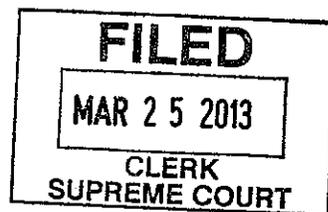


**Commonwealth of Kentucky
Supreme Court**

No. 2011-SC-000159-DG & 2012-SC-000187-DG



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

On review from the Kentucky Court of Appeals
Case No. 2009-CA-000998-MR
Anderson Circuit Court Indictment No. 2007-CR-00070-001

JIMMIE HAWKINS, SR.

APPELLEE

Reply/Responsive Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Reply/Responsive Brief for Commonwealth has been served March 25, 2013, as follows: by mailing to the trial judge, Hon. Charles R. Hickman, Judge, Anderson Circuit Court, 15 Courthouse, 501 Main Street, Shelbyville, Kentucky, 40065; by sending electronic mail to Hon. Laura Donnell, Commonwealth Attorney; and by mailing to Hon. Brandon Neil Jewell, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

A handwritten signature in black ink, appearing to read "J. Paul Varo", written over a horizontal line.

John Paul Varo

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INTRODUCTION

This brief is submitted as a combined reply concerning the one issue raised in the Commonwealth's appellant brief and response to the two issues raised by Jimmie Hawkins Sr. ("Hawkins") in his brief as cross-appellant.

Note Concerning Citations

The record on appeal consists of two volumes of transcript of record, four CD's and one videotape. The transcript of record will be cited as "TR" with the page number. The video record will be cited as "VR" with the date and time index. References to Hawkins's appellee/cross-appellant brief will be noted as "Hawkins's Brief" with the page number.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth will gladly present oral argument to the Court, should the Court deem it helpful.

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CROSS-APPELLEE'S COUNTERSTATEMENT OF THE CASE

Hawkins raises two issues as cross-appellant. The first issue is whether the emergency aid exception to the warrant requirement was applicable at all in this case. Hawkins's Brief at 8, 12. The facts concerning this issue are adequately set forth in the Commonwealth's prior appellant brief which addressed the emergency aid exception and whether it permitted entry into Hawkins's barn in addition to entry into his trailer. Pertinent facts will be set forth in the argument section of this brief as needed.

The second issue is whether questioning and comments by the Commonwealth during trial constituted improper comments on Hawkins's silence and improper burden shifting. Hawkins's Brief at 17. For continuity, the Commonwealth will set forth the pertinent factual background for this claim in the argument section of this brief.

ARGUMENT

I.

THE COURT OF APPEALS OPINION MUST BE VACATED AS TROOPER ROGERS'S ENTRY INTO HAWKINS'S BARN WAS LAWFUL AND REASONABLE UNDER THE EMERGENCY AID EXCEPTION.

This is original issue upon which discretionary review was granted. The Commonwealth continues to rely on all arguments made in its initial brief and simply replies to points raised by Hawkins.

In his brief, Hawkins argues that if the emergency aid exception was applicable at all it was limited to his trailer and did not extend to the barn. Hawkins's Brief at 12. Citing Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), Hawkins argues that a search under the emergency aid doctrine must be "strictly circumscribed by the exigencies which justify its initiation," and asserts that there were no facts to support an objectively reasonable belief that Ms. Snape could be located in the barn. Id. at 12-13. These claims fail.

First, Hawkins's argument applies Mincey too narrowly. Unlike the four-day warrantless search of an apartment following the shooting in Mincey (437 U.S. at 393), Trooper Roger's conduct in this case was properly limited to what was necessary to address the emergency situation. The exigency was still ongoing when Trooper Rogers entered the barn in a continued attempt to locate Ms. Snape. VR 1/12/09, 9:55:00. His conduct was properly circumscribed.

Next, contrary to Hawkins's claim, Trooper Rogers had an objectively reasonable basis for entering the barn. It is acknowledged that Mr. Broce indicated that Ms. Snape was in the trailer. VR 1/12/09, 9:30:18. However, the barn was in close proximity to the trailer (Id. at 9:42:38), it was open (Id. at 9:32:00), and Trooper Rogers saw signs of life emerging from it in the form of the two dogs after he received no response at the trailer door. Id. at 9:31:48. Given these factors it was objectively reasonable for Trooper Rogers to believe that Ms. Snape *or someone who may know her whereabouts could be found there.*

Finally, Hawkins's position leads to an unreasonable result. His position would condone the forcible entry of a residence but condemn the prudent, far less intrusive course of action actually taken by Trooper Rogers here. Such a message should not be sent to law enforcement. Trooper Rogers's entry into the open barn was entirely reasonable under the circumstances and properly limited under the emergency aid exception. The Court of Appeals erred in finding his actions of merely stepping inside the open barn to be improper.

II.

THE EMERGENCY AID EXCEPTION WAS APPLICABLE IN THIS CASE.

Hawkins first argues as cross-appellant that the Court of Appeals erred in finding that the emergency aid exception applied at all in this case. Hawkins's Brief at 8, 12. Specifically, he claims that the facts did not objectively and reasonably support a belief that Ms. Snape was seriously injured or threatened with such injury and in need of

immediate aid. Id. at 10, 12. However, as will be shown, the Court of Appeals correctly found that the emergency aid exception was applicable. The circumstances provided Trooper Rogers with an objectively reasonable basis to believe that Ms. Snape may be in need of immediate aid.

A. The Emergency Aid Exception Applies.

The Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution prohibit unreasonable searches and seizures. As a general rule all warrantless searches are unreasonable unless they fall under an exception to the warrant requirement. Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky.2003). The burden of proof is on the Commonwealth to prove that a warrantless search falls within one of the exceptions to the general rule. Id.

One such exception is the emergency aid exception. This exception was recognized by the United States Supreme Court in Mincey v. Arizona, *supra*, 437 U.S. at 392, as follows:

We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.

Id.

Under this exception, officers must have an objectively reasonable basis for believing that a person is in need of immediate aid. Michigan v. Fisher, 558 U.S. 45, 130 S.Ct. 546, 548, 175 L.Ed.2d 410 (2009) (citing Brigham City v. Stuart, 547 U.S. 398, 406, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), and Mincey, *supra*, 437 U.S. at 392).

The emergency aid exception has been recognized and applied in several Kentucky cases. In Hughes v. Commonwealth, 87 S.W.3d 850 (Ky. 2002), an officer entered an apartment to look for a missing woman. The woman had been missing for two days and had failed to pick up her children, and the officer entered after he received no response at the door and noticed an unusual odor emanating from inside. Id. at 852. The warrantless entry led to the discovery of her decomposing body. Id. This Court upheld the entry and search on the basis that the officer had a reasonable belief that the woman might be inside and be in need of emergency assistance. Id.

In Gillum v. Commonwealth, 925 S.W.2d 189 (Ky. App. 1995), the Kentucky State Police received a call from a neighbor who was concerned for the appellant's well-being. Id. at 189-190. When officers arrived at the scene the neighbor expressed concern that the appellant might be in need of help based on his history of heart problems, and circumstances such as the appellant's truck door staying open for several hours the previous night, lights remaining on in the residence, and the neighbor's inability to contact him. Id. at 190. A warrantless entry by officers led to the discovery of a large number of marijuana plants. Id. The Court of Appeals upheld the entry under the exigency or emergency exception, on the basis that it was reasonable for the officers to believe the appellant was in need of immediate aid under the circumstances. Id. at 190-191. See also Todd v. Commonwealth, 716 S.W.2d 242, 247-248 (Ky. 1986) (upholding warrantless entry into residence on the basis of emergency exigent circumstances where officers obtained no response at the home of victim who was virtually a total invalid, and did not see victim in bed when they looked through windows

while attempting to check on her well-being); Mills v. Commonwealth, 996 S.W.2d 473, 480 (Ky. 1999), overruled on other grounds by Padgett v. Commonwealth, 312 S.W.3d 336 (Ky. 2010) (recognizing that blood trail leading to appellant's residence justified a warrantless entry in order to render immediate aid and assistance); Mundy v. Commonwealth, 342 S.W.3d 878 (Ky. App. 2011) (finding that the emergency aid exception applies to automobiles but finding warrantless entry improper where officer had no objectively reasonable belief that person in vehicle was in need of immediate aid).

In this case, Trooper Rogers and Deputy Moberly entered onto Hawkins's property under an objectively reasonable belief that Ms. Snape may be in need of immediate aid. When the officers encountered Mr. Broce he stated that he was waiting on his girlfriend, April Snape. VR 1/12/09, 9:30:15. He indicated that she was in a trailer which was visible from where the truck was parked and was approximately 100-150 yards away. Id. at 9:30:18. Mr. Broce stated that he was supposed to meet Ms. Snape and she had not shown up. Id. at 9:30:30. He did not know anything about the trailer or who lived in it. Id. at 9:30:04. He had also been unable to contact her on her cell phone. Id. at 9:39:05.

Mr. Broce stated that he had met Ms. Snape there on prior occasions and was concerned for her well-being. Id. at 9:30:40. While Trooper Rogers could not recall an exact phrase Mr. Broce used, he understood Mr. Broce to be referring to Ms. Snape's physical well-being and whether she was possibly being held against her will. Id. at 9:51:05. Based upon these facts the officers entered onto the property to check on Ms. Snape's well-being. Id. at 9:30:50, 9:35:10. Thus, Trooper Rogers reasonably responded

to the emergency circumstance based on a citizen's report as did the officers in Hughes and Gillum.

In arguing that the emergency aid exception was inapplicable, Hawkins first asserts that previous Kentucky cases in which searches under the exception have been upheld all involve "extraordinary factual situations" which Hawkins claims were not present here. Hawkins's Brief at 9-10. In essence, Hawkins argues that the exception should not apply since the situation allegedly was not serious enough. But, the emergency aid exception does not require "extraordinary factual situations" in order to apply. As the Supreme Court has recently recognized, "Officer do not need ironclad proof of "a likely serious, life-threatening" injury to invoke the emergency aid exception." Fisher, supra, 130 S.Ct. at 549. Rather, "the test" is simply whether there was "an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger." Id. (citing Brigham City, supra, 547 U.S. at 406, and Mincey, supra, 437 U.S. at 392).

Hawkins's further argument that Trooper Rogers had at most only a subjective belief that Ms. Snape was in need of immediate aid similarly fails. Hawkins's Brief at 10. It is recognized that an officer's mere subjective concern is insufficient to support a search under the emergency aid exception. Mundy, supra, 342 S.W.3d at 885 (citing Brigham City, 547 U.S. at 406). However, in this case the basis of Trooper Rogers's concern was not simply subjective, but was based on an actual report from a concerned citizen. Again, Mr. Broce said he was concerned for Ms. Snape's well-being. VR 1/12/09, 9:30:40. Such a statement made to a police officer necessarily involves

concern for the missing citizen's health or safety. In addition, when asked what part of Ms. Snape's safety Mr. Broce was concerned with, Trooper Rogers indicated that he could not remember the exact phrase but that he understood Mr. Broce to be referring to Ms. Snape's physical well-being and whether she was possibly being held against her will. Id. at 9:51:05-9:51:18. Thus, it was objectively reasonable for Trooper Rogers to believe that Ms. Snape may be in need of immediate aid as he had encountered a citizen who actually expressed concern for her safety. Compare, Mundy, supra, 342 S.W.3d 878 (finding an officer's concern that appellant - who was asleep in a car and took only one deep breath during a ten second period - may be in need of immediate aid constituted a subjective belief which was insufficient to justify warrantless entry under emergency aid exception).

Furthermore, the fact that Trooper Rogers subsequently left the property to obtain a search warrant prior to locating Ms. Snape does not negate his objective basis for acting under the exception as Hawkins's suggests. Hawkins's Brief at 12. Such action would at most indicate that the officer lacked a *subjective belief* that Ms. Snape may be in need of assistance which again is not determinative.¹ Mundy, supra, 342 S.W.3d at 885.

¹ It should be noted, however, that Trooper Rogers's action in obtaining the warrant was entirely reasonable and in no way indicates that he lacked a belief that Ms. Snape was in need of aid. The record indicates that Trooper Rogers left to obtain a search warrant after discovering evidence of methamphetamine production in Hawkins's open barn. It is well-recognized that manufacturing methamphetamine is an inherently dangerous process. See Bishop v. Commonwealth, 237 S.W.3d 567, 569 (Ky. App. 2007) (recognizing methamphetamine production to be "an inherently dangerous act"); United States v. Layne, 324 F.3d 464, 470-471 (6th Cir. 2003) (discussing the many inherent dangerous of methamphetamine manufacturing). Thus, Trooper Rogers should not be

In Mundy, the Court of Appeals recognized that “[l]aw enforcement officers frequently perform essential community caretaking functions, such as helping stranded motorists, returning lost children to anxious parents, and assisting and protecting citizens in need, that are wholly divorced from law enforcement’s criminal-related functions. Id. at 883 (citations and quotation marks omitted). Here, Trooper Rogers encountered a citizen who expressed concern for the well-being of another citizen. It would not have served society’s interests for Trooper Rogers to simply ignore Mr. Broce and make no effort to address this concern. As acknowledged in Fisher, *supra*, “It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away” 130 S.Ct. at 549.

Therefore, based on this discussion, the facts and circumstances presented Trooper Rogers with an objectively reasonable belief that Ms. Snape may be in need of immediate aid. Fisher, *supra*, 130 S.Ct. at 548. Accordingly, Trooper Rogers properly acted under the emergency aid exception when he stepped inside Hawkins’s open barn in an attempt to verify her well-being. The trial court’s final judgment should be affirmed.

B. Alternatively, the Court Should Consider Whether the Barn was Entitled to Fourth Amendment Protection.

The Commonwealth maintains that the emergency aid exception applied in this case and justified Trooper Rogers’s entry into Hawkins’s barn in an attempt to locate

faulted for leaving one exigent situation to address another. Nor did Trooper Rogers simply abandon the search for Ms. Snape. Other officers remained at the scene while the warrant was obtained. VR 1/12/09, 14:33:15. And, when Hawkins arrived at the property he was questioned about Ms. Snape and subsequently had her come to the property for the officers to verify her well-being. VR 1/13/09, 13:44:18-13:44:55; TR 16.

Ms. Snape. Nevertheless, should the Court find that the exception does not apply, the Court should alternatively consider whether the barn was even entitled to Fourth Amendment protection.²

It is well-established that Fourth Amendment protection extends to a home and its curtilage, but not to the open fields. United States v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, L.Ed.2d 326 (1987); Oliver v. United States, 466 U.S. 170, 178-179, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Curtilage includes the area which “harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life” such that it should be considered part of the home itself. Dunn, 480 U.S. at 300 (internal quotations omitted). In contrast, open fields “may include any unoccupied or undeveloped area outside of the curtilage” and “need be neither ‘open’ nor a ‘field’ as those terms are used in common speech.” Oliver, 466 U.S. at 180, n.11. Government intrusion upon the open fields without a warrant is not an unreasonable search as proscribed by the Fourth Amendment. Id. at 177.

In Dunn, the United States Supreme Court set forth four non-exclusive factors to be considered in analyzing curtilage questions. 480 U.S. at 301. These include:

² The Commonwealth disagrees with Hawkins’s claim that this argument has been waived and should not be considered. The Commonwealth did not concede before the trial court or the Court of Appeals that the barn was within the protected curtilage of Hawkins’s residence or that it was entitled to full Fourth Amendment protection. Rather, the Commonwealth simply asserted before the Court of Appeals that a curtilage determination was not required due to the applicability of the emergency aid exception. But if the exception is now found to be inapplicable, the Court should consider this alternative argument since it is recognized that an appellate may affirm the trial court for any reason supported by the record. McCloud v. Commonwealth, 286 S.W.3d 780, 786 n.19 (Ky. 2009)

the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id.

In applying the Dunn factors here, Trooper Rogers testified at the suppression hearing that the barn was in "close proximity" to Hawkins's trailer - approximately 50-60 feet or 20-30 yards. VR 1/12/09, 9:42:35. In Dunn, the Supreme Court noted that a distance of **60 yards** from the defendant's barn to his house was "substantial" and "support[ed] no inference that the barn should be treated as an adjunct of the house." Id. at 302. As such, the distance in this case appears to support at least some inference that the barn was within the curtilage of the residence.

However, while the proximity factor may to some extent support a curtilage finding, the remaining Dunn factors do not. First, the barn was not within an enclosure surrounding the home. Trooper Rogers testified that Hawkins's property is an open lot and that there are no fences on the property. VR 1/12/09, 9:40:10. Hawkins confirmed this at trial, testifying that the property is approximately five acres and that there are no fences. VR 1/13/09, 14:06:40.

Next, the barn appears to have been used for business purposes rather than for the intimate activities associated with Hawkins's home. Hawkins testified at trial that he makes a living partly through mechanic work and that he used the barn to work on vehicles. VR 1/13/09, 13:50:40. During his testimony he identified a picture of a vehicle

in the barn and stated that if that particular vehicle had not been in the barn “it’d have been another one.” Id. at 13:52:30-13:52:45.

Finally, it appears that Hawkins did little to prevent persons from observing what the barn contained. As has been discussed, the barn was open and had no door. VR 1/12/09, 9:32:00, 9:54:55. There was also no evidence that Hawkins took any steps to prevent access to his driveway off of which the barn appears to have been located. See TR 38, 41. In fact, Hawkins indicated that “anyone” could “drive up [his] driveway and if [he] didn’t have a vehicle right up at the front you could actually pull right up in the barn.” VR 1/13/09, 14:07:18. Thus, given these considerations, the Dunn factors on balance indicate that the barn was not located within the protected curtilage of Hawkins’s residence.

When law enforcement searches an outbuilding located in the open fields of one’s property, the controlling factor is whether the individual had a legitimate expectation of privacy in the structure. See United States v. Trickey, 711 F.2d 56, 59 (6th Cir. 1983). In this case, Hawkins can claim no legitimate expectation of privacy in the barn. Again, the barn had no doors and Hawkins did nothing to prevent the public from accessing it. As Hawkins himself indicated, “anyone” could pull up the driveway and drive into the barn provided there was no vehicle already there. VR 1/13/09, 14:07:18. Such testimony belies any contention that Hawkins possessed a subjective expectation of privacy in the barn.

This is especially the case given the fact that Hawkins *did take steps to protect the privacy of his residence and camper*. The record indicates that many of the

windows on the trailer were covered. VR 1/13/09, 14:05:15. There were also security cameras posted on the trailer which Hawkins testified were meant to deter break-ins and protect his personal property. Id. at 14:03:20, 14:04:50. He testified: "I don't have much but I'd like to keep what I've got." Id. at 14:03:30. Trooper Rogers testified at the suppression hearing that cameras were also posted on the camper. VR 1/12/09, 9:33:25. However, there were no cameras on the barn and Hawkins expressed no such concern over it. VR 1/13/09, 14:07:35. It was simply open and by Hawkins's own admission was accessible by *anyone*. Accordingly, Hawkins cannot claim any reasonable or legitimate expectation of privacy in the barn as he took no steps to protect its privacy. See Trickey, supra, 711 F.2d at 58 (holding that defendant had reasonable expectation of privacy in outbuilding because defendant took steps to protect his privacy by boarding up windows); State v. Showalter, 427 N.W.2d 166, 170 (Iowa 1988) (defendant had reasonable expectation of privacy in barn that was locked and nailed shut); United States v. Pennington, 287 F.3d 739, 745-746 (8th Cir. 2002) (upholding warrantless search of underground bunker located outside curtilage where structure had readily visible entranceway and no lock or door impeding access).

Therefore, based on this discussion, Trooper Rogers properly stepped inside the barn in an attempt to find Ms. Snape even if the emergency aid exception was inapplicable in this case. The barn was not Hawkins's residence, it was not located within the protected curtilage of his residence, and he cannot claim a legitimate expectation of privacy based on the above considerations. While the trial court did not

deny the motion to suppress on this basis, this Court may affirm the trial court for any reason supported by the record. McCloud, *supra*, 286 S.W.3d at 786 n.19.

III.

HAWKINS'S COMMENT ON SILENCE AND BURDEN SHIFTING ARGUMENTS ARE NOT PRESERVED FOR APPELLATE REVIEW. IF THE COURT CONSIDERS THE MATTER, ERROR, IF ANY, DOES NOT RISE TO THE LEVEL OF PALPABLE ERROR RESULTING IN MANIFEST INJUSTICE.

Hawkins finally argues as cross-appellant that the Commonwealth improperly informed the jury of his silence and improperly shifted the burden to him to prove his innocence through questioning and comments. Hawkins's Brief at 17. He acknowledges that his arguments are not preserved for review but seeks review for a palpable error under RCr 10.26. Id. However, as will be shown, the Commonwealth's questioning and comments constituted proper impeachment on a prior inconsistent statement, not improper references to his silence or impermissible burden shifting. Moreover, to the extent that error occurred, it does not warrant relief under the high standard of RCr 10.26.

A. **Factual Background**

During the Commonwealth's case in chief Trooper Rogers indicated that Hawkins was made aware of the search warrant after officers obtained it and returned to the property. VR 1/12/09, 14:35:00. The Commonwealth asked how Hawkins responded, to which Trooper Rogers testified: "He didn't have a whole lot to say. He pretty much invoked his right to remain silent . . . He was polite in his demeanor but chose to remain

silent most of the time.” Id. at 14:35:07. The Commonwealth then asked if Hawkins made any statements about having any knowledge, to which Trooper Rogers testified: “He said he had no knowledge of anything on his property that would be illegal.” Id. at 14:35:25.

Later during trial Hawkins testified in his own defense. He indicated that many of the items found on the property were not actually his but had been discovered in a bag in a truck he had purchased from Ron Hartman. VR 1/13/09, 13:54:15-13:55:20. Hawkins testified that he had an idea that the items were illegal but had not gotten rid of them because he was afraid of what Hartman might do. Id. On cross-examination the Commonwealth asked Hawkins why he hadn’t told officers this story at the time of the search and whether he had come forward with the story at any point during the eighteen months between the time of the search and trial. Id. at 14:43:22-14:44:52. Hawkins responded that he was never asked about it and indicated that he had not told authorities in the meantime. Id.

The Commonwealth similarly cross-examined Hawkins’s girlfriend Jackie Miller as to whether she ever notified the police about where the items came from. VR 1/13/09, 15:56:35. Finally, during closing arguments, the Commonwealth emphasized the fact that Hawkins had eighteen months in which he could have told law enforcement that the items were not his and eighteen months in which to come up with an explanation. VR 1/14/09, 11:57:15-11:57:45.

B. The Commonwealth's Questioning and Comments Were Not Improper Comments on Silence.

Hawkins primarily argues that the Commonwealth's questions and comments concerning his failure to tell police the Hartman story constituted improper references to his invocation of his right to remain silent. Hawkins's Brief at 20. In making this argument Hawkins relies heavily on Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, L.Ed.2d 91 (1976).

In Doyle, two defendants made no post-arrest statements about their involvement in a drug transaction. However, at trial each defendant took the stand and testified that they had been framed. 426 U.S. at 612-613. As part of cross-examination, the prosecutor asked the defendants why they had not told police the frameup story at the time of the arrest. Id. at 613-614.

The United States Supreme Court found such impeachment to be "fundamentally unfair" and held that the prosecution's "use for impeachment purposes of [a defendant's] silence at the time of arrest and after receiving Miranda³ warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." Id. at 618-619. The Court reasoned that since Miranda warnings contain an implicit assurance that a defendant's silence will carry no penalty, it did not comport with due process to allow the prosecution to call attention at trial to the defendant's silence at the time of arrest. Id. at 618.

³ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

However, in this matter, unlike the defendants in Doyle, Hawkins did make a statement to police. As noted, Trooper Rogers testified that at the time of the search Hawkins said he had no knowledge of anything on his property that would be illegal.⁴ VR 1/12/09, 14:35:25.

In Anderson v. Charles, 447 U.S. 404, 408, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), the Supreme Court held that Doyle “does not apply to cross-examination that merely inquires into prior inconsistent statements.” The Court explained that “[s]uch questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.” Id.

Anderson was cited by this Court recently in Taylor v. Commonwealth, 276 S.W.3d 800 (Ky. 2008). In Taylor, the defendant testified at his murder trial. Id. at 808. On direct-examination he indicated that statements he made to police implicating himself following the shooting were false and that his brother actually murdered the victim. Id. On cross-examination the Commonwealth asked if this was the first time the defendant denied committing the murder and proceeded to ask if the defendant had ever come forward with this information to the trial judge or detectives in the years leading up to trial. Id.

This Court found that such questioning did not infringe on the defendant’s

⁴ It should be noted that Hawkins was not under arrest at the time of this statement or at anytime on the day his property was searched. VR 1/13/09, 14:14:25. It also appears from the record that Miranda warnings were only given after Hawkins’s initial statement was made. See TR 16. When the warnings were given Hawkins reiterated his “no knowledge” comment. Id.

right to remain silent. Id. at 809. The Court held that it was proper to cross-examine the defendant “about the discrepancies between his prior confession and his trial testimony” since he had provided a statement to the police and did not remain silent after receiving Miranda warnings. Id. The Court further noted that such questioning properly included asking the defendant why he had not revealed his story to anyone prior to trial if his testimony at trial was true and his prior statement was false. Id.

In this case, while Trooper Rogers indicated that Hawkins “pretty much invoked his right to remain silent,” he further testified that Hawkins provided a statement that he had no knowledge of items on his property that would be illegal. As to this subject, Hawkins did not remain silent.

Thus, pursuant to Anderson and Taylor, it was permissible for the Commonwealth to cross-examine Hawkins on the inconsistencies between his prior statement and his Hartman explanation at trial, including asking why he had failed to come forward with the explanation previously. It was likewise permissible for the Commonwealth to comment on these matters during its closing argument to attack Hawkins’s credibility. Parties are provided great leeway in closing argument. Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987). “A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.” Id. This Court should construe the Commonwealth’s questioning and comments as proper impeachment on a prior inconsistent statement, not as impermissible comments on silence.

Next, to the extent that Hawkins challenges the Commonwealth's questioning of Jackie Miller, there also was no error. It is permissible to ask defense witnesses why they did not come forward with an alibi prior to trial in order to attack their credibility. Gerlaugh v. Commonwealth, 156 S.W.3d 747, 757-758 (Ky. 2005).

Finally, to the extent that Hawkins alleges error in Trooper Rogers's testimony that Hawkins "pretty much invoked his right to remain silent," it should be noted that this has never been raised as grounds for reversal. Hawkins claim has always been limited to the Commonwealth's cross-examination questioning and related comments in closing argument. Should the Court consider the matter, it is recognized that the jury should not be informed that a defendant exercised his right to remain silent. Vincent v. Commonwealth, 281 S.W.3d 785, 790 (Ky. 2009). However, not every reference to silence constitutes reversible error. Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky. 1983). And, here, where the matter is unpreserved, review is only for a palpable error resulting in manifest injustice under RCr 10.26. Even if improper, Trooper Rogers's testimony does not rise to this high standard as will be discussed in Section D, *infra*.

C. There Was No Burden Shifting.

Hawkins's additional argument that the Commonwealth impermissibly shifted the burden to him to prove his innocence similarly fails.

There is no doubt that it is the Commonwealth's burden to prove every element of a crime beyond a reasonable doubt. Kirk v. Commonwealth, 6 S.W.3d 823, 828-829 (Ky. 1999) (citing KRS 500.070 and In re Winship, 397 U.S. 358, 90 S.Ct. 1068,

25 L.Ed.2d 368 (1970)). As such, “any burden shifting to a defendant in a criminal trial would be unjust.” Butcher v. Commonwealth, 96 S.W.3d 3, 10 (Ky. 2002).

In this matter there was no burden shifting by the Commonwealth. As discussed above, the Commonwealth’s questioning of Hawkins was a proper form of impeachment. Similarly, the comments in closing argument were not meant to shift the burden to Hawkins, but rather to attack his credibility and cast doubt on the theory of defense. This was proper, as again, the prosecution “may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.” Slaughter, *supra*, 744 S.W.2d at 412. There was no suggestion by the Commonwealth that Hawkins bore the burden to prove his innocence, nor any suggestion that he failed to disprove an element of the offenses. Thus, no burden shifting took place.

Furthermore, the jury would not have interpreted the questioning or comments to shift the burden to Hawkins given the repeated references to the fact that the Commonwealth bore the burden of proof at trial. At the beginning of trial the court instructed the jury that it was the Commonwealth’s burden to establish the defendant’s guilt beyond a reasonable doubt. VR 1/12/09, 10:26:45. During jury selection the parties reiterated that the Commonwealth bore the burden of proof. Id. at 10:53:45-10:54:26; 11:45:00. During closing arguments the parties again emphasized that the Commonwealth was required to prove guilty beyond a reasonable doubt. VR 1/14/09, 11:25:05; 12:19:20. The prosecutor stated, “You have received enough evidence to find

this case beyond a reasonable doubt.” Id. at 12:19:35. The trial court also instructed the jury on the defendant’s presumption of innocence in the jury instructions.⁵ TR 77.

Given these considerations, nothing in the Commonwealth’s questioning or comments shifted the burden to Hawkins to prove his innocence. There was no error.

D. Alternatively, Error, If Any, Does Not Warrant Relief Under RCr 10.26.

Should the Court find that error occurred, it must against be emphasized that none of Hawkins’s arguments are preserved for appellate review. Pursuant to RCr 10.26, this Court *may* consider an unpreserved error if it is a “palpable error” which affects a defendant’s “substantial rights” and resulted in “manifest injustice.”⁶ The required showing for a palpable error resulting in manifest injustice is “probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due

⁵ The jury was instructed as follows:

INSTRUCTION NO. 1

PRESUMPTION OF INNOCENCE

The law presumes a defendant(s) to be innocent of a crime and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant(s) not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that the Defendant(s) is guilty. If upon the whole case you have a reasonable doubt that the Defendant(s) is guilty, you shall find such Defendant(s) not guilty. TR 77.

⁶ The fact that Hawkins alleges constitutional violations does not alter the standard of review. Unpreserved errors are reviewed under RCr 10.26 regardless of whether the error involves constitutional or non-constitutional claims. See Brown v. Commonwealth, 313 S.W.3d 577, 595 (Ky. 2010); Commonwealth v. M.G., 75 S.W.3d 714, 719 (Ky. App. 2002).

process of law.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). “To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.” Id. at 4. Moreover, what a palpable error analysis really “boils down to” is whether there is a “substantial possibility” that the result would have been different without the error. Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006). “If not, the error cannot be palpable.” Id.

In this matter, even if error occurred, Hawkins is not entitled to relief under RCr 10.26 as there is no possibility, let alone a *substantial* one, that the result would have been different.

First, the record indicates that evidence of methamphetamine production and drug paraphernalia was found throughout Hawkins’s property. In the barn, officers discovered a container with a chalky substance described as a “pill soak” as well as a jar with lithium strips floating inside. VR 1/13/09, 9:31:50, 9:32:25. In the trailer, officers discovered two glass pipes, a blue bank-style bag, and a black garbage bag in Hawkins’s bedroom. VR 1/12/09, 14:39:25-14:40:40. The blue bag contained digital scales and multiple plastic baggies. Id. at 15:32:00. The garbage bag contained items consistent with the manufacture of methamphetamine including: a clear gallon jug, black rubber gloves, an aerosol can of carburetor cleaner, lithium batteries, and two pill bottles of a white powder which was later determined to contain pseudoephedrine. Id. at 15:37:25; VR 1/13/09, 10:13:00, 11:43:35. A box containing hypodermic needles was also found in the trailer. VR 1/12/09, 14:47:45. In the camper, officers found additional items which

can be used in the manufacture of methamphetamine including liquid fire, acetone, and ice cream salt placed together in a cardboard box. Id. at 14:36:00; VR 1/13/09, 10:20:40. The jury heard testimony that all of the ingredients necessary for an active methamphetamine lab were found on the property and that the process of manufacturing methamphetamine had been started. Id. at 10:33:40.

In addition to this significant evidence, Hawkins's defenses were not such as to create a substantial possibility of a different result. His claims that he just happened to find the garbage bag of items in the truck he purchased (VR 1/13/09, 13:54:20), that he just happened to be unable to contact Hartman to return it him during the two weeks before the search occurred (Id. at 14:18:08), that his girlfriend just happened to place the bag in his bedroom and place certain items from the bag in his drawer (Id. at 13:55:56, 14:13:25), that he just happened to never see the containers that were sitting out in his barn (Id. at 13:56:50), etc. are simply too improbable to change the result. Moreover, his claims were undercut by his own statement to police that he had no knowledge of anything on his property that would be illegal. VR 1/12/09, 14:35:25.

Thus, given the significant evidence against Hawkins and the nature of his defenses, it cannot be said that there is a substantial possibility that the result would have been different in the absence of any improper testimony, questioning or comments discussed above. Accordingly, error, if any, does not rise to the extreme level of palpable error resulting in manifest injustice. Relief under RCr 10.26 is not warranted.

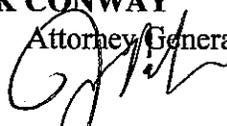
CONCLUSION

For all of the foregoing reasons, this Court should vacate the opinion of the Court of Appeals and affirm the final judgment of the Anderson Circuit Court.

Respectfully Submitted

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