawyer or something," was unequivocal and unambiguous invocation of right to counsel, noting a lack of "commonly encountered signs of equivocation that would support a conclusion that the suspect has not unequivocally invoked his right to counsel" such as declaring that "maybe" he needs a lawyer, or that he "might" need a lawyer, or asking if he needs a lawyer).

Stinson's statement that *he thinks* it *would probably be safe* for him to have a lawyer is more akin to an offhand comment or a verbalization of his thoughts than an outright request for a lawyer. At best, reasonable minds could differ as to whether he requested a lawyer. "[I]f reasonable minds could differ on whether a request for an attorney had been made, the language is perforce ambiguous or equivocal." *Bradley*, 327 S.W.3d at 516. The trial court did not abuse its discretion in admitting statements made by Stinson after he stated "I think it would probably be safe for me to have a lawyer. I kind of see where this is going" and until he stated, "I would really want to talk to a lawyer, at this point."

D. The trial court did not abuse its discretion in denying Stinson's motion for a new trial.

On the sixth day of trial, defense counsel disclosed to the trial court that Sergeant Dick, who was seated at the Commonwealth's table during the trial, "ha[d] made facial expressions, or rolled his eyes, smiled, smirked, etc., as other witnesses have testified" and argued that his behavior was a form of non-verbal communication commenting on the credibility of witnesses. Defense counsel pointed out that, being with the Commonwealth, a trooper, and a sergeant, Sergeant Dick was "clothed with some aura of respectability" and argued that "there's the possibility, maybe probability, that over time, we're at day six, that it could influence the jury if he keeps doing that. I think that's something the Commonwealth can ask him not to do." Defense counsel explained that this behavior mostly occurred during Stinson's cross-examination of the Commonwealth's witnesses. The Commonwealth denied noticing the behavior but promised to talk to him.

Two days later, after Stinson had delivered his closing arguments, defense counsel again approached the court and reported that numerous people have confirmed that Sergeant Dick had continued to "act out," going as far as to mouth words such as "that's not true" to the jury several times. Defense counsel stated that they had personally noticed such a "commotion like that" one time but "didn't take the time to pinpoint it." The trial court commented on its inability to observe the witness from the bench, as there was a lamp blocking the view. Defense counsel suggested that Sergeant Dick be "admonished again." The Commonwealth again denied seeing any of this behavior but promised to speak with him again.

After trial, Stinson moved for a new trial, stating that Sergeant Dick's behavior, among other things, deprived Stinson of a fair trial. An affidavit by Stinson's attorney was attached to the motion, which stated, "Throughout the trial, counsel observed [Sergeant Dick] sitting at the prosecution table making gestures and exaggerated facial expression designed to suggest his disapproval of the evidence presented. Most troubling, however, I observed Sgt. Dick mouthing words while witnesses testified and while defense counsel made arguments."

A hearing on Stinson's motion for a new trial was held on January 3, 2024. The following witnesses testified at this hearing: Attorney Christian Woodall, co-counsel for the defendant; Angela Fish, friend of Stinson's family; Sandra Carnahan, Stinson's aunt; Kaitlin Shiro, Stinson's sister; Rhonda Neighbors, Stinson's mother; Taylor Creed, Stinson's ex-girlfriend; Kathy Cravens, Taylor Creed's mother; Melissa Brown, court bailiff and court security officer for Trigg County Sheriff's Office; and Assistant Commonwealth's Attorney Jill Giordano. No juror was called as a witness.

Attorney Christian Woodall testified that he observed Sergeant Dick making facial expressions several times during the trial to show disapproval or approval of testimony being made. Attorney Woodall recalled that during Detective Hill's cross-examination, Sergeant Dick mouthed the words, "no, it isn't" or "yes, we did." Attorney Woodall testified that he believed Sergeant Dick was seated directly in sight of the jury and that the jury was seated when Sergeant Dick engaged in this behavior. Attorney Woodall acknowledged that defense counsel did not move for a mistrial during the trial based on the alleged conduct by Sergeant Dick. Attorney Woodall was not able to relay which jurors were looking at Sergeant Dick when he was making these faces, nor was he able to confirm that any juror saw Sergeant Dick make any nonverbal expression. Attorney Woodall testified that, given the layout of the courtroom and the exaggerated nature of Sergeant Dick's behavior, the jury would have likely seen Sergeant Dick's actions, but he did not personally observe any particular juror observing Sergeant Dick's actions. Ultimately, Attorney Woodall could offer no proof that any juror actually saw any actions by Sergeant Dick or was affected by them.

Angela Fish testified that she observed the trial from the left side of the courtroom close to the wall. She testified that she noticed Sergeant Dick nodding his head in agreement and shaking his head is disagreement several times, and during closing arguments he appeared very happy by throwing his hands up and smiling. She testified that these actions captured her attention, but she did not notice if any juror also observed Sergeant Dick's actions.

Sandra Carnahan testified that she was seated in the second or third row on the left side of the courtroom. She testified that it was difficult to focus on any testimony from witnesses because of the way Sergeant Dick was moving his head and arms in response to the testimony being given. She testified that he appeared very proud and happy by his conduct. She testified that the jury was in the courtroom when he engaged in this behavior. She testified that she did not personally observe any juror looking at Sergeant Dick at the time he allegedly made the faces but found it unlikely that the jury would not have noticed it.

Kaitlin Shiro testified that she was a witness in the case, so she was not able to observe the trial until close to the end of the trial. She stated that Sergeant Dick was seated almost directly in front of the jury. She described Sergeant Dick's actions as "charades," explaining that he would "use his body motions, his mouth was open," and she described his conduct as a "constant distraction." She explained that his bodily movements were so dramatic that she had no choice but to notice them. She stated that she was sitting in the first or second row behind the jury, and she could see the juror's heads and necks turn towards Sergeant Dick at times. She was unable to recall which specific jurors had turned towards him.

Rhonda Neighbors testified that she was a witness in the case, so she was not able to observe the trial until closing arguments. She testified that she observed Sergeant Dick throw himself back in the chair, throw his hands up, and mouth words when defense counsel spoke about law enforcement failing to follow up on leads or send out fingerprints. She testified that she noticed several jurors turn their heads toward Sergeant Dick but could not identify which specific jurors did so.

Taylor Creed testified that she was a witness in the case, so she was not able to observe part of the trial. She testified that while other witnesses were testifying to the jury, she observed Sergeant Dick shaking his head and mouthing, "no I didn't" or "yes I did." She testified that she observed several jurors' heads turn toward Sergeant Dick when he engaged in this behavior, but she was unable to identify specific jurors who noticed the behavior.

Kathy Cravens testified that she was present during the testimony of Cadiz Police Chief Duncan Wiggins. She testified that she was able to observe Sergeant Dick's face during Chief Wiggins' testimony and it appeared very animated. She testified that she observed him mouthing words. She testified that some of the jurors turned to face Sergeant Dick instead of the witness. She was unable to identify specific jurors but observed some of their heads shifting.

Melissa Brown testified that she was working as court security during Stinson's trial. She denied that any member of the jury alerted her to anything about Sergeant Dick's behavior.

Jill Giordano testified that she assisted as co-counsel for the Commonwealth during Stinson's trial and sat at counsel table next to Sergeant Dick. She denied noticing any distracting behavior by Sergeant Dick during the trial. She likewise denied noticing any jurors turning to Sergeant Dick during the trial. She acknowledged remembering that defense counsel approached the court twice during the trial regarding Sergeant Dick's behavior and the Commonwealth agreeing to speak with Sergeant Dick.

The Commonwealth argued to the trial court that there was no proof that anything Sergeant Dick did influenced the jury. It argued that, had Sergeant Dick's behavior been serious enough to warrant a new trial, the defense would have moved for a mistrial during the trial. Stinson argued that he did bring Sergeant Dick's behavior to the court's attention during trial, based solely on what Attorney Woodall had observed. He argued that it was not until after the trial that the defense counsel realized that Sergeant Dick's behavior was as egregious as it was. Stinson argued that any attempt of a party or witness to communicate with the jury other than through the testimony given on the witness stand is error.

The trial court issued an order denying Stinson's motion for a new trial, stating,

> While the defendant produced witnesses to attest Sgt. Dick was behaving in an inappropriate manner in the presence of the jury, the proof is insufficient of any influence on the jury that would constitute a new trial. Even if Sgt. Dick did engage in inappropriate conduct during the trial, there is no evidence or proof that the jury was influenced by anything he may or may not have done. The Court did not witness or observe any outbursts. Further, the defendant only addressed two occurrences on the record and could have moved for a mistrial if he believed the conduct was serious enough.

The trial court also noted that it reviewed camera footage of the trial, but the video footage was too grainy to be of use. This Court likewise reviewed the camera footage provided in the record, but Sergeant Dick was out of view during most of the trial. As a result, neither the trial court nor this Court has been able to either confirm or deny Stinson's allegations.

On appeal, Stinson argues that he is entitled to a new trial in accordance with RCr 10.02 and *Sharp v. Commonwealth*, 849 S.W.2d 542, 546–47 (Ky. 1993). A trial court's ruling on a motion for new trial is reviewed for an abuse of discretion. *Taylor v. Commonwealth*, 175 S.W.3d 68, 71 (Ky. 2005). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The trial judge [is] in the best position to determine whether any remedial action [is] necessary to preserve decorum and ensure a fair trial." *Wilson v. Commonwealth*, 836 S.W.2d 872, 890 (Ky. 1992), *overruled on other grounds by St. Clair*, 10 S.W.3d 482.

RCr 10.02 states, in relevant part, that "[u]pon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." Of the elements of a fair and impartial trial, our predecessor court has stated,

> Perhaps no precise definition can be given it [a fair trial], but it certainly must be one where the accused's legal rights are safeguarded and respected. There must not only be a fair and impartial jury and a learned and upright judge to instruct the jury and pass upon the legal questions, but there ought to be an atmosphere of calm, in which the witnesses can deliver their testimony without fear and intimidation, and in which the fear and intimidation, and in which the attorneys can assert the defendant's rights freely and fully, and in which the truth may be received and given credence without fear of violence.

Raney v. Commonwealth, 153 S.W.2d 935, 937 (Ky. 1941) (alteration in original).

In *Sharp*, this Court stated that

> the question for the court when faced with a motion for mistrial is whether the impropriety would likely influence the jury. As it is impossible to catalog the myriad occurrences which might provoke a motion for mistrial, courts generally hold that the trial court is vested with broad discretion to determine whether a mistrial is necessary upon the occurrence of courtroom misconduct.

849 S.W.2d at 547. Noting that a "bystander [gesturing] to the child witness during the child's testimony" bolstered her demeanor during testimony and her ability to withstand cross-examination, "inevitably influenc[ing] the jury as to whether or to what extent she should be believed," this Court found "the violations . . . so egregious and inimical to the concept of a fair trial that they cannot be disregarded in the name of trial court discretion." *Id.*

The Commonwealth argues that instead of applying RCr 10.02, the more appropriate Rule is RCr 10.04, which states that, "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." The Commonwealth argues that a relevant exception to that Rule is that "jurors are permitted to testify as to any outside influences that may have played an inappropriate role in the jury's deliberations." *Ford v. Commonwealth*, 628 S.W.3d 147, 158 (Ky. 2021). According to the Commonwealth, "it was incumbent on Stinson to question jurors and to present their testimony to support his claim," and failure to question jurors about any influence Sergeant Dick's behavior had on them meant that Stinson failed to meet his burden.

The Commonwealth compares this situation with *Hammond v. Commonwealth*, 504 S.W.3d 44 (Ky. 2016), wherein the appellant argued that his right to a fair trial was violated "because some individuals, presumably the victim's friends or family members, wore t-shirts at the trial displaying [the victim]'s picture along with the message, 'We will Never Forget.'" *Id.* at 49. In declining to find prejudice, this Court noted that there was no evidence that any jurors actually saw the messages on the shirts. We said:

> [H]ere some victim support t-shirts were worn in the courtroom during the trial. However, Appellant is unable to show that any jurors were exposed to the message or were even aware of their presence. The trial court specifically found that the t-shirts did not create "an intimidating environment for the jury," and the Monroe family was admonished to be mindful of the t-shirts. Appellant did not ask to examine the

> jury on the issue to establish a more complete record for our review. Since we cannot conclude with any assurance of accuracy that any jurors actually saw the messages, we cannot say that Appellant suffered actual prejudice from the limited display tolerated by the trial judge. The record is otherwise silent on the extent to which victim support messages were displayed in the courtroom and the extent to which jurors were exposed to, or affected by, them. We will not presume prejudice from a silent record.

Id. at 51. Here, however, the record is not silent. Four witnesses to the trial testified that they observed heads turning toward Sergeant Dick as he was engaging in the expressive conduct. We have, in the past, presumed prejudice from spectator misconduct even in the absence of direct testimony from affected jurors. *See Sharp*, 849 S.W.2d at 547 (discussing that "this Court reversed a conviction in part upon improper conduct by spectators and its presumed effect upon the jury" in *Raney*, 153 S.W.2d at 938). Therefore, the Commonwealth's argument that "it was incumbent on Stinson to question jurors and to present their testimony to support his claim. . . . [N]o jurors testified about any extraneous influence; in fact, no jurors testified at all. Thus, Stinson failed to meet his burden here," is erroneous as a matter of law insofar as it implies that without juror testimony, a defendant automatically fails to meet his or her burden of proof of influence.

Nevertheless, Stinson still had the burden to prove that Sergeant Dick's actions influenced the jury. The trial court found that "the proof is insufficient of any influence on the jury that would constitute a new trial. Even if Sgt. Dick did engage in inappropriate conduct during the trial, there is no evidence or proof that the jury was influenced by anything he may or may not have done." The question, then, is whether the trial court abused its discretion in finding that Stinson had failed to meet his burden of proof in showing influence on the jury.

There is no doubt that the alleged behavior by Sergeant Dick, if it occurred, was inappropriate courtroom behavior and unbecoming of a sergeant with at least twelve years of law enforcement experience at the time. Likewise, the trial court does not indicate, and leaves us to wonder, why the lamp obscuring the trial court's view of Sergeant Dick was not moved, if it could be, after his actions were first brought to the trial court's attention so that the trial court could adequately monitor the situation. Further, while the trial court states that it did not admonish the jury to disregard Sergeant Dick's actions because the court did not personally observe the actions nor was it requested by Stinson, the responsibility "to control the decorum and conduct of those in the courtroom to ensure that neither the defendant nor the Commonwealth is denied a fair trial" belongs to the judge. *Allen v. Commonwealth*, 286 S.W.3d 221, 230 (Ky. 2009). "A judge has a right and obligation to maintain control over his own courtroom so as to minimize or prevent activities that might distract the jurors during the course of the trial." *Fugate v. Commonwealth*, 62 S.W.3d 15, 21 (Ky. 2001).

Nevertheless, not all improper or questionable conduct results in prejudice to the defendant. Here, the trial court conducted a hearing on the motion for a new trial and heard testimony from nine witnesses, most of whom were aligned with the defendant and none of whom were jurors. The court failed to observe the alleged outbursts by Sergeant Dick, indicating some limit to how disruptive this behavior could have been. Taken together, the trial court did not abuse its discretion in failing to find that the jury had been unduly prejudiced by Sergeant Dick's alleged actions and in denying Stinson's motion for a new trial.

This Court now avails itself of the opportunity to describe best practice in this or similar situations. We strongly urge our trial courts to make every effort to personally observe potentially disruptive conduct brought to their attention and, if such conduct is indeed validated by the trial court, a strong admonition to the offending party is warranted. If courtroom decorum is significantly breached, then an admonition to the jury regarding same, whether requested or not by a party, may be warranted.

E. Reversal is not required under the cumulative error doctrine.

Stinson contends that his convictions should be reversed on the basis of cumulative error. The cumulative error doctrine states that where there are "multiple errors, although harmless individually, [the errors] may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). Stinson claims that if the asserted errors do not individually warrant reversal, then the cumulative effect of the errors requires reversal. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial. *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992).

Because cumulative error only applies when there is an accumulation of errors, it is inapplicable where, as here, no error was made. Stinson is not entitled to a reversal under the cumulative error doctrine.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

All sitting. Lambert, C.J.; Bisig, Goodwine, Nickell and Thompson, JJ., concur. Conley, J., concurs in result only.

EMPLOYMENT LAW

WAGE AND HOUR DISPUTE

OVERTIME PAY

FRINGE BENEFITS v. WAGES

LIQUIDATED DAMAGES UNDER KRS 337.385

AWARD OF STATUTORY INTEREST

ATTORNEY FEES AND COSTS

Plaintiff worked for City of Pioneer Village (City) as a police officer for approximately 10 years ending in August 2018 — During his employment, officers would be paid for working 40 hours each workweek while working 36 hours one week and 44 hours the next week, without overtime wages for the hours in excess of 40 — City's representatives held a meeting where they discussed the 36/44-hour work schedule as a manner of allocating the preferred 12-hour shifts without incurring overtime; however, there was no evidence presented that an agent designated by the police, or a representative of any collective bargaining agent, was present when the work schedule was discussed — After complaints, City participated in a 2019 audit during which it learned it was required to pay overtime under existing scheduling routine with the officers for weeks they worked over 40 hours — Checks were issued to employees which reflected amounts submitted by the auditor — After 2019 audit, City revised its overtime payroll procedures — Plaintiff rejected his check as inaccurate, contested the hours and categories of compensation it reflected, and brought instant action — Per KRS 413.120, consideration of statutory claims are limited to be brought within five years after the cause of action accrued; thus, plaintiff's claim was limited to employment from July 2015 through August 2018 — Mayor, city clerk and chief of police acknowledged the rotating 36/44 work schedule and that employees were told to put the four hours of overtime onto the 36-hour workweek — Additionally, the clerk would regularly correct officers' timesheets and the chief would approve corrected timesheets, relying on clerk's corrections without further review by the officers — City argued that it owed nothing under the circumstances, relying on plaintiff's signed timesheets and his failure to dispute his pay within six days — Trial court found that City violated KRS 337.285 in failing to timely pay plaintiff — Trial court found that City was not exempt from paying overtime to officers as allowed under KRS 337.285(13)(b) because City failed to introduce evidence that either plaintiff had agreed to the practice or that the practice was the result of negotiations with a collective bargaining unit as required by the statute — Trial court denied plaintiff's request for liquidated damages — Trial court found City willingly complied with audit and testimony showed City thought plaintiff was part of the group which had agreed in their meeting to work 44 hours in one week and 36 hours in the other week — Without a specific breakdown or reference to calculations, trial court awarded plaintiff $21,129.22 in overtime wages, $2,620 in unpaid vacation, and $560 in unpaid accrued sick leave — Trial court found City acted in good faith and that liquidated damages were not appropriate under KRS 337.385 — Plaintiff's request for retirement hazardous duty pay was denied for failure to meet the burden of proof — City filed timely CR 59.05 motion to amend the calculations — City noted that plaintiff had been paid for the straight time amount of the four hours and was merely missing the 50% increased rate that is allocated to the four hours as designated overtime and as adjudicated due him per the judgment — Trial court overruled in part and granted in part City's CR 59.05 motion — Trial court reduced overtime award to $2,823.57, left the vacation award in place, and eliminated unpaid sick leave award — Sick leave award was eliminated per Ordinance 99-003 — This ordinance had been submitted into evidence during trial and eliminated sick leave upon termination — Having previously granted "reasonable' attorney fees in the original judgment, trial court rejected the submitted invoices and ordered $2,500 for "attorney fees and costs in this matter," deeming counsel's rate of $365/hour to "exceed a reasonable hourly rate" — Vacation time was left undisturbed — Court of Appeals affirmed denial of liquidated damages, denial of sick leave wages, denial of retirement hazardous duty pay, reduced overtime wage award, and vacation time wage award; however, it reversed and remanded for reconsideration of the issues of statutory interest on the judgment per KRS 360.040 and attorney fees and costs — AFFIRMED — Trial court's alteration to the judgment per City's CR 59.05 motion to amend, alter, or vacate correcting calculations and applying existing law was appropriate — A court may amend and correct a clerical mistake at any time because the time restrictions of rules governing motions to amend a judgment do not apply — Miscalculation is analogous to a clerical mistake — In instant action, trial court only used the actual amounts from the evidence submitted at trial in its recalculations — Trial court did not admit new evidence, did not conjecture or extrapolate amounts in addition to the evidence, and merely recalculated the numbers to align with the words — Trial court appropriately integrated City's ordinance into its amended judgment — Ordinance had been admitted into evidence at trial, but was not accounted for in its original order — KRS 337.010(1)(c) is consistently interpreted to exclude retirement benefits from the definition of "wages" — Retirement benefits are "fringe benefits," not "wages" — Thus, plaintiff's claim to entitlement to retirement hazardous duty pay as wages fails as a matter of law — Liquidated damages under KRS 337.385 are within the trial court's discretion — Trial court found that City acted in good faith and that City had reasonable grounds for believing its actions were not in violation of the law — Trial court relied on evidence of plaintiff's timesheets that bore his signature under a statement asserting their accuracy and City's participation in the 2019 audit and actions City took in light of that audit — Further, trial court referenced understanding between police chief and officers that in exchange for permission to work preferred 12-hour shifts, officers reported two 40-hour weeks rather than the actual 36-hour and 44-hour weeks — Plaintiff was entitled to interest on the judgment under KRS 360.040 — Plaintiff was entitled to costs and reasonable attorney fees under KRS 337.385(1) — "Lodestar" method of calculating reasonable attorney fees in employment claims consists of the product of counsel's reasonable hours, multiplied by a reasonable hourly rate — "Lodestar" figure may then be adjusted to account for various special factors in the litigation — In instant action, trial court reduced attorney fees without satisfying "lodestar" requirements — On remand, trial court should closely evaluate the record of the litigation, including the hours devoted to discovery, procedural hurdles presented, continuances filed by the defense, and preparation necessary to present a wage-and-hour case at trial — Purpose of fee-shifting provisions in wage and hour laws is not merely to compensate prevailing counsel, but to ensure meaningful enforcement of the law —

Adam Wheeler; Courtney L. Graham; and Strause Law Group, PLLC v. City of Pioneer Village, Kentucky (2024-SC-0350-DG); On review from Court of Appeals; Opinion by Justice Keller, *affirming*, rendered 9/18/2025. **[This opinion is not final. Non-final opinions may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. RAP 40(H).]**

This matter comes before the Court upon discretionary review from the decision of the Kentucky Court of Appeals in a wage and hour dispute. At issue are questions of statutory interpretation and discretion regarding liquidated damages, the application of post-judgment motions to alter or amend, the determination of reasonableness for attorney's fees, and the appropriate consideration of fee-shifting principles in the context of employee compensation claims.

Appellant, Adam Wheeler, timely brought forth overtime compensation claims against the City of Pioneer Village before the Bullitt Circuit Court. In 2022, following a four-day bench trial spanning most of 2022 (March 3 and 4, June 7, October 4), the trial court entered judgment in favor of Wheeler on several portions of the wage claims. The judgment was subsequently amended to correct calculation errors and to reflect a municipal ordinance that had been in evidence governing the forfeiture of accrued sick leave upon termination. The trial court also granted "reasonable" attorney's fees, but later reduced the requested award to $2,500.00, an amount far below what the record suggests was commensurate with the work performed.

On appeal, the Kentucky Court of Appeals affirmed the trial court's denial of liquidated damages, sick leave wages, and certain awards of vacation and overtime pay. The Court of Appeals reversed only as to the reconsideration of interest and attorney's fees, remanding for reconsideration on those issues.

This opinion addresses (1) the appropriateness of post-judgment motions to alter or amend based on existing evidence with regard to calculations and categories of compensation, (2) the statutory framework governing liquidated damages within the wage and hour protection statute KRS[1] 337.385, (3) the statutory interest on judgments per KRS 360.040, and (4) standards for assessing reasonable attorney's fees and fee-shifting in employee compensation claims. For the reasons set forth below, we affirm the judgment of the Court of Appeals in its entirety.

[1] Kentucky Revised Statutes.

I. FACTS AND PROCEDURAL BACKGROUND

Appellant, Adam Wheeler ("Wheeler"), worked for the City of Pioneer Village ("the City") as a police officer for approximately ten years ending in August 2018. During Wheeler's employment, officers would be paid for working forty (40) hours each workweek while working thirty-six (36) hours one week and forty-four (44) hours the next, without overtime wages for the hours in excess of forty (40).

The City's representatives held a meeting where they discussed the 36/44-hour work schedule as a manner of allocating the preferred 12-hour shifts without incurring overtime; however, no evidence was presented that an agent designated by the police, or a representative of any collective bargaining agent was present when the work schedule was discussed. After complaints, the City participated in a 2019 audit during which it learned it was required to pay overtime under the existing scheduling routine with the officers for the weeks they worked over forty (40) hours. Checks were issued to the employees which reflected amounts submitted by the auditor. After the 2019 audit, the City revised its overtime payroll procedures. Wheeler rejected his check as inaccurate, contested the hours and categories of compensation it reflected, and brought suit. Per KRS 413.120, consideration of statutory claims are limited to be brought "within five years after the cause of action accrued" thus limiting his claim to employment from July 2015 through August 2018.

The 2009 pre-existing KRS 337.285 statute allowed a "collective bargaining agreement, memorandum of understanding, or any other agreement between the employer and representative of the county or city employees" to control certain aspects of hourly wage agreements. In 2016, during a portion of Wheeler's employment, KRS 337.285(13) was added and the statute, as amended, read:

> (a) A law enforcement department of a consolidated local government organized under KRS Chapter 67C shall not be deemed to have violated subsection (1) of this section with respect to the employment of a peace officer if:
> 1. The officer works eighty (80) hours or less in a work period of fourteen (14) consecutive days; and
> 2. The law enforcement department and a representative of a collective bargaining unit certified under KRS 67C.408 that includes the officer agree to the exception.
>
> (b) It is the intent of this subsection to allow the employment of a peace officer for longer than forty (40) hours in any seven (7) consecutive days within a fourteen (14) day work period without incurring the obligation to pay a rate of not less than one and one-half (1- ½) times the officer's hourly wage under subsection (1) of this section.

KRS 337.285(13) (2016).

While (a)(1.) is not in dispute as the work schedule, the City failed to demonstrate (a)(2.) was satisfied. Wheeler maintained he consented to the schedule but not to the forty (40) hours of straight pay for both weeks regardless of excess hours worked on the alternating weeks. No evidence of a representative agreement was presented.

The mayor, the city clerk, and the chief of police acknowledged the rotating 36/44 work schedule and that employees were told to put the four hours of overtime onto the 36-hour workweek. Additionally, the clerk would regularly correct the officers' timesheets and the chief would approve her corrected timesheets, relying on her corrections without further review by the officers. Examples of timesheets with additional hours worked were submitted into evidence as altered and initialed by the clerk and police chief. The clerk conceded to changing officer timesheets as a regular practice and that she had implied authority to do so from the police chief.

The City maintained its position that it owed nothing under the circumstances relying upon Wheeler's signed timesheets and his failure to dispute his pay within six days. In March, the trial court found in favor of Wheeler for failure to be timely paid in violation of KRS 337.285. The statute requires that

> [n]o employer shall employ any of his or her employees for a work week longer than forty (40) hours, unless such employee receives compensation for his or her employment in excess of forty (40) hours in a work week at a rate of not less than one and one-half (1-1/2) times the hourly wage rate at which he or she is employed.

KRS 337.285(1).

The trial court found that the City was not exempt from paying overtime to police officers as allowed under KRS 337.285(13)(b) because they failed to introduce evidence that either Wheeler had agreed to the practice or that the practice was the result of negotiations with a collective bargaining unit as required by the statute. The trial court further found Wheeler failed to meet the burden of proof as to additional overtime beyond the four (4) hours on the rotating schedule.

Wheeler was denied liquidated damages as "inappropriate given Wheeler's express written statements" referencing his time cards, the City's "willingness to comply with the audit of the Department of Labor, Office of Workplace Standards" and the testimony which "showed that Pioneer Village clearly thought that Wheeler was part of the group which had agreed in their meeting to work the 44 hours in one week and the 36 hours in the other week."

Without a specific breakdown or reference to calculations, the trial court awarded Wheeler $21,129.22 in overtime wages, $2,620.00 in unpaid vacation, and $560.00 in unpaid accrued sick leave. The City was found to have acted in good faith and the trial court did not find liquidated damages were appropriate for Wheeler per KRS 337.385. Wheeler's request for retirement hazardous duty pay was denied for failure to meet the burden of proof. The total initial award for Wheeler amounted to $24,309.22.

The City timely filed a motion to amend the calculations. It correctly identified Wheeler had been paid for the straight time amount of the four hours and was merely missing the fifty percent (50%) increased rate that is allocated to the four hours as designated overtime and as adjudicated due him per the Judgment. The language of the March Judgment stating "remaining unpaid wages are four (4) hours of overtime every other week spanning July 2015 through July 2018" mirrored "the remaining one-half times his rate for every four (4) hours of overtime biweekly" in the July 13, 2023, Order. Forty hours were paid on the 36-hour work weeks and 40 hours were paid on the 44-hour work weeks. Having been paid for eighty (80) regular rate hours, the difference was the missing percentage described above. Wheeler contested the correction of the Order because the City did not present or argue these calculations during the trial.

Subsequently, the court issued an Order in July 2023 overruling in part and granting in part Pioneer Village's CR[2] 59.05 motion to correct the calculations and apply the ordinances, which corrected the calculations. The July 2023 Order reduced the overtime award from $21,129.22 to $2,823.57, left the vacation award in place, and eliminated the unpaid sick leave award. The vacation time award was $3,620.00 for a total award adjusted from $24,309.22 to $5,443.57.

[2] Kentucky Rules of Civil Procedure.

The sick leave award was eliminated per Ordinance 99-003. The ordinance had been submitted into evidence during trial and eliminated sick leave upon termination. Notably the attempt to also eliminate vacation pay under Ordinance 2017-06 was denied as not applicable or in place as to the dates of employment in issue.

Having previously granted "reasonable" attorney's fees in the original judgment, the trial court rejected the submitted invoices and ordered a mere $2500.00 for "attorney fees and costs in this matter," deeming counsel's rate of $365.00/hour to "exceed a reasonable hourly rate." Vacation time was left undisturbed.

On appeal, the Court of Appeals affirmed the denial of liquidated damages, denial of sick leave wages, denial of retirement hazardous duty pay, reduced overtime wage award, and vacation time wage award. However, it reversed and remanded for reconsideration of the issues of statutory interest on the judgment per KRS 360.040 and attorney's fees and costs.

II. STANDARD OF REVIEW

The issue concerning statutory interpretation is a question of law we review de novo. *See Kentucky Emp. Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007). When this Court reviews questions of statutory interpretation de novo, it grants no deference to the lower courts. *Louisville & Jefferson Cnty. Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 535 (Ky. 2007).

The remaining issues are to be analyzed as follows and as articulated below. Under CR 52.01, "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment." *Ellington v. Becraft*, 534 S.W.3d 785, 790 (Ky. 2017). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. "A trial court's findings are not clearly erroneous if they are supported by substantial evidence." *Ellington*, 534 S.W.3d at 790 (citing *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)).

III. ANALYSIS

A. The trial court's alteration to the judgment per the City's CR 59.05 Motion to Amend, Alter, or Vacate correcting calculations and applying existing law was appropriate.

A trial court's ruling on a motion to alter, amend, or vacate a judgment under CR 59.05 is reviewed for abuse of discretion. *Rumpel v. Rumpel*, 438 S.W.3d 354, 365 (Ky. 2014). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Appropriateness of CR 59.05

Wheeler filed a timely motion pursuant to CR 59.05 seeking to alter or amend the judgment to correct certain errors in calculation and address the application of an ordinance introduced into evidence during trial. A motion to alter, amend, or vacate a judgment allows the trial court to correct its own errors of law or fact, or to prevent manifest injustice before appellate review. *Gullion v. Gullion*, 163 S.W.3d 888, 892 (Ky. 2005). It preserves error for appeal and ensures an opportunity for trial courts to address, as in this situation, potential calculation and statutory missteps.

While this is not a case of mere typos, miscalculation is analogous to clerical mistake. A court may amend and correct a clerical mistake at any time because the time restrictions of rules governing motions to amend a judgment do not apply. *Benson v. Lively*, 544 S.W.3d 159, 164 (Ky. App. 2018). This is distinguishable from *Rumpel*, the example offered by Wheeler. *Rumpel v. Rumpel*, 438 S.W.3d 354 (Ky. 2014). In *Rumpel*, the court acknowledged:

> CR 59.05 accords the trial court broad discretion to "alter or amend a judgment," so as to correct manifest errors, to address intervening changes in controlling law, to take into account newly discovered but previously unavailable evidence, or otherwise to prevent manifest injustice, [but] a party cannot invoke CR 59.05 "to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of judgment."

Rumpel, 438 S.W.3d at 365–66 (citing *Gullion*, 163 S.W.3d at 893); *Hopkins v. Ratliff*, 957 S.W.2d 300 (Ky. App. 1997). The former wife of Kaven Rumpel had submitted into evidence a mortgage statement from which the court computed a further increase in marital property beyond what was on the face of the statement. This continued increase in value could, and should, have been raised at trial. *Rumpel*, 438 S.W.3d at 366. The trial court incorrectly amended the judgment to reflect the further increase from the timing of the submitted evidence to the date of the judgment. In other words, it used the amounts submitted into evidence to calculate a change from the *actual* evidence to the increased amount inferred from the pendency of the trial.

Here, the trial court only used the actual amounts from the evidence submitted at trial. The paystubs Wheeler submitted were used to verify he had, in fact, been paid the base 80 hours of straight time over each two-week period. Because the time was being shifted to account for the actual 36/44 scheme, the only pay missing per the March judgment award was the overtime rate on top of the four (4) hours of base pay previously received. Pay stubs and pay rates originally submitted by Wheeler, and confirmed by the City, led the trial court to amend its order. The ability to do so is the essence of the CR 59.05 motion with limitations. The trial court did not admit new evidence, did not conjecture or extrapolate amounts in addition to the evidence, and merely recalculated the *numbers* to align with the *words*.

While one may question the City's apparent inability to have accurately computed the pay owed under these circumstances and its own ordinance sooner in time, the trial court appropriately integrated the City's ordinance into its amended judgment, thereby ensuring consistency with the applicable governing law. Accordingly, the trial court's decision to grant the motion in part and enter an amended order was well within the scope of CR 59.05. The corrections were not the product of new evidence or untimely theories, but rather of the court's duty to render a judgment that accurately reflects both the record and the applicable law.

Because the aforementioned corrections were rooted in evidence presented at trial, and because CR 59.05 authorizes correction of manifest errors, the trial court acted within its discretion. The initial judgment contained mathematical errors in the computation of the overtime award. The motion to alter or amend squarely presented those errors on the record, and the trial court was entitled to correct them before appellate review. As none of this amounted to "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" adjustments, no abuse of discretion is found. *Goodyear*, 11 S.W.3d at 581.

Sick Leave

In addition, the ordinance governing the forfeiture of accrued sick leave upon termination had been admitted into evidence at trial but was not accounted for in the original order. Whether sick leave was properly denied depends upon the appropriate application of the ordinance. Questions of law are reviewed de novo. *Louisville Metro. Health Dep't. v. Highview Manor Ass'n, LLC*, 319 S.W.3d 380, 383 (Ky. 2010).

The trial court recognized the City of Pioneer Village Ordinance submitted in The City's Exhibit 2 during trial requiring forfeiture of sick leave upon termination. The Ordinance, 99-003 Section IV(G) on page 2 was adopted in 1999, submitted during trial, and governed sick leave in this instance.

An ordinance lawfully enacted and admitted into evidence should be taken into account by the trial court. The trial court initially overlooked the ordinance, but later corrected this error through its amended judgment. The forfeiture of the sick leave award was proper.

Retirement Hazardous Duty Pay

The denial of the award for retirement hazardous duty pay is one of statutory interpretation, which we review de novo. *Jewell v. Ford Motor Co.*, 462 S.W.3d 713,715 (Ky. 2015).

While Wheeler characterized retirement hazardous duty pay as "wages," Kentucky law has drawn a distinction. "Benefits, which include such things as retirement plans, health and disability insurance, and even life insurance, are . . . not considered to affect the pay, wages, or compensation of the employee but are considered an additional benefit." *Caldwell Cnty. Fiscal Ct. v. Paris*, 945 S.W.2d 952, 954 (Ky. App. 1997). This is consistent with the exclusion of retirement plans and other benefits from the statutory definition under Kentucky's Workers' Compensation Act's definition of "wages." KRS 342.0011(17). "'Wages' are 'money payments for services rendered, . . . the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes." *Jewell*, 462 S.W.3d at 715 (citing KRS 342.140(6)) (noting the term "wages" is similarly defined in KRS 342.0011(17)). It is also persuasive that the federal courts in this state, when applying Kentucky law, also found KRS 337.010(1)(c) to exclude "benefits such as retirement plans, health and disability insurance, and life insurance." *Francis v. Marshall*, 684 F.Supp.2d 897, 911 (E.D. Ky. 2010). Kentucky precedent is clear. Retirement benefits are "fringe benefits," not "wages" within the meaning of KRS 337.010(1)(c)(1).

In sum, Kentucky law distinguishes between fringe benefits and wages. The statutory language of KRS 337.010(1)(c) is consistently interpreted to exclude retirement benefits from the definition of "wages." Without an enforceable contractual entitlement, this interpretation aligns with the broader statutory scheme reserving "wages" for direct monetary compensation for services rendered, while treating retirement and similar benefits as additional, non-wage compensation. Because Wheeler's claim rests on an incorrect classification, his entitlement to retirement hazardous duty pay as wages fails as a matter of law, and the Court need not reach the issue of the amount of any award.

B. Liquidated Damages Under KRS 337.385 Considers the Court's Discretion.

We review statutory interpretation de novo. *Active Care Chiropractic, Inc. v. Rudd*, 556 S.W.3d 561, 564 (Ky. 2018), *Cumberland Valley Contractors, Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007). As the plain meaning of the statutory language is presumed to be the intent of the legislature, the first rule is the plain-meaning rule. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). If the meaning is plain, then the court cannot base its interpretation on any other method or source. *Id.* It is this Court's duty when interpreting statutes to:

> ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed. In other words, we assume that the [Legislature] meant exactly what it said and said exactly what it meant. Only when [it] would produce an injustice or ridiculous result should we ignore the plain meaning of a statute.

Id. (internal quotation marks and citations omitted).

The second rule of statutory construction is the whole-text rule. We have repeatedly stated that we "must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy." *Cosby v. Commonwealth*, 147 S.W.3d 56, 58 (Ky. 2004).

While the plain-meaning rule and whole-text rule may, at first glance, appear at odds, the intent of the legislature is the lodestar by which we are guided. *Samons v. Ky. Farm Bureau Mut. Ins. Co.*, 399 S.W.3d 425, 429 (Ky. 2013). We presume, of course, that the General Assembly intended for the statute to be construed as a whole and for all of its parts to have meaning. *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87,91 (Ky. 2005). We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one. *Layne v. Newberg*, 841 S.W.2d 181,183 (Ky. 1992). "[T]he use of the word 'shall' with reference to some requirements . . . is usually indicative that it is mandatory, but it will not be so regarded if the legislative intention appears otherwise." *Knox Cnty. v. Hammons*, 129 S.W.3d 839, 843 (Ky. 2004) (quoting *Skaggs v. Fyffe*, 98 S.W.2d 884, 886 (Ky. 1936)).

The statute KRS 337.385, in its entirety, contains five sections, each one to two sentences long. The first and second sections were created together and, in 2013, an additional punitive award for forced labor further enhanced the damages available in that circumstance. Section (1) of the statute provides:

> any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, *for an additional equal amount as liquidated damages*, and for costs and such reasonable attorney's fees as may be allowed by the court.

(emphasis added). But it continues in the second section,

> If, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he or she had reasonable grounds for believing that his or her act or omission was not a violation of KRS 337.020 to 337.285, *the court may, in its sound discretion, award no liquidated damages*, or award any amount thereof not to exceed the amount specified in this section.[3]

(emphasis added).

[3] In 2013, the General Assembly added "Except as provided in subsection (3) of this section" to section 1 and provided for treble damages in scenarios of forced labor. The portions of (1) and (2) had previously coexisted as part and parcel of KRS 337.385 when a concern for human trafficking prompted steeper fines when forced labor is found than the amount equal to the missing pay was desired.

Thus, we begin our inquiry with the plain language of KRS 337.385. As the trial court found the City in violation of the statute, liquidated damages became available. Appellant correctly asserts a portion of KRS 337.385 states that an employer who pays an employee less wages and overtime compensation than they were entitled under KRS 337.020 "**shall** be liable to such employee affected . . . for an additional equal amount as liquidated damages." (emphasis added). However, that is not the end of this statute or the analysis.

While section (1) provides liquidated damages, section (2) allows the trial court discretion to award no liquidated damages or an amount less than specified "in this section." As no amount is authorized in section (2), the words "this section" directs us to the statute as a whole and allows the court to award an amount from zero, or "no liquidated damages," to an "equal amount" of the wage award determination. When the statute is read beyond "a single sentence," it comports and does not conflict or render an "absurd" result. *Cosby*, 147 S.W.3d at 59; and *see Layne*, 841 S.W.2d at 183. Upon a finding of good faith or reasonable belief, the liquidated damage award becomes a discretionary amount limited to the parameters of the statute.

Liquidated damages are viewed under most employment statutes, such as the ADEA[4], as primarily punitive and therefore only awarded for intentional misconduct or where the employer has not acted in good faith. *See* KRS 411.186. As the Court of Appeals properly referenced, the Kentucky statutes under KRS Chapter 337 mirror the language of 29 U.S.C.A. §260 stating:

> if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216.

KRS 337.385 mirrors the Section 216 provision requiring "the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C.A. §216(b).

[4] Age Discrimination in Employment Act.

Pursuant to KRS 337.385, the court had sound discretion to determine whether the City's actions were in good or bad faith and, subsequently, whether to award the damages, we review for clear error. "It is not for us to determine whether or not we would have reached a different conclusion, faced with the same evidence confronting the trial court." *Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992). Proper regard must be given to the "opportunity of the trial court to judge the credibility of the witnesses," and we acknowledge "[t]his task is exclusively within the province of the trial court." *C.W. Hoskins Heirs v. Wells*, 560 S.W.3d 852, 856 (Ky. 2018). Thus, the question is limited to whether the trial court's decision, after assessing the credibility of the witnesses, was supported by substantial evidence. *Id.*

The trial court relied upon evidence of Wheeler's timesheets that bore his signature under a statement asserting their accuracy. Though Wheeler testified to his belief that he was owed overtime, he admitted repeatedly submitting the signed timesheets reflecting a 40-hour week. The City participated in the 2019 audit, learned it was required to pay overtime, issued checks to the employees which reflected amounts submitted by the auditor, and revised its overtime payroll procedures. While Wheeler correctly identifies much of this behavior as post-violation, the court reasonably viewed the City's holding of the meeting regarding schedules with significant weight, and the issuance of back-pay checks and policy changes as further evidence of good faith. The court also credited testimony regarding an understanding between the police chief and officers: in exchange for permission to work preferred 12-hour shifts, officers reported two 40-hour weeks rather than the actual 36- and 44-hour weeks. While employees cannot waive statutory overtime, the court permissibly viewed this arrangement as supporting the City's good-faith belief that its practices were lawful.

As the City employer showed to the satisfaction of the court that the act or omission giving rise to its actions was in good faith and that it had reasonable grounds for believing the action was not in violation, the court acted within its discretion to award no liquidated damages. On this record, the denial of liquidated damages was not clearly erroneous because it was supported by substantial evidence to which the trial court gave credibility and weight.

C. Award of Statutory Interest Follows Entry of Judgment per KRS 360.040.

We agree with the Court of Appeals' holding that statutory interest per KRS 360.040 is applicable to Wheeler's claim. KRS 360.040 provides a judgment "shall bear six percent (6%) interest compounded annually from the date the judgment was entered." The purpose is to compensate the judgment creditor for judgment debtor's use of his money. *Doyle v. Doyle*, 549 S.W.3d 450, 458 (Ky. 2018). Per the trial court, the claim "should just be a matter of math." A "liquidated claim is 'capable of ascertainment by mere computation, can be established with reasonable certainty, [and] can be ascertained in accordance with fixed rules of evidence and known standards of value.'" *Id.* at 455 (quoting *3D Enter. Contracting Corp. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.* 174 S.W.3d 440, 450 (Ky. 2005)). The CR 59.05 Motion to Amend's own assertion relies upon "known standards of value," so the unliquidated damages assessed by the court based on the actual loss suffered became liquidated and an issue of "mere computation." *Id.* The judgment falls squarely within KRS 360.040(1). "With respect to appellate rulings upholding the original determination of liability, but adjusting on the existing record the amount of the award, . . . the clear majority position is that post-judgment interest accrues from the original judgment." *Commonwealth, Justice & Pub. Safety Cabinet, Dep't of Kentucky State Police v. Gaither*, 539 S.W.3d 667, 674 (Ky. 2018) (emphasis added).[5] Therefore, the remand to the trial court for reconsideration of interest on the judgment and attorney's fees and costs is appropriate and affirmed.

[5] The estate of a murdered police informant's successful award of post-judgment interest started to accrue on the original award date despite the reinstated award resulting in a recovery lower than the original award. *See Gaither*, 539 S.W.3d at 676.

D. Attorney's Fees Are Mandated by Statute but Subject to Reasonableness Review.

Wheeler also challenges the trial court's determination of attorney's fees. The award of attorney's fees is not in question but the amount. Kentucky law makes clear that a trial court's discretion in setting fees is not unlimited. When a statute authorizes or mandates an award of "reasonable" attorney's fees, granting these awards is a matter of law and reviewed de novo; however, the awarded amount is reviewed to determine "whether the circuit court's determination constitutes an abuse of discretion." *Hunt v. N. Am. Stainless*, 482 S.W.3d 796, 799 (Ky. App. 2016).

The amount must be anchored in the evidence and guided by established factors. "In order for us to review the court's exercise of discretion, the district court must provide a clear statement of the reasoning used in adopting a particular methodology and the factors considered in arriving at the fee." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)) ("It remains important . . . for the district court to provide a concise but clear explanation of its reasons for the fee award.").

In this case, the Court of Appeals succinctly outlined the following:

> Shortly after the March 2023 Order, but before the July 2023 Order, Officer Wheeler's legal counsel requested $1,356.35 in costs and $91,031.50 in fees. She supported her motion/notice with an hourly breakdown of 299.10 hours performed from three attorneys ($325 to $365/hour), five law clerks ($100 to $165/hour), and two paralegals ($165/hour). She tendered a personal affidavit of her legal experience and examples of similar rates for similar work in the same region.

The trial court's August 2023 Order determined the request for $91,031.50 in fees was not reasonable in relation to the claim, an award of $5,443.57, and that Officer Wheeler's legal counsel's rate of $365.00/hour exceeded "a reasonable hourly rate." The court awarded $2,500.00 in combined attorney's fees and costs but did not elaborate on how it arrived at this amount. On appeal, Officer Wheeler's counsel argues that the trial court abused its discretion by combining the fees with costs and by failing to support or explain the award of $2,500.00. While the trial court has a great deal of discretion in regard to fees, in this case, we must agree.

As discussed, KRS 337.385(1) holds an employer liable for failing to pay an employee full and fair compensation and "costs and such reasonable attorney's fees as may be allowed by the court." KRS 337.385(1).

This Court has described a "lodestar" method of calculating reasonable attorney's fees in employment claims as consisting of the product of counsel's reasonable hours, multiplied by a reasonable hourly rate, thus providing a "lodestar" figure which may then be adjusted to account for various special factors in the litigation. *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 826 (Ky. 1992) (citing the analysis in *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Although the court recognized Wheeler's entitlement to an award of "reasonable" fees under the governing wage and hour statute, it reduced the fee petitioned to a flat $2,500.00 without explanation.

Here, the trial court's drastic reduction of a detailed petition without findings fails to satisfy those requirements. On remand, the trial court should closely evaluate the record of the litigation, including the hours devoted to discovery, the procedural hurdles presented, continuances filed by the defense, and the preparation necessary to present a wage-and-hour case at trial. Such cases are often intensive, involving review of records, examination of statutory and local ordinances, and preparation of multiple witnesses. To disregard the scope of that work by arbitrarily capping the fee risks undermining the statutory scheme itself.

It bears emphasis that the purpose of fee-shifting provisions in wage and hour laws is not merely to compensate prevailing counsel, but to ensure meaningful enforcement of the law. If awards are untethered from the actual work required, employees — who by statute are guaranteed their earned wages — may be unable to secure representation. Likewise, employers determined to have acted unlawfully might be incentivized to prolong litigation, knowing that counsel for employees may never be adequately compensated relative to the work performed.

This Court has since adopted the "lodestar" method that attorney's fees awarded should consist of the product of counsel's reasonable hours multiplied by a reasonable hourly rate, which may then be subject to adjustment for special circumstances. *Meyers*, 840 S.W.2d at 826.

KRS 337.385 mandates "reasonable attorney's fees" to prevailing employees reflecting legislative judgment that wage protections must be meaningfully enforceable. That enforcement depends on ensuring employees can secure competent representation. Wheeler's counsel submitted a detailed affidavit documenting nearly 300 hours of work at prevailing market rates. The court reduced an affidavit of attorney's fees with a "contemporaneous record" of hourly breakdown and dates from $91,031.50 to $2,500.00 combined with costs without explanation. This arbitrary and unfounded reduction was an abuse of discretion.

The Court of Appeals correctly determined that the trial court's reduction was unsupported and remanded for reconsideration. We affirm that determination. On remand, it is recommended that the trial court assess the petition in light of the governing factors, articulate its reasoning with specificity, and award a fee that reflects the actual work performed and the legislative purpose of ensuring employees have access to effective legal representation in vindicating their statutory rights.

IV. CONCLUSION

The Court of Appeals faithfully applied the rules of statutory interpretation, the standards for CR 59.05 motions, recognition of statutory interest, and the lodestar framework for attorney's fees. Having affirmed in part, reversed in part, and remanded for recalculation of interest and attorney's fees, its judgment is affirmed in all respects.

Lambert, C.J.; Bisig, Conley, Keller, Nickell, and Thompson, JJ., sitting. All concur. Goodwine, J., not sitting.

SUPREME COURT RULINGS

DEPUBLISHING OPINIONS OF

THE COURT OF APPEALS

Com., ex rel. Attorney General Coleman v. Kentucky Educ. Assoc., 72 K.L.S. 3, p. 43; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 9/10/2025.

Everman v. Robinson, 71 K.L.S. 12, p. 1; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 9/10/2025.

Yount v. Canada, 71 K.L.S. 12, p. 7; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/10/2025.

PETITIONS FOR REHEARING, ETC.

FILED AND FINALITY ENDORSEMENTS

ISSUED BETWEEN

AUGUST 14, 2025 AT 10:00 A.M.

AND SEPTEMBER 18, 2025 AT 10:00 A.M.

(Cases previously digested in K.L.S.)

PETITIONS:

Professional Home Health Care v. Com., Cab. for Health and Fam. Servs., 72 K.L.S. 8, p. 75; Petition for rehearing was filed on 9/3/2025.

MOTIONS for extension of time to file petitions: None.

RULINGS on petitions previously filed:

Johnson v. Com., 72 K.L.S. 6, p. 26; Petition for rehearing was denied on 9/18/2025. Finality endorsement was issued on 9/18/2025.

FINALITY ENDORSEMENTS:

During the period from August 14, 2025, through September 18, 2025, the following finality endorsements were issued on opinions which were designated to be published. The following opinions are final and may be cited as authority in all the courts of the Commonwealth of Kentucky. RAP 40(G).

In re: Barrett, 72 K.L.S. 8, p. 23, on 9/4/2025.

Brown v. Com., 72 K.L.S. 8, p. 25, on 9/4/2025.

Buechele v. Com., 72 K.L.S. 8, p. 31, on 9/4/2025.

City of Paintsville v. Haney, 72 K.L.S. 8, p. 33, on 9/4/2025.

Com. v. Strunk, 72 K.L.S. 8, p. 43, on 9/4/2025.

Dunkelberger v. Com., 72 K.L.S. 3, p. 70, on 8/21/2025.

Hollingsworth, Jr. v. Com., 72 K.L.S. 8, p. 47, on 9/4/2025.

Johnson v. Com., 72 K.L.S. 6, p. 26; Petition for rehearing was denied on 9/18/2025. Finality endorsement was issued on 9/18/2025.

LeMaster v. Stiltner, 72 K.L.S. 8, p. 54, on 9/4/2025.

Lexington Alzheimer's Investors, LLC v. Norris, 72 K.L.S. 8, p. 62, on 9/4/2025.

Long v. Com., Dep't of Rev., 72 K.L.S. 8, p. 66, on 9/4/2025.

In re: Miller, 72 K.L.S. 8, p. 73, on 9/4/2025.

In re: Myles, Jr., 72 K.L.S. 8, p. 73, on 9/4/2025.

Saturday v. Com., 71 K.L.S. 12, p. 64; Motion to reconsider was denied on 8/22/2025. Finality endorsement was issued on 8/22/2025.

Simpson v. Com., 72 K.L.S. 8, p. 78, on 9/4/2025.

DISCRETIONARY REVIEW:

MOTIONS granted:

Com., ex rel. Attorney General Coleman v. Kentucky Educ. Assoc., 72 K.L.S. 3, p. 43; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 9/10/2025.

Everman v. Robinson, 71 K.L.S. 12, p. 1; Motion for discretionary review was granted and the Court of Appeals' opinion was designated not to be published by operation of RAP 40(D)(2) on 9/10/2025.

MOTIONS denied:

BLC Lexington SNF, LLC v. Townsend, 72 K.L.S. 3, p. 4; Motion for discretionary review was denied on 9/12/2025.

Helm v. Com., 70 K.L.S. 9, p. 9; Motion for discretionary review was denied on 9/10/2025.

Marshall v. Com., 72 K.L.S. 3, p. 56; Motion for discretionary review was denied on 9/10/2025.

Yount v. Canada, 71 K.L.S. 12, p. 7; Motion for discretionary review was denied and the Court of Appeals' opinion was ordered not to be published on 9/10/2025.

MOTIONS filed:

Com. v. Campbell, 72 K.L.S. 7, p. 40; Motion for discretionary review was filed on 8/26/2025.

Kentucky Assoc. of Counties All Lines Fund v. City of Somerset, Kentucky, 72 K.L.S. 7, p. 20; Motion for discretionary review was filed on 8/12/2025.

Kentucky Bluegrass Experience Resort v. Woodford Cty. Bd. of Adjustments, 72 K.L.S. 7, p. 17; Motion for discretionary review was filed on 9/11/2025.

Roark v. Com., 72 K.L.S. 8, p. 19; Motion for discretionary review was filed on 9/9/2025.

MOTIONS for extension of time to file motions for discretionary review: None.

OTHER:

Saturday v. Com., 71 K.L.S. 12, p. 64; Motion to reconsider was denied on 8/22/2025. Finality endorsement was issued on 8/22/2025.

WEST Official Cites on Supreme Court opinions upon which Finality Endorsements have been issued:

Baum v. Aldava, 72 K.L.S. 4, p. 21—713 S.W.3d 96.

In re: Beattie, 72 K.L.S. 4, p. 26—713 S.W.3d 174.

In re: Brinker, 72 K.L.S. 4, p. 27—713 S.W.3d 145.

Com. v. Ellery, 72 K.L.S. 4, p. 29—713 S.W.3d 114.

Com. v. Ullman, Jr., 71 K.L.S. 4, p. 41—714 S.W.3d 373.

In re: Curlin, 72 K.L.S. 4, p. 31—713 S.W.3d 168.

In re: Dade, 72 K.L.S. 4, p. 32—713 S.W.3d 91.

Erie Ins. Exchange v. Johnson, 72 K.L.S. 4, p. 33—713 S.W.3d 149.

KBA v. Thornton, 70 K.L.S. 2, p. 53—714 S.W.3d 363.

In re: Nolan, 72 K.L.S. 4, p. 38—713 S.W.3d 94.

In re: Sammons, 72 K.L.S. 4, p. 39—713 S.W.3d 112.

Tejeda v. KBA, 70 K.L.S. 9, p. 51—714 S.W.3d 364.

In re: Thornton, 72 K.L.S. 4, p. 39—713 S.W.3d 134.

Williams v. Hon. Thompson, 72 K.L.S. 4, p. 41—713 S.W.3d 138.

Wynn v. Com., 72 K.L.S. 4, p. 43—713 S.W.3d 122.

—END OF SUPREME COURT—

FINALITY OF DECISIONS

When using K.L.S. with respect to decisions which are not yet final, care should be taken to give the case status, as, for example, hypothetically, "*Doe v. Roe*, Ky., 27 K.L.S. 54, p. 14 (11/3/80), petition for rehearing pending." Non-final opinions, orders, or opinions and orders may not be cited as binding precedent in any courts of the Commonwealth of Kentucky and may not be cited without indicating the non-final status. Rules of Appellate Procedure (RAP) 40(H). As to finality in civil and criminal matters *see* RAP 40 and related provisions. *See also* the K.L.S. listings of petitions for rehearing filed and finality endorsements issued on cases previously digested.

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