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RENDERED: APRIL 27, 2017  
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2015-SC-000149-MR

MOSES KUH BANDER

APPELLANT

V. ON APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
NO. 13-CR-00132

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### **AFFIRMING IN PART, REVERSING IN PART AND REMANDING**

Appellant Moses Kuhbander appeals as a matter of right, pursuant to Ky. Const. § 110(2)(b), from the Jessamine Circuit Court judgment sentencing him to twenty years' imprisonment for first-degree sexual abuse and for being a first-degree persistent felony offender. On appeal, Kuhbander raises the following issues: (1) the trial court erred by permitting the Commonwealth to introduce evidence of Kuhbander's arrest in Ohio for obstructing official business; (2) the Commonwealth's prosecutorial misconduct constituted palpable error; and (3) the trial court erred by failing to exclude recordings of jail phone calls due to a discovery violation. For the following reasons, we

affirm Kuhbänder's convictions, but reverse his sentence and remand for a new penalty phase proceeding.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 2013, Kuhbänder lived in Dayton, Ohio, with his girlfriend Virginia and her two children Sarah and Allison.<sup>1</sup> In July of that year, Kuhbänder, Virginia, Allison, Sarah, and Sarah's friend, Beverly, took a weekend trip to Nicholasville, Kentucky. On the trip, everyone but Allison stayed with Virginia's friend, Donna Smith. During the weekend trip, Allison stayed with her father, Jeffery.

During the evening of July 21, Sarah was outside playing with Beverly when she developed an earache and decided to go to bed. When Sarah entered the bedroom her family was staying in, Kuhbänder and Virginia were already in bed watching a movie. Sarah laid down on the bed, resting her ear on Kuhbänder's arm, and fell asleep.

Later that evening, Sarah was awakened by Kuhbänder's hand reaching inside her shorts, beneath her underwear, and massaging her buttocks. In an effort to get Kuhbänder to stop touching her, Sarah rolled over in bed. However, Kuhbänder was undeterred and reached his hand inside Sarah's shorts, beneath her underwear and fondled her vagina. During the course of the assault, Virginia got out of bed and went to the bathroom. In her absence,

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<sup>1</sup> The names of all minors in this opinion have been replaced with pseudonyms to preserve their privacy.

Kuhbänder asked Sarah if she was enjoying what he was doing. Sarah replied that she wanted to sleep. Subsequently, Sarah put on her pajama pants and laid down on the floor of the bedroom to go back to sleep.

The next morning, Kuhbänder asked Sarah if she remembered anything from the previous evening. Sarah lied and informed him that she did not. Later that morning, as the family was preparing to leave Donna's house, Sarah told Beverly about the assault. Subsequently, Sarah also told Donna that Kuhbänder had tried to put his hands down her pants. After learning about the abuse, Donna insisted that Sarah tell Virginia about what had happened.

Shortly thereafter, Sarah informed her mother of the assault, but Virginia did not take any action. Rather, despite Donna's request that Virginia leave Sarah with her, Virginia elected not to change the family's plan to leave that morning to return to Dayton.<sup>2</sup>

Several hours after the group left, Donna called Jeffery's girlfriend to inform her about what had happened, and she in turn relayed the information to Jeffery. After learning of the abuse, Jeffery concocted a ruse with the assistance of the Jessamine County Sheriff's Office (JCSO). Jeffery had a friend contact Virginia to tell her that he and Allison had been injured in a car accident and were in the hospital. In the meantime, Jeffery and law enforcement waited at the hospital for the arrival of Virginia and Kuhbänder.

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<sup>2</sup> While the trip to Dayton was not delayed, the group left in such a hurry that they did not retrieve Allison from Jeffery's home as expected.

However, the ruse was discovered when one of Virginia's friends went to the hospital and learned that there had been no accident. That friend then informed Virginia, who continued their trip back to Dayton. Subsequently, Jeffery contacted Virginia to discuss Sarah's claim of sexual abuse. After the pair began to argue, Kuhbander took the phone to speak to Jeffery. Kuhbander told Jeffery that accusing him was a mistake and threatened to kill him.

In the meantime, while law enforcement had been unsuccessful in luring Kuhbander back to Nicholasville, they continued to pursue the case. Specifically, Detective Brian Carpenter of the JCSO requested that the Dayton Police Department conduct a welfare check on Sarah. The Dayton police agreed and dispatched two officers to Virginia and Kuhbander's residence.

When the Dayton police arrived at the residence, they informed Kuhbander and Virginia that they were there to perform a welfare check on Sarah. Virginia and Kuhbander informed the police that Sarah was not there, but at a relative's home in Kettering, a suburb of Dayton. The officers asked for the relative's address, at which point Kuhbander left the room to make a telephone call. After completing his call, Kuhbander informed the police that they could not know where Sarah was without a lawyer and a court order.

In response, the police informed Kuhbander and Virginia that by failing to provide them with the address, they could be arrested for obstructing official business. Kuhbander and Virginia remained steadfast in their refusal to

provide the address. Subsequently, the police arrested the couple for obstructing official business, although the charges were dismissed shortly thereafter. Ultimately, the police were able to locate Sarah and she participated in a forensic interview. That interview was provided by the Dayton police to Detective Carpenter, who presented the case to the grand jury. The Jessamine County Grand Jury returned an indictment against Kuhbander for first-degree sexual abuse and for being a second-degree persistent felony offender.<sup>3</sup>

During Kuhbander's trial, the Commonwealth primarily relied upon Sarah's testimony to establish the sexual abuse. The Commonwealth also introduced a series of jail phone call recordings of conversations Kuhbander had while in custody. In those recordings, among other damaging statements, Kuhbander attempted to obtain an alibi and acknowledged that he was "not one hundred percent sure" that he committed the crime he had been charged with. To counter this evidence, Kuhbander testified on his own behalf. He claimed that he had been drinking heavily the night of the incident, but denied committing the offense for which he had been accused.

The jury found Kuhbander guilty of first-degree sexual abuse and for being a first-degree persistent felony offender and recommended a penalty of twenty years' imprisonment. The trial court sentenced Kuhbander in

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<sup>3</sup> Prior to trial the charge of second-degree persistent felony offender was amended to first-degree persistent felony offender.

conformance with the jury's recommendation. Kuhbander brings this appeal as a matter of right.

### **ANALYSIS**

#### **I. Evidence of Kuhbander's Arrest for Obstructing Official Business was Admissible Under Kentucky Rule of Evidence (KRE) 404(b).**

Kuhbander argues that evidence of his arrest in Ohio for obstructing official business should have been excluded as impermissible prior-bad-acts evidence. Under KRE 404(b),

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

While KRE 404(b)(1) describes some examples of other purposes, "it states the "other purpose" provision in a way that leaves no doubt that the specifically listed purposes are illustrative rather than exhaustive." *Tamme v.*

*Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998) (quoting Robert G. Lawson, *THE KENTUCKY EVIDENCE LAW HANDBOOK*, § 2.25 at 87 (3rd ed. 1993)).

In applying KRE 404, the trial court must exercise caution and eliminate evidence which is solely relevant as proof of the accused's propensity to commit a certain type of crime. *Major v. Commonwealth*, 177 S.W.3d 700, 707

(Ky. 2005). “To determine whether evidence of prior bad acts is admissible, we must decide if the evidence is relevant ‘for some purpose other than to prove the criminal disposition of the accused[,]’ probative as to the actual commission of the prior bad act, and not overly prejudicial under KRE 403.”

*Kerr v.*

*Commonwealth*, 400 S.W.3d 250, 260 (Ky. 2013) (quoting *Meece v.*

*Commonwealth*, 348 S.W.3d 627, 662 (Ky. 2011)).

On appeal, when reviewing the trial court’s balancing under KRE 403, the reviewing court views “the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.” *Major*, 177 S.W.3d at 707. The standard for reviewing a trial court’s evidentiary ruling is abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.*

Kuhbander preserved this issue by objection at trial and now argues that the trial court abused its discretion in admitting evidence of his arrest for obstructing official business. As noted, when the police arrived to check on Sarah, Kuhbander refused to provide the address at which she could be located. He insisted that the police needed to return with a lawyer and a court order. Even after being warned that his actions could lead to criminal charges and arrest, Kuhbander refused to provide the information.



In light of these actions, a reasonable jury could have concluded that Kuhbänder's refusal to provide Sarah's location to police was consciousness of guilt and an attempt to avoid prosecution for her sexual abuse. *See Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) ("Evidence of assumption of a false name following the commission of a crime is relevant as an admission 'by conduct, constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself.'") (citation omitted); *Tamme*, 973 S.W.2d at 29 – 32 (Attempted spoliation of evidence is relevant as evidence inconsistent with innocence). Thus, it was proper for the Commonwealth to introduce information about the efforts of the Dayton police to perform a welfare check on Sarah, and Kuhbänder's refusal to comply with their queries. Kuhbänder's refusal to comply with police led to his arrest, which further demonstrated Kuhbänder's intent to avoid prosecution for sexually abusing Sarah. Pursuant to the KRE 403 balancing test, the trial court properly weighed the probative value of allowing the sequence of events to be accurately recounted to the jury, including Kuhbänder's arrest, and in determining that probative value outweighed any prejudicial effect of introducing evidence of Kuhbänder's arrest for a misdemeanor charge which was ultimately dismissed. Accordingly, the trial court did not abuse its discretion by permitting the Commonwealth to introduce evidence of Kuhbänder's arrest for obstructing official business.

## **II. The Alleged Prosecutorial Misconduct During Guilt Phase Does Not Support Reversal.**

Kuhbander alleges that multiple instances of prosecutorial misconduct occurred during the guilt phase of his trial, specifically the Commonwealth: 1) vouching for Sarah's testimony in closing argument; 2) cross-examining Kuhbander about his arrest for interfering with official business; 3) crossexamining Kuhbander about his jail phone calls; 4) shaming the jury to convict Kuhbander; 5) arguing in closing argument that Kuhbander did a "masterful job spinning this case" and by offering "red herrings"; and 6) explaining in closing argument that Sarah's story was not inconsistent, but rather evolved as victim's accounts usually do.

Prosecutorial misconduct is "[a] prosecutor's improper or illegal act . . . involving an attempt to . . . persuade the jury to wrongly convict a defendant or assess an unjustified punishment." *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011) (quoting *BLACK'S LAW DICTIONARY* (9th ed. 2009)). It "may result from a variety of acts, including improper questioning and improper closing argument." *Id.* "Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (Ky. 2001) (internal citations omitted).

"If the misconduct is objected to, we will reverse on that ground if proof of the defendant's guilt was not such as to render the misconduct harmless,

and if the trial court failed to cure the misconduct with a sufficient admonition to the jury.” *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010). Additionally, if the defendant failed to object, the Court “will reverse only where the misconduct was flagrant and was such as to render the trial fundamentally unfair.” *Id.*; Kentucky Rule of Criminal Procedure (RCr) 10.26 (palpable error standard of review).

First, Kuhbander asserts that the Commonwealth improperly vouched for the credibility of Sarah. Specifically, Kuhbander complains of the Commonwealth’s statements in closing argument that “we stand firmly behind [Sarah].” Since Kuhbander failed to object to the Commonwealth’s statements at trial, we will review his claim for palpable error.

When reviewing an allegation of prosecutorial misconduct in closing argument, we consider the argument as a whole while keeping in mind that counsel is granted “wide latitude” during closing argument. *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). “The longstanding rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom.” *Padgett v. Commonwealth*, 312 S.W.3d 336, 350 (Ky. 2010). “Improper vouching occurs when the prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the [prosecutor's office] behind that witness.” *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999). *See also Lewis v. Commonwealth*, 475 S.W.3d 26, 39 (Ky. 2015) (“[A]

prosecutor should not personally vouch for the credibility of a witness.”) Kuhbander alleges that on four occasions during closing argument the Commonwealth improperly vouched for Sarah’s credibility by stating as follows: 1) “[a]nd we’ll talk about it more as we move through this closing, but we stand firmly behind [Sarah];” 2) “[w]e stand firmly behind [Sarah] and her testimony;” 3) “I’m going to address briefly the Commonwealth’s proof, like I said, we stand firmly behind [Sarah] and think her testimony proves our case;” and 4) “[w]e’ve talked about the Commonwealth’s case, and like I said, we firmly stand behind [Sarah].”

The Commonwealth claims that these comments were an expression of the Commonwealth’s support for the victim of a crime and a permissible comment on the evidence. While we find the Commonwealth’s commentary constitutes improper vouching, reversal is only required if the misconduct was “flagrant” and rendered the trial fundamentally unfair. We employ a four-part test to determine whether a prosecutor’s improper comments amount to flagrant misconduct. The four factors to be considered are: “(1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.” *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010).

As to the first factor, we conclude Kuhbander was not prejudiced by the Commonwealth’s statements. The statements were made during closing

argument, and the jury was instructed not to consider them as evidence. Again, counsel is afforded wide latitude in closing argument. We believe the jury could have reasonably deciphered that the Commonwealth's statements were an attempt to persuade it to convict Kuhbender, much like defense counsel persuaded it not to, and were not intended to mislead the jury. Accordingly, this factor weighs in favor of the Commonwealth.

As to the second factor, the Commonwealth's remarks comprised only a small portion of the prosecutor's closing argument, so this factor likewise weighs in the Commonwealth's favor. As to the third factor, we can only conclude that the comments were deliberately placed before the jury. This factor weighs in Kuhbender's favor. However, the fourth factor, the weight of the evidence against Kuhbender, weighs in the Commonwealth's favor. Contrary to Kuhbender's suggestion, evidence of his guilt was considerable. In particular, the Commonwealth presented detailed testimony about the abuse from Sarah and recordings of Kuhbender's jail phone calls, which were highly incriminating. Therefore, we are unable to say that the Commonwealth's vouching for Sarah during closing argument was so egregious as to undermine the essential fairness of Kuhbender's trial. While the prosecutor's statements were clearly improper, the statements standing alone did not rise to the level of flagrant misconduct.<sup>4</sup>

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<sup>4</sup> Kuhbender also alleges that the Commonwealth improperly vouched for Sarah's account of the abuse, by telling the jury that her trial testimony was consistent with what she said in her forensic interview. Kuhbender emphasizes that

Next, Kuhbander assigns as error the prosecutor's cross-examination of Kuhbander about his arrest for obstructing official business. Specifically, Kuhbander argues that the Commonwealth improperly implied that Kuhbander was guilty of obstructing official business and, by extension, the crimes that he had been charged with in the case in bar. Since Kuhbander failed to object at trial, we review his claim for palpable error.

During the Commonwealth's cross-examination of Kuhbander, the prosecutor asked whether Kuhbander had been arrested in Ohio for obstruction of official business. Kuhbander attempted to parry this question by shifting blame to his brother-in-law, explaining that his arrest was due to Virginia's brother-in-law's failure to cooperate with authorities by refusing to provide the address where Sarah was located. Additionally, Kuhbander emphasized that he was not convicted of the offense. Subsequently, the Commonwealth asked whether in fact the obstruction charge (a misdemeanor) was dismissed due to Kuhbander's facing felony sex charges in Kentucky. Kuhbander disagreed, explaining that the obstructing official business charge had been dismissed prior to his indictment for sexual abuse.

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Sarah's forensic interview was not admitted as evidence at the trial. In response, the Commonwealth acknowledges that the interview had not been admitted into evidence, but that a transcript of the interview had been used by Kuhbander to impeach Sarah. Additionally, during Kuhbander's closing argument, he alleged inconsistencies between Sarah's forensic interview and her trial testimony. Accordingly, the Commonwealth sought to rebut this claim by characterizing Sarah's testimony as being consistent. While this issue was mishandled, we conclude any error was harmless.

The Commonwealth maintains that its questioning was proper since Kuhbander had attempted to shift blame to another individual and then emphasized the dismissal of the obstructing official business charge. The Commonwealth contends that upon Kuhbander's assertion of innocence to the obstructing official business charge, the prosecutor was permitted to question Kuhbander with an alternative explanation for why the charge was dismissed. While the Commonwealth's questioning may have improperly suggested that the obstructing official business charge had been dismissed due to Kuhbander's being charged with a more serious felony sex offense in the case at bar - with the implication that Kuhbander's punishment would be in Kentucky - we cannot deem the comment, standing alone, to be flagrant. As with Kuhbander's first claim of prosecutorial misconduct, the limited nature of the prosecutor's remarks and the strength of the case against Kuhbander precludes a finding that the questioning in and of itself undermined the essential fairness of Kuhbander's trial.

Next, Kuhbander contends that the prosecutor's cross-examination of him about his jail phone calls was improper. Specifically, Kuhbander argues that the Commonwealth erred by asking Kuhbander why he declined to call witnesses who would have allegedly supported his account to testify at trial on his behalf. Once again, Kuhbander failed to raise this objection at trial so we review his claim for palpable error.

On cross-examination, the Commonwealth focused on Kuhbänder's assertion at trial that Sarah had made a claim of sexual abuse in order to get back at him for threatening to send her to live with her father. When pressed as to why this theory was not expressed in the jail phone calls between Kuhbänder and his family members, Kuhbänder asserted that it had been and that the Commonwealth was selectively choosing which portions of the recordings to play. The Commonwealth disagreed, and inquired of Kuhbänder whether he intended to have those family members testify on his behalf.

At the conclusion of the Commonwealth's cross-examination, Kuhbänder requested an admonition that the Commonwealth's questioning was improper burden shifting. Subsequently, the trial court admonished the jury, reminding them that the Commonwealth bears the burden of proof and that Kuhbänder had no duty to present witnesses on his behalf. We believe any flaw in the Commonwealth's questioning was appropriately addressed and cured by the trial court's admonition. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) ("A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error.").

Kuhbänder further maintains that the Commonwealth's questioning improperly encouraged Kuhbänder to try to admit testimonial evidence that would have been barred as hearsay by KRE 802. However, as noted by the Commonwealth, testimony about whether Kuhbänder had recently fabricated the defense he was presenting at trial ("she made it all up to get back at me")



nevertheless would have been admissible under KRE 801A(a)(2). Thus, the Commonwealth did not attempt to elicit testimony that was inadmissible; rather, the prosecutor's questioning focused on the jail phone call recordings and whether they would establish Kuhbänder's prior consistent statements about Sarah's reason for accusing him of sexual abuse. Accordingly, the Commonwealth's questioning in this regard was not improper.

Next, Kuhbänder argues that the Commonwealth improperly shamed the jury into convicting him by telling jurors that they would be "cynical" if they did not believe Sarah. Kuhbänder failed to raise an objection at trial, thus we will review his claim for palpable error only.

Kentucky case law is well established that the prosecutor is prohibited from shaming jurors or attempting to put community pressure on jurors' decisions. *Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009). The Commonwealth argues that the prosecutor's statement was not an attempt to shame the jury into convicting Kuhbänder, but rather, a comment on the veracity of Sarah's account which is permissible during closing argument. We disagree. The prosecutor's remark about living in a cynical time and the jury being cynical if they did not believe Sarah, when viewed in the entirety of the prosecutor's closing argument, was clearly designed to pressure the jury to accept Sarah's account of the abuse. This type of argument is inappropriate as the Commonwealth's Attorney is obligated to argue the law and facts of a given case to obtain a conviction, rather than seek to influence the jury to

decide the case on other grounds. However, due to the strength of the Commonwealth's case against Kuhbander and the fact that the statement only constituted a small portion of the prosecutor's closing argument, again we cannot say that this remark standing alone fundamentally undermined the essential fairness of Kuhbander's trial. It plainly did not.

Next, Kuhbander contends that the Commonwealth made impermissible comments about Kuhbander's counsel during closing argument. In particular, Kuhbander points to the prosecutor's statements that the defense had employed red herrings and spun the case in an effort to obtain an acquittal. Additionally, Kuhbander complains about the prosecutor's statement that the defense had made up multiple versions of its story to explain Sarah's sexual abuse claim. Kuhbander did not object to these statements at trial, so palpable error review is appropriate.

As we have previously explained, "[g]reat leeway is allowed to *both* counsel in a closing argument. It is just that—*an argument*. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). Here, the prosecutor was permitted to comment during closing argument on the defense's tactics and strategies, and that is precisely what the prosecutor sought to accomplish here. No error, let alone palpable error, occurred.

Next, Kuhbander argues that the Commonwealth improperly commented on the facts of the case by arguing that Sarah's account of the abuse was not inconsistent, but rather evolved over time as most victim's accounts do. Again, Kuhbander did not object at trial so we review for palpable error. The statement at issue was made in response to Kuhbander's closing argument remark in which he argued that Sarah's account was inconsistent and unbelievable. The Commonwealth permissibly responded to this argument and offered its interpretation of the evidence in the case, which supported the conclusion that Sarah's account was consistent.

However, in explaining any perceived inconsistencies in Sarah's statement, the Commonwealth made a sweeping statement about how child victims act when they have been abused. The Commonwealth argued that "[Sarah's] story didn't get inconsistent, the story evolved. And that's what children do when they've been abused. The longer they talk about things to people they feel more comfortable with, the more they feel more comfortable they're away from the setting of the abuser, the more stuff comes out."

Kuhbander maintains that this argument was improper, relying on *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996). In *Newkirk*, the Court reversed Newkirk's conviction due to the improper admission of expert witness testimony about child sexual abuse accommodation syndrome. *Id.* at 693, 695. *Newkirk* is distinguishable since here, the challenged statement was not expert testimony about child abuse victims generally, but rather was a

statement made by a prosecutor during closing argument. That said, we agree with Kuhbander that the prosecutor improperly made sweeping representations to the jury about the actions of child victims of sexual assault, in an effort to support Sarah's account of her abuse. Yet again, we are unable to say that the Commonwealth's statement standing alone constituted flagrant misconduct, due in large part to the limited nature of the remarks and the strength of the case against Kuhbander.

### **III. Trial Court Did Not Abuse its Discretion in Denying Kuhbander's Motion to Exclude Evidence.**

Kuhbander alleges that the trial court abused its discretion by denying his motion to exclude evidence of the recordings of his jail phone calls. Specifically, he contends that the Commonwealth failed to timely turn over the recordings and in so doing violated the trial court's discovery order and RCr 7.24. We review a trial court's evidentiary rulings for an abuse of discretion. *Goodyear*, 11 S.W.3d at 581.

Upon a defendant's written request, RCr 7.24 requires the Commonwealth to turn over the defendant's written or recorded statements that the attorney for the Commonwealth knows to be in the possession, custody, or control of the Commonwealth. In this case, the Commonwealth and defense counsel entered into an Agreed Order for Mutual Discovery to that effect and the trial court entered a Discovery Order accordingly. No dispute exists that the recorded jail phone calls fall under the Agreed Order and RCr 7.24, thereby requiring the Commonwealth to provide the records once the

attorney for the Commonwealth knows them to be in his possession, custody, or control.

The record shows that the Commonwealth informed Kuhbänder's counsel of the recordings a week and a half prior to trial, and promptly provided copies. At trial, Kuhbänder moved to exclude the recordings on grounds that the late disclosure violated the discovery rules and that counsel did not have a chance to review the recordings. In response, the Commonwealth stated that discovery rules require disclosure to be timely, and that the Commonwealth promptly turned over the recordings once they came into its possession. The trial court admitted the recordings, and portions of Kuhbänder's phone calls were played for the jury, including him asking for someone to verify he was working as an alibi, saying that being in jail on this charge was embarrassing, and that he was not one-hundred percent sure that he did it. The Commonwealth argued that the recordings were evidence of Kuhbänder's guilt.

After trial, Kuhbänder filed a motion for judgment notwithstanding the verdict ("JNOV"), arguing that the trial court improperly played redacted versions of the jail phone calls; the redacted versions were not agreed upon prior to trial; and defense counsel did not have an opportunity to thoroughly review the tapes or anticipate which additional portions to play for the jury, due to the volume of the material on the tapes and the short time in which counsel had to review them. KRE 106 provides that "[w]hen a writing or

recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” Kuhbander contends that the short recess given to him by the trial court after the Commonwealth played its redacted versions of the recordings was insufficient time in which to determine what relevant portions to play to rebut the portions played by the Commonwealth. The trial court denied Kuhbander’s JNOV motion.

Kuhbander now argues that the trial court abused its discretion by admitting the recordings. However, the record reflects that the Commonwealth disclosed the jail phone records to defense counsel once such recordings came within the possession, custody, or control of the Commonwealth, as required by RCr 7.24. Defense counsel admits to receiving the jail phone records at least a week before trial. The discovery rules do not require the Commonwealth to inform defense counsel which portions of recordings it intends to use at trial. Moreover, Kuhbander could have moved for a continuance to allow defense counsel additional time to produce recordings to rebut those presented by the Commonwealth, but no motion for continuance was made. We fail to find any violation of RCr 7.24, or of the trial court’s discovery order, so as to mandate reversal and do not believe the trial court abused its discretion by admitting the recordings.

### **III. The Cumulative Effect of Alleged Errors During Guilt Phase Does Not Mandate Reversal.**

Kuhbander asks this Court to overturn his convictions due to cumulative error. This doctrine recognizes that “multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair.” *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). Application of the cumulative error doctrine has been limited to those situations “where the individual errors were themselves substantial, bordering, at least, on the prejudicial.” *Id.* If the errors have not “individually raised any real question of prejudice,” then cumulative error is not implicated.

*Id.*

In the case at bar, we simply cannot conclude that Kuhbander’s trial was fundamentally unfair. His alleged errors were unpreserved, and do not individually mandate reversal or rise to the level of “flagrant misconduct” so as to constitute palpable error. Even viewed collectively, the alleged errors do not undermine our confidence in the overall fairness of the guilt phase proceeding or otherwise deny Kuhbander his due process right to a fair trial.

### **V. Prosecutorial Misconduct During Penalty Phase Does Mandate Reversal.**

Kuhbander alleges that the Commonwealth made improper comments during the penalty phase of the trial. Prior to the start of the penalty phase, counsel met with the trial court in chambers to discuss how to present Kuhbander’s criminal record to the jury. During that meeting, the

Commonwealth and Kuhbänder's counsel appeared to enter into an agreement, whereby the Commonwealth would inform the jury only of the charges for which Kuhbänder had been convicted in the past, and not reveal any details or underlying facts with respect to those convictions. In exchange, Kuhbänder's counsel agreed to stipulate to those convictions. However, despite this agreement, the penalty phase became contentious, apparently due to a difference of opinion between counsel as to what the parties had agreed.

During the penalty phase closing argument, Kuhbänder's counsel said to the jury that "if you are satisfied that you have received enough evidence to find him guilty of being a persistent felony offender," at which point the Commonwealth objected from counsel's table in full hearing of the jury:

Your honor, once again, we took out multiple pages of these documents and she's up here saying "if you're satisfied you've gotten enough evidence." We took out pages that could have been evidence based on our agreement and now she's up here trying to argue against the PFO charge.

The trial court, the prosecutor, and Kuhbänder's counsel then addressed this objection for the next minute or so in front of the jury, before Kuhbänder's counsel moved on to the next portion of her argument.

Kuhbänder claims that the prosecutor's objection improperly informed the jury that there was additional evidence about Kuhbänder's past that they were not allowed to hear. In support of this argument,

Kuhbänder cites the Court to *Mack v. Commonwealth*, 860 S.W.2d 275, 277 (Ky. 1993), wherein the prosecutor, during closing argument of the



penalty phase, referred to the guilt phase and stated that there was a “vast store of incriminating evidence,” against Mack which the jury had not been able to hear due to “rules of evidence” and “legal proceedings.” This Court reversed, concluding that “[a] defendant cannot confront phantom witnesses, or cross-examine real witnesses on a ‘full story’ consisting of mere suggestion.” *Id.*

The Commonwealth contends that, unlike in *Mack* where the prosecutor’s actions were clearly intended to persuade the jury of the existence of hidden evidence of Mack’s guilt, here the prosecutor’s statement was directed to the trial court in the form of an objection and in an effort to enforce the agreement reached with Kuhbänder’s counsel. Additionally, the Commonwealth argues that the difference in the timing of the statements was significant, with the improper conduct in *Mack* occurring during the guilt phase closing argument as opposed to this case where it occurred during the penalty phase closing argument.

*Mack* stands for the proposition that it is wholly improper for the Commonwealth to suggest to the jury the existence of relevant evidence that has been kept from them. Here, if the prosecutor believed that Kuhbänder’s counsel had not honored their agreement, the proper route would have been for him to approach the bench to address the issue. Instead, the Commonwealth improperly informed the jury, by way of an objection, that additional evidence of Kuhbänder’s wrongdoing existed, of

which they had not been made privy. As a result, we hold that a new penalty phase is warranted.

### **CONCLUSION**

We affirm Kuhbander's conviction, reverse his sentence, and remand to the Jessamine Circuit Court for a new penalty phase proceeding.

All Sitting. Cunningham, Keller, VanMeter, and Wright, JJ., concur. Hughes, J., concurs in part and dissents in part by separate opinion in which Minton, C.J., and Venters, J., join.

#### **HUGHES, J., CONCURRING IN PART AND DISSENTING IN PART:**

While I agree with the majority that prosecutorial misconduct warranted a new penalty phase, errors in the guilt phase of the trial were substantial enough and at least bordered on prejudicial individually so that, in my view, considered collectively they undermined confidence in the overall fairness of the proceedings. Accordingly, this cumulative error denied Kuhbander his due process right to a fair trial.

I respectfully disagree with the majority's conclusion that evidence of Kuhbander's arrest for obstructing official business was more probative than prejudicial under KRE 403's balancing test. While I agree that the Commonwealth was permitted to introduce evidence about the efforts of the Dayton police to perform a welfare check on Sarah and Kuhbander's response to their queries, the admission of evidence of his arrest was erroneous.

By simply recounting the efforts of the police to check on Sarah's welfare, the Commonwealth had sufficient, relevant evidence to argue to the jury that Kuhbänder's failure to provide the police with Sarah's address demonstrated consciousness of guilt. The fact that Kuhbänder was arrested for the offense of obstructing official business did nothing to further establish that point. Given that the charge was dismissed almost immediately and does not appear to be well grounded in Ohio law, the jury should not have been informed of Kuhbänder's arrest. See *Cleveland Hts. v. Lewis*, 933 N.E.2d 1146 (Ohio App. 2010) (Defendant's refusal to provide police with his or his daughter's address did not hamper police in the performance of their duties and as such was insufficient to support conviction for obstructing official business).

The prejudicial nature of Kuhbänder's arrest for obstructing official business easily outweighed its probative value. As such the trial court abused its discretion by permitting the Commonwealth to introduce evidence of Kuhbänder's arrest. It is possible that this error could be deemed harmless, but when considered in conjunction with multiple other errors discussed below, especially the suggestion that Kuhbänder should be punished in Kentucky for this "offense," reversal is required.

As noted by the majority there were a series of errors committed by the prosecution in this case including: 1) improper vouching for the victim during closing argument; 2) suggesting during Kuhbänder's cross-examination that the charge of obstructing official business had been dismissed due to his being

charged with a more serious felony sex offense in the case at bar—with the clear implication that Kuhbander’s punishment would be imposed in Kentucky in the case the jury was considering; 3) shaming the jury to convict Kuhbander; and 4) improperly commenting on the facts of the case by arguing that Sarah’s account of the abuse was not inconsistent, but rather evolved over time.

However, in examining each of these errors individually, the majority concluded that none of the errors undermined the essential fairness of Kuhbander’s trial. Additionally, the majority determined that as a whole these errors did not constitute palpable error. I disagree as the cumulative effect of these errors denied Kuhbander a “fundamentally fair” trial.

The *Brown* Court in discussing the cumulative error doctrine noted that “multiple errors, although harmless individually, may be deemed reversible if there cumulative effect is to render the trial fundamentally unfair.” 313 S.W.3d at 631. *See also Taylor v. Kentucky*, 436 U.S. 478, 488 n.15 (1978) (Concluding that the cumulative effect of potentially damaging circumstances violated the defendant’s due process guarantee of fundamental fairness.); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

The majority’s decision to not find cumulative error, despite a series of errors, is similar to the issue raised in *Cooper v. Sowders*, 837 F.2d 284 (6th

Cir. 1988). In 1983, Cooper was convicted of murder and sentenced to life in prison. *Id.* at 285. On appeal the Court affirmed Cooper's conviction and sentence in an unpublished opinion. *Id.* However, in a dissent joined by former Chief Justice Stephens, Justice Leibson argued that cumulative evidentiary issues rendered Cooper's trial fundamentally unfair. *Id.* Subsequently, Cooper was denied a writ of habeas corpus from the United States District Court for the Eastern District of Kentucky. *Id.* On appeal, the United States Court of Appeals for the Sixth Circuit, reversed and issued the writ. *Id.* at 288.

The Sixth Circuit explained that the trial court erred by permitting a police officer to testify that all available evidence pointed to Cooper as the perpetrator of the crime. Quoting from Justice Leibson's dissent, the Sixth Circuit noted that "[t]he police officer was permitted to testify to his own, personal opinion that such evidence as there was against other suspects was insufficient to justify their arrest. . . . This opinion suggests to the jury the guilt of the accused and the innocence of other suspects." *Id.* at 287 (quoting *Cooper v. Commonwealth*, 84-SC-494-MR at 2 (Ky. 1985) (Leibson, J. dissenting)). Accordingly, the Sixth Circuit determined that this "opinion-testimony had a direct influence on the jury's consideration of [Cooper]'s guilt or innocence." *Id.*

Also, in overruling Cooper's objection to the police officer's testimony, the trial court explained that, "[h]e can give an opinion. He is a police officer and

that is his job. He is an expert in that field.” *Id.* The trial court further noted that the officer, “is an expert on whether to arrest somebody or not.” *Id.* The Sixth Circuit found that the trial court’s commentary about the officer being an expert was impermissible as it invaded the province of the jury. *Id.* at 288. As such, the Sixth Circuit determined that the “[trial] court’s comment was highly prejudicial and ‘was tantamount to instructing the jury on this critical subject.’” *Id.* (quoting *Cooper*, at 2 (Leibson, J. dissenting)).

Additionally, the Sixth Circuit concluded that the trial court erred in permitting a police informant to answer questions about the informant’s “reliability,” to bolster his credibility. Ultimately, the Sixth Circuit held “that when considered cumulatively, these errors produced a trial setting that was fundamentally unfair.” *Id.* at 288 (citing *Walker*, 703 F.2d at 963).

In the case at bar, the majority has affirmed Kuhbander’s conviction despite a series of errors in his trial. While none of those errors was sufficient to individually mandate reversal, their cumulative effect, as was the case in *Cooper*, is sufficient to undermine confidence in the overall fairness of the proceedings. As such, I would reverse Kuhbander’s conviction for first-degree sexual abuse and remand his case for a new trial untainted by these errors.

Minton, C.J.; and Venters, J., join.

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