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RENDERED: AUGUST 21, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000421-MR

SYLVESTER CLAY — APPELLANT

V.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
NO. 08-CR-00140

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Sylvester Clay of first-degree sodomy. Consistent with the jury's recommendation, the trial court sentenced Clay to twenty years' imprisonment. He appeals the resulting judgment as a matter of right.[1]

Clay contends the trial court erred by (1) denying his motion to suppress the statement he give to police while in custody; (2) denying his right to confront witnesses against him; (3) admitting multiple instances of hearsay evidence; (4) allowing the prosecution to use a peremptory challenge to strike an African-American juror over a *Batson* challenge; and (5) allowing the incompetent child-victim, Sally,[2] to testify at trial. He also alleges the

[1] Ky. Const. § 110(2)(b).

[2] We have chosen a pseudonym to protect the identity of the child.

Commonwealth committed prosecutorial misconduct by attempting to define the term *beyond a reasonable doubt* in its closing argument.

Finding no error that merits reversal, we affirm the conviction.

I. FACTUAL AND PROCEDURAL HISTORY.

Sylvester Clay was formerly the live-in boyfriend of Angela Kays. For a period of time during their relationship, Clay and Kays were the primary caretakers of Kays's then-infant granddaughter, Sally.

As Sally grew older, her mother, Ashley Kays, took over the role of Sally's primary caretaker, and Clay's relationship with Angela Kays ended. But Clay remained in contact with Ashley, often providing her with assistance as needed. This included furnishing her with transportation, diapers, medication, and housing.

On the day of the event at issue, Ashley, then a mother of three, asked Clay if he would drive her to pick her children up from daycare. Clay obliged. He also took her to the grocery and agreed to drive her to her son's doctor's appointment the next day.

After picking up the children and groceries, Clay returned to Ashley's apartment with her and the children. Clay drank beer in the apartment's living room. According to Ashley, he consumed as many as twelve beers, or a "whole trashcan full."

Clay remained at the apartment until it was the children's bedtime. Sally shared a bedroom with her brother Jack,[3] while the infant child shared a room with Ashley. As Ashley tended to the infant child's cries, Clay offered to help put Jack to sleep because he was keeping Sally awake. Although Clay stated he never left the living room, Ashley testified he entered the room shared by Jack and Sally and sat down on Sally's bed even though he was ostensibly attempting to put Jack to sleep.

Witnessing this, Ashley told Clay he needed to leave the children's bedroom. Clay left momentarily and Ashley went to change the infant's diaper. With her next glance into the children's room, Ashley saw Clay hovering over Sally's bed, leaning over her body, raising himself up and away from her. This sight ignited concern that was confirmed when she recognized Sally's distraught nature upon entering her room. Sally was apprehensive when first asked what had happened. Once she was reminded Ashley could not help her if she did not disclose what happened, Sally pointed to her vagina and stated that Clay had licked her "butt."

Ashley called the police, at which time Clay denied any wrongdoing and "jetted" from the apartment. Officer Hankins responded to the call and took Ashley's statement of the incident. At the same time, another officer responded to a call to check a residence for the presence of a station wagon matching the description of Clay's vehicle. The officer did not find a station wagon but, instead, saw a man—later determined to be Clay—round a corner, run down a

[3] We have chosen a pseudonym to protect the identity of the child.

fencerow and into a garage behind a residence. The officer found this behavior to be suspicious, reported it to dispatch, and began pursuit.

After taking Ashley's statement, Officer Hankins left the residence and was informed of the foot chase involving Clay. He went to provide assistance. Once in the area of the pursuit, Hankins saw Clay running. He announced his presence and demanded Clay stop. But Clay did not stop. Instead, he jumped over a guardrail and ran down the adjacent hill. Hankins followed and eventually found Clay wedged between two trees.

Clay was sweating profusely and smelled of alcohol. Hankins assisted him in climbing back up the hill where he was arrested for alcohol intoxication. He was later identified as the suspect in the sodomy of Sally and brought to trial on first-degree sodomy charges.

The jury convicted Clay of first-degree sodomy and recommended a twenty-year sentence, which the trial court imposed. This appeal followed.

II. ANALYSIS.

A. Clay Waived his Right to Challenge the Admissibility of Statements he Made While in Custody.

Detective William Riley[4] was assigned the duty of investigating the alleged sexual assault of Sally. Ashley's statement implicated Clay as the perpetrator, so Riley interviewed him the day after his arrest. The story Clay presented during the interview paralleled the version of events Ashley described as leading up to Sally's sexual assault. Clay admitted to driving Ashley around

[4] Riley retired from the police force while Clay awaited trial.

town and drinking beer in her apartment. But he deviated from Ashley's narrative when it came to the ultimate allegation of the crime. He denied ever leaving the living room and claimed to have had no interaction or contact with the children. He also downplayed his relationship with Ashley. He labeled her as a friend he does favors for and claimed he did not know the children's names.

At trial, the Commonwealth introduced much of Clay's statement into evidence through the testimony of Riley himself. Upon completion of Riley's testimony, Clay moved to suppress the admission of his statement and to strike Riley's testimony because his statement was taken in violation of *Miranda*.[5] The trial court denied Clay's motion as untimely.

Now, on appeal, Clay challenges this ruling by the trial court. Clay argues his motion was timely and preserved his *Miranda* claim for appellate review. Against the contingency that we may find this issue unpreserved, he also requests palpable error review.[6]

There is no dispute that Clay's statement violated *Miranda*.[7] The only issue we are asked to decide is whether Clay's motion to suppress was timely made. But we do not find it necessary to decide this issue because we find any

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

[6] RCr. 10.26; *see also Shepherd v. Commonwealth*, 251 S.W.3d. 309, 316 (Ky. 2008) ("Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant.").

[7] In its brief, the Commonwealth concedes Clay was not sufficiently Mirandized before giving his statement to Riley.

error committed by the trial court in admitting Clay's statements was invited by Clay himself and, therefore, not subject to judicial review.

"Generally, a party is estopped from asserting an invited error on appeal."[8] Invited errors, unlike forfeited errors subject to palpable error review, "amount to a waiver, *i.e.*, invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review."[9]

Clay had ample opportunity to raise his *Miranda* challenge before trial. He was provided with a written transcript and video recording of his custodial interrogation *years* before his case proceeded to trial. The contents of these recordings provided Clay with sufficient grounds for a motion to suppress because the only recitation of rights contained in it was clearly inadequate.[10] But failure to seek suppression before trial, standing alone, does not constitute a knowing waiver.

Instead, we find the length of Riley's testimony and depth of information he was permitted to reveal before Clay moved to suppress his un-Mirandized statement evinces Clay's knowing relinquishment of his right to claim error. Our review of Riley's testimony reveals that the Commonwealth's direct

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[8] *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011) (citing *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006)).

[9] *Id.* at 38 (citing *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997)).

[10] We note Clay's purported reason for failing to move to suppress the statement before trial was that he anticipated Riley to testify that he had properly Mirandized Clay prior to his statement, but the waiver simply did not make its way into the written or video recording of the interview. The trial court echoed this expectation because this appears to be a fairly common occurrence. We note that circumstances such as these particularly lend themselves to pre-trial suppression motions as a mechanism for clearing the specter of unrecorded *Miranda* warnings.

examination focused on Clay's statement and lasted approximately forty-five minutes. Clay's cross-examination then lasted approximately thirty minutes; and his last question regarding *Miranda*, which resulted in a pragmatic admission that *Miranda* was violated, took place about midway through this time period. The final fifteen minutes of his testimony were about equally split between re-direct and re-cross examination, during which time no questions relevant to *Miranda* were asked.

Though this timeline of Riley's testimony is helpful in framing our analysis, we are not suggesting a strict mathematical or mechanical approach to finding waiver. We instead use this factual backdrop as a springboard for assessing the content of Riley's testimony and Clay's actions after recognizing his right to seek suppression of his statement to Riley.

There can be no clearer evidence of Clay's acknowledgement of his right to seek suppression of his un-Mirandized statement than his penultimate question to Riley regarding *Miranda*. Nearly halfway through his cross-examination, Clay's counsel pointedly asked Riley if he had provided Clay with proper *Miranda* warnings. Although this important question remained unanswered,[11] it conveys counsel's seeming awareness during this line of questioning of the lack of adequate *Miranda* warnings. Then, in response to Clay's ultimate question regarding the propounded *Miranda* warnings, Riley

[11] The Commonwealth's objection that this question required Riley to draw a legal conclusion was sustained by the trial court.

admitted he did not inform Clay of his right to an attorney and that no *Miranda* warnings were provided to Clay outside of those in the written transcript.

Armed with this testimonial admission conclusively proving that Clay's statement was taken in violation of *Miranda*, Clay chose not to raise the matter with the trial court. He did not seek to suppress and strike any testimony pertaining to his un-Mirandized statement. Instead, he pressed on. He continued questioning Riley about the content of the un-Mirandized statement as if it had been properly admitted. Clay took this opportunity to elicit beneficial testimony regarding his statement; most notably that he had denied sexually abusing Sally forty-eight times during the interview.[12]

Not only did he continue his cross-examination of Riley, Clay also chose not to move to suppress his statement at the conclusion of his cross-examination. This allowed the Commonwealth a second chance to examine Riley and elicit prejudicial evidence regarding Clay's un-Mirandized statement during re-direct examination. It was not until after Clay further inquired into the substance of his un-Mirandized statement during re-cross examination that he finally moved to suppress his statement to Riley and to strike Riley's testimony from the record.

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[12] The Commonwealth alleges that Clay's failure to raise timely his *Miranda* objection was a ploy to allow Clay's denial of wrongdoing to be put before the jury without subjecting him to cross-examination. The Commonwealth presents no support for this argument aside from the logic it inherently rests upon. Even if this were Clay's intention in continuing his cross-examination, we are still at a loss as to why Clay would not raise his motion to suppress immediately following his cross-examination instead presenting the witness to the Commonwealth for re-direct examination.

Having concluded Clay knew and acknowledged his right to seek suppression of Clay's un-Mirandized statement approximately half-way through his cross-examination, we find no rational reason, other than a waiver of that right, for Clay to delay presenting his motion to the trial court. If Clay were truly concerned about suppressing and excluding prejudicial testimony of an inadmissible out-of-court statement, we cannot conceive why he would allow the Commonwealth the opportunity to admit such evidence via re-direct examination without first having to face a motion to suppress. We, therefore, conclude that Clay knowingly relinquished his right to claim his un-Mirandized statement as error.

Invited error is not often found in situations where an objection or motion to suppress is made at trial. And we do not expect this opinion to upset that trend. We confine our holding to this limited set of circumstances where it is abundantly clear that counsel has an understanding of his right to seek suppression of evidence but, nonetheless, chooses to deepen the taint laid upon the jury by presenting more proof of the inadmissible evidence only to later claim suppression is required. In instances such as these, we find the post-testimonial objection to be an attempt to "bury a landmine" in the record to be detonated on appeal if necessary.[13] Today, we safely defuse that landmine and conclude that Clay knowingly relinquished his right to seek suppression of his un-Mirandized statements.

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[13] *See Fratzke v. Murphy*, 12 S.W.3d 269, 273 (Ky. 1999) (Lambert, C.J., dissenting).

B. The Trial Court's Admission of the Recorded Forensic Interview of Sally did not Violate Clay's Right to Confront his Accuser.

Meade's next allegation of constitutional error involves the Commonwealth's presentation of a recorded forensic interview of Sally conducted at the Children's Advocacy Center (CAC). He claims the video's admission into evidence violated his rights under the Confrontation Clause because the recording contained testimonial statements, and he was unable to confront the speakers. We find no Confrontation Clause error.

The Supreme Court has held that the Confrontation Clause prohibits admission of evidence that consists of testimonial hearsay "unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[14] A statement is testimonial when "the circumstances objectively indicate that . . . the primary purpose of the [statement] is to establish or prove past events potentially relevant to later criminal prosecution."[15]

We have previously held statements made by rape victims to sexual assault nurse examiners (SANE nurses) are testimonial in nature because SANE nurses follow "protocol . . . require[ing] them to act upon request of a peace officer or prosecuting attorney" and "act to supplement law enforcement

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[14] *Davis v. Washington*, 547 U.S. 813, 821 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)); *see also Turner v. Commonwealth*, 248 S.W.3d 543, 545 (Ky. 2008) (acknowledging the Supreme Court's Confrontation Clause jurisprudence in *Davis* and *Crawford*).

[15] *Davis*, 547 U.S. at 822; *see also id.* at n.1 (noting that although the *Davis* decision was couched in terms of police interrogation, the same Confrontation Clause principles apply to statements outside of a formal interrogation).

by eliciting evidence of past offenses with an eye towards future prosecution."[16] Sally's interview at the CAC is indistinguishable from a SANE nurse's examination in regard to its testimonial nature.

The CAC's website states that the forensic interviews they offer are "conducted to assist law enforcement in gathering factual information regarding the abuse allegations."[17] Sally's CAC interview was arranged by police and conducted at the request of law enforcement. Police officers also transported Sally to the CAC for her interview and watched via one-way glass. The police even made contact with Emily Cecil, the interviewer, during the course of the interview to request she undertake a specific line of questioning. Like in the SANE nurse cases, the foregoing renders the testimonial nature of the forensic interview beyond dispute.[18]

Determining that the overarching purpose of the forensic interview was testimonial is not the end of this analysis, however. As *Crawford* and its progeny teach us, testimonial statements are only barred by the Confrontation Clause if they are also used for a hearsay purpose and the declarant does not testify at trial. We find that the audio recording of Sally's forensic interview does not meet these requirements and, therefore, falls outside the scope of the Confrontation Clause.

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[16] *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009).

[17] *Forensic Interviews*, CHILDREN'S ADVOCACY CTR. OF THE BLUEGRASS, http://kykids.org/about/forensic-interviews (last visited Aug. 12, 2014).

[18] *See also Souder v. Commonwealth*, 719 S.W.2d 730, 734 (Ky. 1986) (concluding that a social worker's interview of an alleged child sexual abuse victim was "clearly for the purpose of investigating into the possibility of child abuse and, if there was evidence, testifying about it").

The Commonwealth ineloquently argues that the statements made by Cecil could not fall within the purview of *Crawford* because they cannot be classified as hearsay, which is necessary to trigger the Confrontation Clause's bar. The Commonwealth argues Cecil's statements are not hearsay because they were not offered to prove the truth of the matter asserted. We must agree.

This issue is similar to the one we dealt with in *Turner v. Commonwealth.*[19] In that case, we were forced to decide whether an informant's statements contained on an audio recording of an illicit drug transaction were testimonial hearsay barred by the Confrontation Clause. Relying on precedent from the federal Circuit Courts of Appeal, we concluded that "to the extent that the non-testifying informant's statements and remarks on the audio recordings . . . provided context for . . . the conversations, the admission into evidence of the informant's portions did not run afoul of [the defendant's] confrontation right."[20]

The questions Cecil posed to Sally during the forensic interview provide nothing more than context for Sally's answers. Her infrequent repetition of Sally's answers is, likewise, not intended to prove the content of Sally's statements, as Clay alleges, but is intended to confirm Sally's statement while providing audible clarity. Just as in *Turner*, Cecil's statements were not hearsay because they were not offered to prove the truth of the matter asserted

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[19] 248 S.W.3d 543 (Ky. 2008).

[20] *Id.* at 546-47.

but to provide context to Sally's more probative statements.[21] Because Cecil's statements on the recording were not admitted for a hearsay purpose, Clay had no right to confront the non-testifying interviewer. So Clay's confrontation rights were not violated by the playing of Cecil's statements.

The statements Sally made during the forensic interview, likewise, do not violate Clay's rights under the Confrontation Clause. "The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."[22] That Sally's answers during the interview are testimonial hearsay is clear.[23] They are out-of-court statements offered to prove the truth of the matter asserted,[24] and their utterance may be objectively viewed as taking place under circumstances indicating that their primary purpose was to prove past events with an eye towards criminal prosecution.[25] But it is equally clear that Sally testified at trial and was subject to cross-examination where Clay confronted her. Because Sally was

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[21] *See* KRE 801(c) ("[*Hearsay*] 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.")

[22] *Crawford*, 541 U.S. at 59 n.9.

[23] This label only contemplates Sally's statements with reference to the definition of hearsay provided in KRE 801(c). We do not presently address the admissibility of Sally's hearsay statements. That issue is discussed *infra* at Part II.C.3.

[24] *See* KRE 801(c).

[25] *See Davis*, 547 U.S. at 822.

subject to confrontation by Clay at trial, his rights under the Confrontation Clause were not violated.[26]

C. The Trial Court did not Commit Palpable Error by Admitting Hearsay Testimony.

Clay alleges that a multitude of the trial testimony proffered by the Commonwealth constituted inadmissible hearsay. He claims these evidentiary issues were preserved by his motion in limine seeking suppression of the evidence of which he now complains.

Though a motion in limine is often sufficient to preserve an issue for evidentiary review,[27] that is only the case when the motion is "resolved by order of record" by the trial court.[28] Clay admits he cannot find any order disposing of his motion on the record and that it was not ruled upon at any pretrial hearing. Because Clay did not obtain a ruling on the record regarding his motion in limine, as required by Kentucky Rules of Evidence 103(d), this issue is unpreserved. Therefore, we review for palpable error.

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[26] *See, e.g., James v. Commonwealth*, 360 S.W.3d 189, 203 (Ky. 2012) ("[The declarant] was cross-examined—and therefore *confronted*—by the defense. Thus, admission of any statements made by her to the SANE nurse did not violate *Crawford*, since a confrontation violation can only occur if the defendant is unable to cross-examine the declarant."); *Peak v. Commonwealth*, 197 S.W.3d 536, 544 (Ky. 2006) (finding no Confrontation Clause violation when the declarant of admissible testimonial hearsay was present and available to be confronted during trial by the defense but remained uncalled in the defense's discretion).

[27] KRE 103(d); *Lanham v. Commonwealth*, 171 S.W.3d 14, 20-21 (Ky. 2005).

[28] *See* Robert G. Lawson, The Kentucky Evidence Law Handbook § 1.10(5) (5th ed. 2013) ("KRE 103(d) provides that a motion in limine is sufficient to preserve error for appellate review if 'resolved by order of record' (but not if left unresolved)."); KRE 103(d); *Lanham*, 171 S.W.3d at 21 ("[M]otions in limine resolved by order of record are sufficient to preserve errors for appellate review.").

"An error is palpable only if it is 'shocking or jurisprudentially intolerable'"[29] and Clay can show a "probability of a different result or [an] error so fundamental as to threaten [his] entitlement to due process of law."[30] We find many of the evidentiary errors alleged by Clay are not error. But we also conclude that none of those that are error amount to palpable error.

1. Ashley Kays's Testimony was Properly Admissible.

Clay's first assignment of hearsay error attacks the testimony of Sally's mother, Ashley Kays. Clay claims that Ashley's testimony regarding the statements Sally made to her immediately following the alleged act of sexual abuse was inadmissible hearsay. We disagree.

Ashley testified that after she saw Clay leaning over Sally's bed, she entered Sally's room and could sense something was wrong. She then asked Sally if she was okay. Once Clay left the room and Ashley reassured Sally that she was there to protect and help her, Sally confided that Clay had "licked her butt" and pointed to her vagina. When informed that was not her butt, Sally reiterated that was where she was licked.

Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted."[31] That Ashley's recitation of Sally's statements was intended to prove that Clay sodomized Sally is clear. But this is not the end of our analysis because a label of hearsay does not automatically

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[29] *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

[30] *Martin*, 207 S.W.3d at 3.

[31] KRE 801(c).

coincide with inadmissibility.[32] Though hearsay is generally inadmissible, our rules of evidence contain an abundance of exceptions to this general bar.[33] After considering these exceptions, we find the excited utterance exception applicable here.[34]

A hearsay statement qualifies as an *excited utterance* when it relates to a "startling event or condition" and is made while the declarant "was under the stress of excitement caused by the event or condition."[35] To determine whether a statement qualifies as an excited utterance under this exception, we have previously held the following criteria to be the most significant indicators:

> (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.[36]

These criteria are not intended to be rigidly applied when determining admissibility. Instead, this test is a guidepost in contemplating the totality of the circumstances.[37]

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[32] *See* KRE 802 ("Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky.").

[33] *See* KRE 803, 804.

[34] KRE 803(2).

[35] *Id.*

[36] *Souder v. Commonwealth*, 719 S.W.2d 730, 733 (Ky. 1986).

[37] *Smith v. Commonwealth*, 788 S.W.2d 266, 268 (Ky. 1990).

Addressing each criterion in turn, it becomes clear that Sally's statements to her mother were sufficiently spontaneous and made under the excitement of a startling event to be properly admitted under KRE 803(2):

i) Lapse of time. Sally's statements were made moments after the startling event that they pertain to—the alleged sexual assault—took place.[38]

ii) Opportunity of likelihood of fabrication. Given the miniscule lapse of time between the startling event and her statement, Sally had minimal opportunity to fabricate the content of her statement. The likelihood of fabrication is further distilled when considering that Sally unknowingly referred to her vagina as her "butt." Her use of improper terminology when referring to her genitalia shows she is not sexually aware and would not have the mental faculty to contemplate such an act unless she had experienced it.

iii) Inducement to fabrication. Even if Sally were capable of fabricating such a story, the record is devoid of any inducement or motive for fabrication.

iv) Actual excitement of the declarant. Sally was not outwardly hysterical following the stressful event, but her mother testified she could sense something was wrong when she entered Sally's room. We are unwilling to rely solely on a mother's intuition to determine Sally's level of excitement

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[38] *See Cook v. Commonwealth*, 351 S.W.2d 187 (Ky. 1961) (finding statements made an hour after the exciting event were temporally sufficient for admissibility, whereas, statements made six hours after the event were not admissible).

following the alleged stressor, but we have routinely found crimes carrying a concomitant shock value meet this excitement element.[39]

v) Place of the declaration. Sally's statement was made in the same location as the exciting event. This attributed to maintaining Sally's excitement level, as she was unable to remove herself from the stressful environment.

vi) Visual results of the act or occurrence to which the utterance relates. The evidence adduced at trial provided ample physical and corroborating evidence that the alleged stressful act occurred. Ashley's testimony that she saw Clay lifting himself off of Sally's bed immediately before she entered Sally's room to find Sally disheveled, Clay's statement that he was present at Sally's home on the night of the incident, and DNA evidence linking Clay to physical contact with Sally's genital area are sufficient corroborators to support Sally's statement.

vii) Whether the utterance was made in response to a question. Sally's statement was made in response to a question posed by Ashley. But this fact is not controlling of our analysis. Here, the questions that led to Sally's eventual utterance were simple, brief, and open-ended as to not suggest a particular answer.[40]

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[39] *See, e.g., Davis v. Commonwealth*, 967 S.W.2d 574 (Ky. 1998) (child sexual abuse and assault); *Wells v. Commonwealth*, 892 S.W.2d 299 (Ky. 1995) (stabbing); *Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004) (being shot).

[40] *Ernst v. Commonwealth*, 160 S.W.3d 744, 755 (Ky. 2005) (finding that the excited utterance applied to statements made in response to questioning where the questions "were brief and not suggestive").

viii) Whether the declaration was against interest of self-serving.

Sally's statement was neither self-serving nor against her interest. It was ambivalent, as Sally had nothing to gain or lose by admitting she had been sexually assaulted by Clay.

On balance of these factors, Sally's statements to her mother fall squarely within the excited utterance exception to the general bar on hearsay evidence. We, therefore, find no error in the trial court's admission of Ashley's recitation of Sally's out-of-court statements.

2. The Testimony of Officer Hankins is not Subject to Judicial Review.

Clay next alleges the testimony of Officer Hankins also contained inadmissible hearsay. Hankins testified that he arrived at Sally's apartment in response to an emergency call alleging child sexual abuse. He provided evidence that Clay first became a suspect in Sally's sexual assault because Ashley told him a friend of the family had licked her daughter's private area. When he was primed to begin discussion of the specifics of what Ashley told him in explaining what Sally said immediately after the incident, Clay objected. His objection was sustained, and he requested no further remedy.

Although we are unconvinced that the entirety of Hankins's testimony constitutes hearsay,[41] Clay's failure to request that the trial court admonish the jury to disregard any of the purported hearsay evidence is dispositive of

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[41] Instead of being admitted as evidence to prove the truth of the initial assertion—that Clay had sexually assaulted Sally—it was admitted to show how the police were able to connect Clay, who was being pursued on other grounds during Hankins's investigation, with the alleged sexual assault of Sally.

this issue.[42] A sustained objection without request for a further remedy leaves no room for a subsequent allegation of prejudicial error because, absent compelling circumstances, a failure to request an admonition, limiting instruction, or other relief is considered a trial tactic intended to reduce the attention called to the inadmissible testimony.[43] Finding no compelling circumstances here, we find no reviewable error.

3. *Sally's Statements in the Child Advocacy Center Interview were Inadmissible Hearsay.*

Clay also claims that Sally's statements made during her forensic interview were inadmissible hearsay.[44] We agree.

Sally's statements in the forensic interview were inarguably made out of court, and the only imaginable purpose for which the Commonwealth would seek admission of the interview is to prove the truth of the matter asserted in Sally's statements. It is equally clear that no hearsay exception applies in this instance. We have long held that there is no hearsay exception for statements made by children alleging sexual abuse.[45] In fact, the Commonwealth does not even provide this Court with a putatively applicable hearsay exception. We find the admission of Sally's statements in the CAC interview was error.

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[42] *See Soto*, 139 S.W.3d at 861.

[43] *Id.* (citing *Hayes v. Commonwealth*, 698 S.W.2d 827, 829 (Ky. 1985) ("Merely voicing an objection, without a request for a mistrial or at least for an admonition, is not sufficient to establish error once the objection is sustained.")).

[44] Clay also alleges that the statements of the interviewer, Emily Cecil, were also inadmissible hearsay. We have already determined her statements in the recording were not hearsay so we will not address that allegation any further. *See supra* Part II.B.

[45] *Souder*, 719 S.W.2d at 734.

We have easily concluded that this scheduled, testimonial, out-of-court interview is inadmissible hearsay. But we remain concerned about the frequency with which similar inadmissible interviews are being admitted into evidence without regard for our Commonwealth's rules of evidence. In the Commonwealth's response to Clay's motion in limine seeking suppression of the forensic interview, it implicitly acknowledged the interview was not admissible under the Kentucky Rules of Evidence but claimed that "[t]ypically[,] in a trial such as this, the forensic interview is played for the jury to hear once a foundation is laid." Unless the foundation alluded to by the Commonwealth requires proof of a valid hearsay exception, we strongly admonish trial courts to undertake a deeper analysis of the admissibility of similar out-of-court forensic interviews of allegedly sexually abused children before allowing admission.

4. Angela Kays's Testimony was Inadmissible Hearsay.

Clay also challenges the testimony of Angela Kays, Sally's grandmother, on hearsay grounds. Following the sexual assault, Ashley took Sally to the hospital for treatment and to allow collection of any forensic evidence that may have remained on Sally's body. Upon conclusion of their hospital stay, Ashley took all of her children to Angela Kays's house to stay for the remainder of the evening. Kays testified that during this time Sally told her "Papa Seal"[46] had been between her legs and licked her three times.

[46] Evidence at trial established that Sally often referred to Clay as "Papa Seal."

Sally's statement is again clearly hearsay. It was made outside of court and was admitted to prove the truth of the matter asserted.[47] The Commonwealth again does not attempt to claim an applicable exception to the hearsay bar and, likewise, we cannot find one. The excited utterance exception appears to be the most applicable facially; but, unlike Sally's statements to Ashley, the record is unclear regarding how much time elapsed between the conclusion of the stressful event and Sally's statement to Kays. Without this important piece of evidence, we cannot conclude that the Commonwealth met its burden of proving Kays's testimony regarding Sally's statements was admissible.[48] The admission of this testimony was error.

5. Detective Riley's Indirect Bolstering of Ashley's Testimony was Error.

Clay also challenges Detective Riley's testimony. He does not argue hearsay grounds like his other allegations of evidentiary error but, instead, alleges Riley improperly bolstered Ashley's testimony. The Commonwealth questioned Riley about the depth of his investigation into Ashley's motivation to levy false allegations against Clay. Riley responded that he had followed his training, kept an open mind regarding the veracity of Ashley's statements, and did his best to determine if a motive to lie was present. When pressed, he concluded he did not discover any such motive.

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[47] KRE 801(c).

[48] *See Cook*, 351 S.W.2d 187 (finding statements made an hour after the exciting event were temporally sufficient for admissibility, whereas, statements made six hours after the event were not admissible).

"Generally, a witness may not vouch for the truthfulness of another witness."[49] In the face of this bright-line rule, this case remains a close one because our case law condemning bolstering typically deals with needless repetition of a witness's testimony or authoritative assertions that a witness is, or seemed, truthful. Riley's testimony here is less patent than we have seen in other cases; but we must still conclude this portion of Riley's testimony improperly, though indirectly, bolstered Ashley's testimony. Its admission was error.

6. Palpable Error.

We now turn to the question of whether the foregoing errors amount to palpable error. "An error is palpable only if it is 'shocking or jurisprudentially intolerable'"[50] and Clay can show a "probability of a different result or [an] error so fundamental as to threaten [his] entitlement to due process of law."[51] We do not feel the present errors meet this standard.

Even considering the multiple evidentiary errors outlined above, we are not convinced that Clay has shown a probability of a different result had the inadmissible evidence been properly excluded. Removing the testimony we have held to be error herein, the Commonwealth presented evidence of Clay's flight from the apartment,[52] the excited utterance of a child explaining the

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[49] *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997).

[50] *Allen*, 286 S.W.3d at 226 (quoting *Martin*, 207 S.W.3d at 4).

[51] *Martin*, 207 S.W.3d at 3.

[52] *See Rodriguez v. Commonwealth*, 107 S.W.3d 215, 219 (Ky. 2003) ("That is, evidence of flight is admissible because it has a tendency to make the existence of the

sexual acts perpetrated against her, as well as the testimony of Ashley that provided the factual backdrop for the alleged criminal events. A majority of this evidence was also corroborated by Clay in his interview with Detective Riley.[53]

In addition to this testimony, the Commonwealth also presented forensic evidence from the underwear Sally was wearing on the night of the incident and a piece of toilet paper she used to wipe herself after the incident. The toilet paper tested positive for amylase, a component of saliva, but no indication of saliva was present inside Sally's vagina. DNA tests conducted on the toilet paper yielded a DNA profile consistent with a mixture of Sally's and Clay's DNA at six of thirteen locations on the DNA chain. The forensic examiner concluded that 1 in 750 people in the United States could have contributed to this DNA mixture with Sally. The DNA evidence from Sally's underwear was even more damning for Clay. He was found to be an inclusive contributor at one loci, but the DNA was consistent with a mixture of Sally's and Clay's DNA at all other loci. This result meant that 1 in 13 million persons in the United States could have been a contributor to this DNA mixture.[54]

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defendant's guilt more probable: a guilty person probably would act like a guilty person.").

[53] Clay's narrative only materially deviates from Ashley's in that he denied entering Sally's bedroom and denied sexually touching Sally.

[54] Clay's forensic expert disagreed with the Commonwealth's interpretation of the DNA results on the toilet paper sample. She stated that 1 in 15 people could have contributed to that sample. She had no disagreement with the Commonwealth's expert's assessment of the results of the underwear sample.

Absent the inadmissible testimony outlined above, the Commonwealth still would have presented a complete and compelling narrative in support of Clay's guilt. The undeniable persuasiveness of the Commonwealth's DNA evidence provides further legitimacy to the Commonwealth's narrative and shows Clay had contact with Sally's genital area. Given the coherence of this narrative and the strength of the DNA evidence, Clay has not convinced us that absent the inadmissible testimony, there is a probability that the jury would reach a different result.[55]

An error so fundamental that the defendant's right to due process is threatened also constitutes palpable error.[56] It is worth noting, however, that a defendant is not entitled to a perfect trial, only a reasonably fair one.[57]

That Clay had an imperfect trial is clear, but admission of the erroneous evidence discussed above is not so egregious as to threaten Clay's due process rights. Riley and Kays each presented one sentence of inadmissible testimony. The inadmissible CAC interview was a more lengthy presentation of inadmissible evidence, but its content was not as prejudicial as Clay would make us believe. In contravention of her mother's testimony, Sally stated at her CAC interview that her molester was named "Troni"[58] and did not describe

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[55] *See Martin*, 207 S.W.3d at 3 (explaining that palpable error can be proven by showing the "probability of a different result" in absence of the alleged error).

[56] *Id.*

[57] *Commonwealth v. Tamme*, 83 S.W.3d 465, 471 (Ky. 2002) (Keller, J., concurring).

[58] There was no evidence introduced at trial that Sally ever referred to Clay as "Troni" or any derivative thereof.

him other than being black. Further, Clay appears to have adopted much of the inadmissible evidence as part of his trial tactic, labeling the Commonwealth's hearsay evidence as an example of the "telephone game," twisting one statement into a sexual abuse allegation against the innocent Clay.[59]

Unlike *Chavies v. Commonwealth*,[60] a case heavily relied upon by Clay to show palpable error, this trial was not a "runaway train" cascading out of the trial court's control.[61] In *Chavies*, we found palpable error based on the amount of inadmissible hearsay, impermissible bolstering, and inadmissible character evidence denigrating the defendant presented to the jury.[62] Elevating the prejudice caused by this slew of inadmissible evidence, the Commonwealth's case in *Chavies* lacked any physical evidence to corroborate the victims' ever-changing allegations.[63] As a result, we acknowledged the outcome ultimately turned on an issue of credibility between the victims and the defendant.[64] Since much of the evidence we found inadmissible was

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[59] The Commonwealth has argued that Clay waived his right to claim the aforementioned hearsay statements as error because he truly wanted the statements admitted to further his "telephone game" argument. While this is feasible and we considered Clay's use of the hearsay statements in gauging the prejudicial effect of the admission of those statements, we find nothing in the record to permit a finding of a knowing waiver of Clay's right to exclude these otherwise inadmissible statements. *Contra* Part II.A. (finding Clay knowingly waived his putative objection to admission of statements taken in violation of *Miranda*)

[60] 374 S.W.3d 313 (Ky. 2012).

[61] *Id.* at 323.

[62] *Id.*

[63] *Id.*

[64] *Id.*

bolstered hearsay and improper character evidence disparaging the defendant, we were compelled to find the error palpable.[65]

After distinguishing *Chavies*, we find that the trial court's evidentiary errors in admitting this relatively minute, minimally persuasive portion of the Commonwealth's evidence were not so jurisprudentially intolerable as to threaten Clay's due process rights.

D. The Commonwealth Presented an Adequate Race-Neutral Justification to Overcome Clay's *Batson* Challenge.

Clay also argues he was denied due process and equal protection of the law when the trial court overruled his *Batson*[66] challenge and allowed the Commonwealth to strike Juror B, an African-American juror, with a peremptory challenge. The trial court held the Commonwealth presented a satisfactory race-neutral explanation for striking Juror B and we agree.

The Commonwealth used preemptory challenges to strike two of the three African-American jurors in the venire. Clay objected, citing *Batson*, and argued that neither juror had said anything to merit removal. The Commonwealth claimed the first juror struck, Juror A, was dismissed because she appeared inattentive during voir dire. The trial court found this justification facially insufficient, and Juror A rejoined the panel and sat on the jury for the duration of Clay's trial.

As justification for striking Juror B, the second African-American dismissed via peremptory challenge, the Commonwealth claimed to have

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[65] *Id.* at 323-24.

[66] *Batson v. Kentucky*, 476 U.S. 79 (1986).

received information from the Frankfort Police Department that she had negative encounters with police in the past. The Commonwealth asserted that it consulted the Frankfort Police Department regarding every potential juror before jury selection began and concerns were raised over only two members of the venire, Juror B and a white juror.[67] This concern was borne from interactions, not necessarily arrests or convictions, between Juror B and members of the police department; and the consensus among the officers was that Juror B was skeptical of, and perhaps even hostile to, police officers.

Secondarily, the Commonwealth claimed Juror B's strike was also driven by the negative demeanor she presented during voir dire. Neither the trial court nor Clay noticed any indication of this; but the Commonwealth insisted Juror B was openly hostile, rolled her eyes, avoided eye contact, and made faces during voir dire.

In response to the Commonwealth's purported race-neutral justification the trial court asked if it possessed a copy of Juror B's criminal history. The Commonwealth advised it did not—stressing that its criminal history check was completed informally through the Frankfort Police Department—but agreed to provide the trial court with a copy of Juror B's criminal history in the form of a "CourtNet" printout. The following morning, the Commonwealth provided the trial court with Juror B's CourtNet report, along with a nineteen-page CourtNet printout of an individual involved in a criminal mischief entry on

[67] Though the white juror had already been dismissed, the Commonwealth averred it would have used a peremptory challenge to remove him from the venire had he remained.

Juror B's criminal record. Although the CourtNet printout was provided at the request of the court, the Commonwealth reiterated its contents were not necessarily the basis for striking Juror B, as not all police interaction is included in the formal record.

The trial court was ultimately satisfied with the Commonwealth's race-neutral justification for striking Juror B. The trial court entered an order concluding that Juror B's "run-ins with Police" and negative demeanor was a sufficient race-neutral reason for the peremptory strike.

The use of a peremptory challenge to remove jurors from the venire on the basis of race violates the Equal Protection Clause of the Constitution.[68] The Supreme Court, in *Batson v. Kentucky*,[69] outlined a three-step process for determining if the use of a peremptory challenge contravenes the Equal Protection clause:[70]

> First, the defendant must make a prime facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[71]

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[68] *Washington v. Commonwealth*, 34 S.W.3d 376, 378-79 (Ky. 2000); U.S. CONST. amend XIV, § 1.

[69] 476 U.S. 79 (1986).

[70] *Id.* at 96-98; *see also, e.g., Commonwealth v. Snodgrass*, 831 S.W.2d 176, 178 (Ky. 1992).

[71] *Snodgrass*, 831 S.W.2d at 178 (citing *Batson*, 476 U.S. at 96-98) (citations omitted).

When reviewing a trial court's *Batson* decision, great deference is given to the trial court because much of the court's analysis will be based on the "demeanor and credibility of the prosecutor"[72]; issues that lie "peculiarly within the trial judge's province."[73] Therefore, a trial court's ruling on a *Batson* challenge will not be disturbed unless clearly erroneous.

Since the Commonwealth offered a race-neutral justification for its use of a peremptory challenge against Juror B, and the trial court made a ruling about the adequacy of the Commonwealth's justification, the issue of whether Clay made a proper prima facie showing of the Commonwealth's disparate use of its peremptory challenge is moot.[74] We will not discuss it further. Instead, we narrow our focus upon the sole issue before a trial court during a *Batson* hearing: Whether the prosecutor exercised its peremptory challenge because of Juror B's race.

Clay argues the Commonwealth's race-neutral justification was mere pretext because the Commonwealth did not have knowledge of Juror B's criminal history when it provided its initial race-neutral justification. In support of this allegation, Clay cites the Commonwealth's admission that it did not possess Juror B's criminal history report when the challenge was made and its subsequent retrieval and submission of the criminal history as proof of a post hoc justification for an otherwise pretextual strike. He also claims the

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[72] *Id.* at 179 (citing *Stanford v. Commonwealth*, 793 S.W.2d 112 (Ky. 1990)).

[73] *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1984)).

[74] *Snodgrass*, 831 S.W.2d at 179

Commonwealth's unsupported claims of Juror B's negative demeanor during voir dire did not provide a sufficient race-neutral basis for a peremptory strike.

We find Clay's argument unconvincing because it misconstrues the nature of the Commonwealth's presentation of Juror B's CourtNet report to the trial court. The report was not evidence of a post hoc justification for striking Juror B, as Clay alleges; it was evidence provided at the trial court's request to aid in its weighing the validity of the Commonwealth's race-neutral reason for striking Juror B. In fact, upon presenting the trial court with the CourtNet report, the Commonwealth disclaimed that the report was the basis of its peremptory challenge. Instead, the Commonwealth maintained the challenge was based on information obtained by direct contact with the Frankfort Police Department, with whom the Commonwealth inquired regarding *all* putative jurors regardless of race.

While we agree with Clay's basic assertion—that a race-neutral justification is insufficient to overcome a *Batson* challenge when the Commonwealth had no basis of knowledge to support the reasoning at the time it was given—we do not find that to be the case here. Therefore, we conclude it was not clearly erroneous for the trial court to find the Commonwealth's race-neutral reason to be credible and deny Clay's *Batson* motion regarding Juror B.

Following our conclusion that the Commonwealth provided the trial court with an acceptable race-neutral reason for exercising its preemptory challenge, Clay's second argument, that the Commonwealth's proffered justification based on an unsubstantiated claim that Juror B had a negative demeanor during voir

dire was insufficient to satisfy *Batson*, is nugatory. We, nonetheless, have grave concerns regarding dismissals based on juror demeanor in light of the Supreme Court's holding in *Snyder v. Louisiana.*[75] But we need not address those concerns here because the Commonwealth is only required to provide a single race-neutral justification for striking Juror B, and we have concluded its justification based on her "run-ins" with the Frankfort Police Department was sufficient to satisfy *Batson.*

E. Allowing Sally to Testify at Trial was not Palpable Error.

Clay alleges that Sally, who was eight-years-old at the time of trial, was incompetent to testify. Clay concedes this issue is unpreserved and requests we apply palpable error review. We find no such error.

KRE 601, the rule controlling competency of witnesses, creates a presumption of competency.[76] This presumption may only be overcome if the party seeking exclusion is able to provide proof of incompetence.[77] Thus, the

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[75] 552 U.S. 472, 472 (2008) ("[T]he trial court must evaluate not only whether the prosecutor's demeanor belies discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.")

[76] *Price v. Commonwealth*, 31 S.W.3d 885, 891 (Ky. 2000); *see also* KRE 601 (a) ("General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.").

[77] *Barton v. Commonwealth*, 300 S.W.3d 126, 142 (Ky. 2009) (citing *Price*, 31 S.W.3d at 891); KRE 601(b) ("Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he: (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify; (2) Lacks the capacity to recollect facts; (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or (4) Lacks the capacity to understand the obligation of a witness to tell the truth.").

competency bar is low; and because age is not determinative of testimonial capacity, there is no minimum age for competency.[78]

As proof of Sally's incompetency, Clay points to the inconsistencies between her testimony and the Commonwealth's theory of the case. Namely, Clay takes issue with Sally's assertion that she had only seen the perpetrator once. He also argues that Sally was incompetent because she could not remember every detail of the alleged crime that took place four years earlier.

We do not find these allegations sufficient to conclude that the trial court abused its discretion in allowing Sally to testify, let alone committed palpable error in doing so. Prior to testifying regarding the ultimate facts in dispute—what took place the evening she was allegedly sexually assaulted—the prosecutor presented Sally with multiple questions designed to show her competency. Sally was able to accurately state her full name, age, list her siblings and their comparative ages, identify her grandmother, and recall her grandmother's first name. The Commonwealth also posed a hypothetical and a line of questioning showing Sally understood what a lie is and the importance of telling the truth.

That Sally's testimony differed from the factual premise underlying the Commonwealth's theory of the case cannot render her incompetent. Her deviation from the picture the Commonwealth attempted to paint does not speak to her competency but, instead, raises an issue of credibility to be

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[78] *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525 (Ky. 2002) (citing *Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998)).

decided by the jury.[79] In fact, one would think a defendant would prefer a victim's testimony to provide a stark contrast with the Commonwealth's theory of the case.

Sally's inability to provide an answer to all of the questions posed to her during her examination also does not render her incompetent. Competency does not turn on a witness's ability to recall every detail while testifying.[80] We have also found a child witness's admission that she does not remember a fact or event is often probative of a child's competency and ability to differentiate between truth and speculation.[81]

Based on the foregoing, we conclude that Clay did not meet his burden of proving Sally incompetent to testify; and the trial court's admission of her testimony was not palpable error.[82]

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[79] *See, e.g.*, Lawson, The Kentucky Evidence Law Handbook § 3.00(2)(b) (quoting Evidence Rules Study Committee, Kentucky Rules of Evidence—Final Draft, p. 54 (Nov. 1989) ("[The power to disqualify witnesses] should be applied grudgingly, only against the 'incapable' witness and never against the 'incredible' witness, since the triers of fact are particularly adept at judging credibility.")).

[80] *Harp v. Commonwealth*, 266 S.W.3d 813, 823 (Ky. 2008) ("A witness is not deemed incompetent solely because of young age or inability to recall each and every detail of life with mathematical precision.").

[81] *See id.*; *Jarvis v. Commonwealth*, 960 S.W.2d 466, 468-69 (Ky. 1998) ("The importance of [the child witness answering 'I don't know'] is the affirmance that [the child] would not guess at or fabricate an answer to a question she did not know in order to please her questioner.").

[82] *Compare Jarvis*, 960 S.W.2d at 468-49 (finding victim who was three-and-a-half years old at the time of the event, and five at time of testimony to be competent because she was able to demonstrate the difference between the truth and a lie, could remember her age, school, and grade, and affirming she would answer "I don't know" when appropriate), *with B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007) (finding a four-year-old witness incompetent when unable to comprehend questions, answer questions, and "had no concept of a lie").

F. The Commonwealth did not Commit Prosecutorial Misconduct.

Clay alleges multiple instances of prosecutorial misconduct. All were unobjected to at trial and are, thus, unpreserved. Therefore, we may only reverse on the basis of prosecutorial misconduct if it was "flagrant" or "palpable."[83] "Under either test, the defendant will be entitled to relief only if the prosecutor's misconduct rendered the trial fundamentally unfair."[84] We do not find this to be the case here.

1. The Commonwealth Neither Improperly Defined Reasonable Doubt, nor Prejudicially Misstated the Law.

Clay first argues that the Commonwealth improperly defined reasonable doubt and misstated the law during its closing argument. This assertion is primarily grounded in the Commonwealth's following statement to the jury during closing arguments:

> If you are tempted when we walk through that door, if you are tempted for a second to think to yourself, man, I know he did it but the Commonwealth did not prove it beyond a reasonable doubt, then you know what? If you know he did it, if you know he did it, he did it beyond a reasonable doubt.

Clay also claims as misconduct the Commonwealth's statements to the jury that it is not their duty to seek doubt but, instead, to find facts and determine truth.

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[83] *Hale v. Commonwealth*, 396 S.W.3d 841, 850 (Ky. 2013) (citing *Hannah v. Commonwealth*, 306 S.W.3d 509 (Ky. 2010); *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006)).

[84] *Id.* (citing *Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010)).

We have previously held that counsel are prohibited from defining reasonable doubt at any time during trial.[85] That holding has softened more recently, though, as we have held that attempts to show what reasonable doubt is *not* do not violate the rule against defining what reasonable doubt *is*.[86]

We do not believe the Commonwealth's above-described statements amount to an attempt to define reasonable doubt.[87] And we do not believe any reasonable jury could have interpreted the Commonwealth's statement as such. Instead, we find the statement is more properly described as a comment on the strength of the evidence and the Commonwealth's view that it presented enough to prove Clay's guilt beyond a reasonable doubt. We do not endorse the Commonwealth's choice of words, and the trial court may have requested the Commonwealth rephrase its comments had a timely objection been made; but we do not find the prosecution attempted to define reasonable doubt.[88]

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[85] *Commonwealth v. Callahan*, 675 S.W.2d 391, 393 (Ky. 1984); *see also* RCr 9.56(2) ("The instructions should not attempt to define the term 'reasonable doubt.'").

[86] *Rodgers v. Commonwealth*, 315 S.W.3d 303 (Ky. 2010); *Cuzick v. Commonwealth*, 276 S.W.3d 260 (Ky. 2009); *Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007).

[87] *See Howell v. Commonwealth*, 163 S.W.3d 442, 447 (Ky. 2005) (citing *Simpson v. Commonwealth*, 759 S.W.2d 226 (Ky. 1988) ("In all of those cases [where this Court found an impermissible attempt to define reasonable doubt], some attempt was made to use other words to convey to the jury the meaning of 'beyond a reasonable doubt.'")).

[88] *But see Rodgers v. Commonwealth*, 314 S.W.3d 745 (Ky.App. 2010). We acknowledge that the Court of Appeals reversed a conviction in *Rodgers* because they concluded that very similar language was a prejudicial definition of *reasonable doubt*. *Id.* at 748-49. This precedent is not controlling on us, however; and we also note the alleged prosecutorial misconduct in *Rodgers* was properly preserved at trial. Had the present assignment of error been preserved like the one in *Rodgers*, our conclusion may have been different.

Having determined the Commonwealth's statements do not amount to a definition of reasonable doubt, we must determine if it amounts to a prejudicial misstatement of the law. We conclude it does not. Though the statements may be subtly flawed in explaining the jury's role and duties, we do not find it to be a material misstatement of the law as to prejudice Clay or render his trial fundamentally unfair.

2. *The Commonwealth's Statements Regarding the Defense's Tactics were not Prosecutorial Misconduct.*

Clay also claims the Commonwealth committed prosecutorial misconduct by "repeatedly denigrat[ing]" the defense. He claims this occurred when the prosecutor urged the jury not to "take something simple and get hoodwinked into thinking it is complicated"; labeling the defense as playing the "blame game"; likening the defense to "playing with a cat with a laser pointer"; and calling the defense's "gamesmanship and tactics"; including its assertion that Clay was only targeted by the police because of his race, "repugnant."

It has long been settled that counsel are afforded wide latitude to comment on the evidence, the opposing party's tactics, and the falsity of the opposing party's position during closing argument.[89] We find the Commonwealth's creative labeling of the defense theories falls within the scope of conduct we have previously declined to label as misconduct. For example, we have affirmed prosecution comments labeling the defense theory as the

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[89] *Hale*, 396 S.W.3d at 851 (citing *Stopher v. Commonwealth*, 57 S.W.3d 787, 805-06 (Ky. 2001)).

"drowsy defense,"[90] the "great octopus defense,"[91] a "scam,"[92] and "stupid."[93] In line with this precedent, we do not find any prosecutorial misconduct in the Commonwealth alleging the defense over complicated the issues, played the "blame game," and likening their theory to "playing with a cat with a laser pointer."

We also find the Commonwealth's comments regarding the perceived repugnancy of the defense's "gamesmanship and tactics" to be proper, though they do give rise to more cause for concern. In *Hale*, we held it was not misconduct for the prosecution to label the defendant's allegation that he was only being "vindictively and inappropriately prosecuted" because a relative of the victim was a member of the local criminal justice system as "offensive."[94] We found the prosecution's characterization was proper as it was in response to an argument furthered by the defendant; and, when taken in that context, the Commonwealth's characterization of the defendant's argument as offensive was reasonable.[95] We find the present situation to be congruous with *Hale*.

Clay's racially charged allegation appears to be nothing more than an attempt to shift responsibility or stir-up emotion in the jury. This is especially true because trial testimony established that Clay became a suspect in this

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[90] *Soto*, 139 S.W.3d at 873.

[91] *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987).

[92] *Id.*

[93] *Stopher*, 57 S.W.3d at 806.

[94] *Hale*, 396 S.W.3d at 850-51.

[95] *Id.* at 851; *see Driver v. Commonwealth*, 361 S.W.3d 877, 889 (Ky. 2012) (holding the prosecution is entitled to make "reasonable argument" in response to arguments furthered by the defense).

criminal investigation because Ashley accused him personally of committing the conduct with which he was charged. The police suspected him because of Ashley's statement, not because he fit a racially discriminatory archetype.

Given as response to Clay's racial defense, it was not improper for the Commonwealth to characterize this tactic that was unsupported by the record as repugnant. Therefore, we find that Clay's trial was not rendered fundamentally unfair by the Commonwealth's comments in closing argument.

III. CONCLUSION.

For the foregoing reasons, we affirm Clay's conviction.

All sitting. All concur.

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