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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 26, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000366-MR

THOMAS D. JACOBS — APPELLANT

V.

ON APPEAL FROM MARION CIRCUIT COURT
HONORABLE SAMUEL T. SPALDING, JUDGE
NO. 17-CR-00193

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Marion Circuit Court jury convicted Appellant, Thomas D. Jacobs, of three counts of first-degree sexual abuse, victim under twelve years of age; four counts of first-degree unlawful transaction with a minor; two counts of second-degree rape; one count of first-degree sodomy, victim under twelve; and tampering with a witness. The jury recommended concurrent sentences totaling thirty years' imprisonment. The jury also found Jacobs to be a first-degree persistent felony offender and enhanced its recommended sentence to a total of thirty-five years' imprisonment. The trial court sentenced Jacobs in accordance with the jury's recommendation. He now appeals to this Court as a matter of right. Ky. Const. §110(2)(b).

Jacobs raises seven claims of error in his appeal, alleging: (1) the trial court erred when it failed to grant a separate trial for the tampering with a witness charge; (2) the trial court erred when it failed to exclude the testimony

of Joseph Caldwell or, in the alternative, grant a continuance; (3) the trial court erred when it allowed two witnesses to mention Jacobs's incarceration on other charges; (4) the trial court erred when it ruled Jacobs "opened the door" to inadmissible evidence that had been previously excluded when he was asked impermissible and highly prejudicial questions; (5) the trial court erred when it failed to grant a directed verdict; (6) the trial court erred when it instructed on multiple offenses for the same act, violating Jacobs's right to be free from double jeopardy; and (7) he was denied a fair trial due to cumulative error. For the following reasons, we affirm.

I. BACKGROUND

Understanding this case begins with the people involved and their relationships to each other. Thomas Jacobs and Jackie Moore were long-time friends. Moore claimed he practically raised Jacobs. Jacobs was also close to Moore's wife, Melissa Chesser, who saw Jacobs as a brother and best friend. Moore, Chesser, and their two daughters Katy and Freda, moved into a house on Lake Avenue in 2010, a couple of houses down the street from Katy's best friend, Melanie.[1] Jacobs often slept in the residence, and sometimes nearby in his car or in the garage.

Jacobs and Moore worked together doing whatever work they could find, including tearing down houses and barns. Katy (Moore and Chesser's oldest daughter) said that after the family moved into the Lake Avenue home, Jacobs

[1] Pseudonyms are used to protect the privacy of the juveniles and victims of alleged crimes.

began molesting her when she was eleven years old. The abuse continued for three years.

In January 2016, the Lake Avenue house burned. This event is the central reference point for describing when Jacobs perpetrated some of the acts of sexual abuse upon Katy, as well as Katy's age at the time of the acts. After the old house burned, a new house was built at the same location, and while it was being built, the family rented a house nearby for a year. The family moved into the new house on Lake Avenue in January 2017.

After moving into the new house, Chesser suffered increasingly difficult health problems and was, on at least one occasion, admitted to the University of Louisville Hospital. Chesser and Moore had marital difficulties during this time including separating and getting back together. The marital problems and Chesser's health problems frequently left the two children in Jacobs's care. Jacobs testified he often cooked for the family. After the family moved into the new Lake Avenue home, Jacobs no longer lived or stayed at the house, although he continued to be a frequent visitor.

According to Katy, some sexual acts occurred in the old house on Lake Avenue when she was eleven years old. Other sexual acts occurred at other locations or in the new house on Lake Avenue when Katy said she was twelve or thirteen. Katy said everything began with her crush on Jacobs, but nothing came of this crush until she was eleven years old. Katy said she knew it happened when she was eleven when "she did not know the difference between right and wrong."

One evening while the family lived at the old house, Katy and her best friend Melanie were playing in the yard. When it got dark, Moore walked Melanie home, a couple of doors down from the old Lake Avenue house. Jacobs walked down from the garage next to the Lake Avenue house, kissed Katy, and grabbed her buttocks. Jacobs told her not to tell anyone, but Katy told Melanie. Katy said she was eleven years old when this happened.

Prior to the house burning, one afternoon Jacobs picked up Katy and her younger sister Freda from school, an occurrence that other witnesses said was common, but Jacobs said was unusual. When the three arrived home, no one else was present. Katy took a shower and after she got out of the shower, Jacobs walked in on her. Jacobs left but came back and locked the door. Katy said Jacobs placed his penis in her vagina while she lay on her back on a small freezer in the bathroom. The sexual intercourse was interrupted when Freda banged on the door.

Katy testified she was eleven years old at the time of the bathroom incident. This event is dated to the old house on Lake Avenue because the freezer was only in the bathroom at the old house.

On another occasion while the family lived at the old house, Jacobs took the children to the Dickens Christmas parade. After they returned, Katy was with Moore in the garage while he worked on a car. Jacobs told Katy to come over to a neighbor's garage located a few feet from where Moore was working. There, the two began making out and performed oral sex on each other. No sexual intercourse happened on this occasion because the activity stopped

when Chesser called Katy to come take her medicine. Katy said she was eleven years old at the time of the garage incident. She made an entry in her diary describing the sex acts. That diary entry became an important piece of evidence at Jacobs's trial.

During the time the family lived in the temporary house and after they moved into the new house on Lake Avenue, Jacobs took the children to school in Chesser's van. The number of times this occurred was the subject of disagreement between Jacobs who claimed only three times and Chesser who said it was often. Jacobs claimed Freda, the youngest child, would not ride with him. According to Katy, on multiple occasions, Jacobs dropped Freda off at school first and then took Katy to a secluded location near a lumber yard where he had sexual intercourse with her.

Katy described the acts of sexual intercourse near the lumber yard in detail—beginning with her removing her pants and sitting in the front passenger seat on Jacobs's lap facing him and, on one occasion, facing away from him. On each occasion, Katy was clear that Jacobs placed his penis in her vagina. Katy saw Jacobs wipe away ejaculate one time with a napkin and discard it out the window. After having sexual intercourse with Katy, Jacobs would take her to school. Katy said these acts occurred when she was twelve or thirteen.

Katy also testified as to an occasion of sexual abuse when she was twelve. On that evening, she went in a garage and Jacobs followed her. Katy

said the two made out and Jacobs grabbed her buttocks. Jacobs did not subject the pre-teen to intercourse on this occasion.

The sixth and final incident about which Katy testified occurred at the new house on Lake Avenue, when Chesser was gone for medical testing. Katy was asleep on the couch in the living room and Jacobs woke her up. The two started kissing and Katy performed oral sex on Jacobs. Moore was in his bedroom located at the end of a hallway connected to the living room, and when he opened his bedroom door, Jacobs told her to stop. Moore did not see what had been going on just moments before and Katy pretended she was asleep.

Several witnesses' testimony, including Chesser's and Moore's, provided a timeline of events. Jacobs argues on appeal that even if the acts happened as Katy described them, the acts could not have occurred when Katy was eleven, the age Katy claimed. Jacobs's calculation is based on Katy's school year and what other witnesses said about various dates.

At trial, witnesses testified regarding observations they had made indicative of an inappropriate relationship between Jacobs and Katy. For instance, Joseph Caldwell, a friend of Moore and Jacobs, caught Katy with a love note. Thinking the note was for a school boy, Caldwell grabbed it and read part of it. Upon realizing the note was not for a school boy, but, instead, was intended for Jacobs, Caldwell raised his concerns with Moore and Jacobs.

Chesser testified that she became suspicious when Katy had an emotional melt-down and left the house when Jacobs brought his new girlfriend, Brittany, to the new Lake Avenue home. Chesser found Katy crying in the backyard and when she asked her daughter what was wrong, Katy responded that Chesser would not understand. Following this event, Chesser set out to figure out what was going on with her daughter.

Over the next four months, Katy would tell her mother very little. Chesser decided to search Katy's room and found a hat and shirt belonging to Jacobs hidden in a closet. A diary with a page missing also turned up in the search. Later, Chesser found ripped-up paper in a backpack pocket and re-assembled the scraps to form the missing diary page. After Chesser read the diary entry, she spoke to Katy's pediatrician, the county attorney, and, ultimately, Sergeant Keene of the Lebanon Police Department.[2] Chesser shared with Sergeant Keene the items she found and took his advice to have Katy seen at the Lebanon Physicians for Women Clinic and interviewed by the Silverleaf Sexual Trauma Recovery Services. Katy's physical examination proved normal and Katy told her pediatrician that she had not had sex.

While Chesser's quest for answer was ongoing, Katy invited her best friend Melanie to her house for the two to spend some time together. Katy had previously told Melanie about Jacobs and the three years of sexual abuse, but

[2] When this case began, Sergeant Keene was Officer Keene. He was promoted while the case was ongoing. Keene will be referred to in this opinion as Sergeant Keene to avoid confusion.

initially Melanie did not believe her. During this visit, Melanie decided to record hers and Katy's conversation on her phone. In this recorded conversation, Melanie asked Katy about Jacobs and Katy spoke freely about the ongoing three-year "relationship," claiming that she loved Jacobs and was going to marry him. On the recording, Katy also discussed having sex with Jacobs on five occasions. Melanie's mother turned the recording over to Chesser, who gave it to Sergeant Keene.

As noted above, Caldwell, a friend of Moore and Jacobs, saw Katy with a note in her hand. After joking and taking it from Katy, Caldwell realized the note was for Jacobs. Caldwell told Moore someone needed to talk to Katy. Caldwell also talked with Jacobs and told him this could never happen. As far as Caldwell knew, nothing was done about the letter. The next time anyone heard from Caldwell about the note was the week before trial was scheduled to begin. At that point, Caldwell went to the Lebanon Police Department and gave a recorded statement to Sergeant Keene about the events surrounding the love note.

Most of the Lebanon Police Department office staff had left for the evening and Sergeant Keene was unable to make copies of the interview that night. On Thursday morning, the recording was entered into the police system and copies were made. The Commonwealth provided a copy to Jacobs on Thursday, which was as soon as the Commonwealth had a copy in its possession to provide. Trial was scheduled to begin the following Monday morning.

Jacobs moved to exclude the testimony of Caldwell citing RCr 7.26's requirement to provide witness statements 48 hours before trial. Jacobs argued the 48 hours did not include the weekend, so delivery was not timely. The Commonwealth responded that it knew of no reason why the weekend did not count for the required 48 hours and the Commonwealth provided the statement as soon as it could.

It is undisputed that neither party had any reason to know about Caldwell and what he had to say before he walked into the Lebanon Police Department. The trial court overruled Jacobs's motion and allowed Caldwell to testify. Finding the Commonwealth did all it could do to provide the statement in a timely manner and finding the 48-hour rule did not exclude weekends, the trial court also denied Jacobs's motion for a short continuance to investigate the statement.

After the police investigation began, but prior to Jacobs's indictment, he was arrested on other charges unrelated to this appeal. While in jail on those charges, Jacobs called Sergeant Keene, the lead officer in charge of investigating the case against Jacobs involving Katy. The calls were recorded. Jacobs told Sergeant Keene that he had video of Keene raping Jacobs's wife, Brittany. Sergeant Keene said for Jacobs to file a complaint and bring in the video. The next day, Kentucky State Police Trooper Carlock met with Jacobs who told the trooper he now believed the allegation was not true and he did not want to pursue the complaint. Jacobs was indicted for tampering with a witness based on the phone calls to Sergeant Keene.

Prior to trial, Jacobs moved to sever the tampering with a witness charge from the charges involving his alleged sexual acts with Katy. Jacobs claimed the tampering with a witness charge lacked the required connection to the underlying sex charges. The Commonwealth disagreed with Jacobs, arguing the tampering charge had the required connection. The trial court stated it was a close call, but ultimately denied the motion to sever.

During Moore's testimony, he made a reference to he and Jacobs both serving prison time. Jacobs did not object to this reference. Later in the trial, Sergeant Keene testified that Jacobs "got locked up" (referring to the other charges for which Jacobs was in jail when he made the phone calls). Sergeant Keene's reference drew an objection and a motion for a mistrial. The trial court overruled the objection, denied the motion for mistrial, and admonished the jury.

During trial, Katy described sexual acts including intercourse in the bathroom on the freezer and in the van. Katy was asked on cross examination about her statement to her pediatrician that she had not had sex. The Commonwealth asserted this question opened the door to allow previously-excluded evidence including the re-assembled diary page, the recording of the conversation between Katy and Melanie, and Melanie's testimony about the things Katy had previously told Melanie regarding sexual acts between Katy and Jacobs. The trial court ruled the Commonwealth could introduce one of the three items. The Commonwealth called Katy back to the stand and she read the re-assembled diary entry. The diary entry described the sexual acts

(including oral sex performed by Katy on Jacobs and oral sex performed by Jacobs on Katy) that occurred in the neighbor's garage the night of the Dickens Christmas parade.

While testifying during direct examination, Jacobs denied ever touching Katy. On cross-examination Jacobs was asked if Katy made the whole thing up, and if her testimony and the diary entry were total fabrications. After Jacobs said yes to the questions, the Commonwealth renewed its efforts to put Melanie on the stand, claiming Jacobs had opened the door to the testimony. Jacobs's attorney objected, claiming Jacobs was just asserting his innocence. Jacobs's attorney told the court she should have objected to the Commonwealth's questions asking Moore to comment on Katy's truthfulness and belatedly realized her mistake.

The trial court allowed Melanie to testify in rebuttal and allowed the Commonwealth to play the recording Melanie made of her conversation with Katy. Melanie testified Katy told her about the sexual "relationship" with Jacobs on earlier occasions before the evening that she made the recording. Melanie's and Katy's testimony differed on how many times Katy said Jacobs had subjected her to sexual intercourse and where in the house the acts occurred.

The trial court overruled most of Jacobs's motions for directed verdict but did grant directed verdicts of acquittal on four counts. Jacobs's proposed jury instructions were denied and his objections to the instructions were overruled. The trial court ultimately instructed the jury on multiple alternative

offenses, giving the jury choices for different offenses based on Katy's age at the time it believed the crimes took place. The jury returned guilty verdicts for the above-listed offenses, including offenses that occurred when Katy was eleven. Jacobs was also found to be a persistent felony offender in the first degree.

Further information will be developed as needed.

II. ANALYSIS

A. Severance of the Tampering Charge

Jacobs asserts the trial court erred when it failed to grant his pretrial motion to sever the tampering with a witness charge. The charges arose out of two phone calls from Jacobs to Sergeant Keene prior to Jacobs's indictment for the sexual offenses involving Katy.

The timing of events is important in understanding the trial court's ruling. Concerned over what she found in Katy's room (particularly the torn-up and re-assembled diary entry), Chesser went to the Lebanon Police Department and met with Sergeant Keene. Sergeant Keene interviewed Jacobs on May 7, 2017, and officially opened his investigation on May 23, 2017. Throughout the pendency of this case, Sergeant Keene was the primary investigating officer.

While pursuing his investigation, Sergeant Keene sought to collect cell phones belonging to Jacobs. Eventually, Jacobs was arrested on other unrelated matters and Sergeant Keene collected two cell phones from Brittany, Jacobs's wife. On September 9, 2017, Jacobs called Sergeant Keene and alleged that Sergeant Keene had raped Brittany, telling her if she did not have sex with him, he would put Jacobs away. Jacobs told Sergeant Keene that the

threats and rape were recorded on video. Sergeant Keene told Jacobs to file a complaint and bring the video to the police captain. Jacobs said the first time Sergeant Keene would see the video would be at trial and Sergeant Keene needed to come see him.

The next day, Kentucky State Trooper Carlock interviewed Jacobs about the complaint. Jacobs told him he no longer believed the allegations to be true and that he did not desire to pursue the complaint. Jacobs was indicted on December 4, 2017.

Prior to trial, Jacobs filed a motion to sever the tampering with a witness charge from the other charges. Jacobs argued there was not a required nexus between the tampering with a witness charge and the other charges. Jacobs further argued he would be prejudiced by joinder of the charges pursuant to RCr 8.31. The Commonwealth asserted the charges were inextricably intertwined and relied on *Elam v. Commonwealth*, 500 S.W.3d 818 (Ky. 2016). The trial court described the phone call as a delusional rant or inferred threat. After hearing arguments and reviewing *Elam*, the trial court overruled Jacobs's motion to sever. Jacobs was convicted of tampering with a witness.

"We review the trial court's denial of a motion to sever for abuse of discretion . . . and the burden is on the appellant to show that the denial was in fact unfairly prejudicial." *Peacher v. Commonwealth*, 391 S.W.3d 821, 834 (Ky. 2013) (citing *Quisenberry v. Commonwealth,* 336 S.W.3d 19 (Ky.2011)); *see also Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993) ("We start with the general proposition that a trial court has broad discretion with respect to

joinder, and will not be overturned absent a showing of prejudice and clear abuse of discretion."); *Rachel v. Commonwealth*, 523 S.W.2d 395, 400 (Ky. 1975) ("If upon the consideration of the case a trial judge orders a joint trial, we cannot reverse unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion."). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "A significant factor in identifying such prejudice is the extent to which evidence of one offense would be admissible in a trial of the other offense." *Rearick*, 858 S.W.2d at 187.

As noted above, the trial court relied on *Elam,* 500 S.W.3d 818. In that case, we extensively discussed joinder of a tampering with a witness charge and charges involving allegations of sexual crimes against children. We referenced prior authority saying, "[t]here must be a sufficient nexus between or among them to justify a single trial." *Peacher*, 391 S.W.3d at 837. "The primary test for determining if the consolidation of different crimes for a single trial creates undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other." *Roark v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002).

In addition to our holding in *Elam*, the trial court also relied on this Court's decision in *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998).

There, we said, "[a]ny attempt to suppress a witness' testimony by the accused, whether by persuasion, bribery, or threat, or to induce a witness not to appear at the trial *or to swear falsely,* or to interfere with the process of the court is evidence tending to show guilt." *Id.* at 29-30.

In this case, the evidence regarding the alleged acts of sexual abuse Jacobs perpetrated against Katy would be admissible in a separate trial for tampering with a witness. If not, Jacobs's calls to Sergeant Keene (the lead investigator in the case concerning Katy's abuse) would lack context, as there would be no evidence of a connection between the investigating officer and Jacobs.

Jacobs notes the passage of months between his interview with Sergeant Keene and the phone calls as indicative of a lack of connection. However, the calls cannot be viewed in isolation but must be viewed in the context of the ongoing investigation being conducted by Sergeant Keene. This investigation took place over several months and the amount of time involved is of little consequence.

If the counts were severed, and the sex counts tried first, the calls would be admissible as evidence of Jacobs's guilt concerning the allegations by Katy. If the tampering with a witness charge was tried first, the sexual allegations and evidence relating to those charges, the reason for the investigation by Sergeant Keene, would be admissible at that trial. Separate trials are not required.

In summary, joinder was appropriate. As we said in *Elam*, "[f]requently, for all of the advantages of consolidating charges cited in *Peacher*, joining a charge of tampering with a witness with the trial of the underlying charge will not only be proper, but may also be preferable." *Elam*, 500 S.W.3d at 824. The trial court did not abuse its discretion in overruling Jacobs's motion to sever the tampering with a witness charge.

B. Motion to Exclude Testimony or Grant a Continuance

Jacobs claims the trial court erred when it failed to exclude the testimony of Joseph Caldwell or, in the alternative, grant him a continuance to investigate the statement. The issue concerns Caldwell's recorded statement to police and whether Jacobs received it in a timely manner prior to trial. Caldwell gave the statement to Sergeant Keene on the evening of Wednesday, April 18. Sergeant Keene testified that there was no one in the office who could copy the statement until the following morning. The Commonwealth provided Jacobs a copy of Caldwell's recorded statement on Thursday, April 19. On Monday, April 23, the morning the trial was set to begin, Jacobs moved to exclude the statement and Caldwell's testimony, claiming it violated the forty-eight-hour rule in RCr 7.26. In the alternative, Jacobs moved for a continuance to investigate the statement. Underlying Jacobs's motion, his appointed counsel claimed a lack of access to investigative services over weekends.

Katy did not mention Caldwell, or the love note incident, in her statements to Chesser or to Sergeant Keene. Caldwell's name did not come up during any other witness interview.

It is undisputed that Caldwell came to the Lebanon Police Department on the Wednesday evening before trial of his own volition. When he spoke with Sergeant Keene that evening, it was the officers' first knowledge Caldwell had anything to say about Jacobs's case . Jacobs's counsel also indicated no prior knowledge of Caldwell and what he had to say before receiving the recorded statement the Thursday before trial.

After Sergeant Keene finished the interview with Caldwell, he was unable to make copies of the recording asthe office workers that knew how to load the recording into the police system had already left work for the evening. The next morning, the recorded interview was entered into the system. A copy was made and delivered to the Commonwealth, which promptly provided a copy to Jacobs's counsel. According to the Commonwealth's response to Jacobs's motion to exclude or continue, the copy was provided by noon on Thursday, April 19.

The morning of trial, the trial court heard Jacobs's motion to exclude the testimony of Caldwell or grant a brief continuance for him to investigate the statement. Jacobs asserted that because of the intervening weekend, he did not receive the full forty-eight hours required by RCr 7.26. When asked by the trial court for authority supporting his argument that the forty-eight-hour-rule did not include weekends, Jacobs did not provide authority beyond the written

motion. In his reply brief, Jacobs states: "While it is true that defense counsel did not state what rule it was, it did state the rule." Jacobs makes no reference to the record in his reply brief in support of this claim. A review of Jacobs's pretrial arguments does not reveal counsel stating the rule with or without the rule number. Trial counsel's assertions were made only pursuant to RCr 7.26.

On appeal, Jacobs argues that RCr 1.10 excludes weekends in the calculation of time. The Commonwealth objects to this argument as it was not raised at the trial level. A review of the record makes clear that no reference to RCr 1.10 (by number or content) was made. Rather, the defense merely said the time period should exclude weekends, and when asked for a citation to support its argument, it could provide none—only emphasizing that it did not have access to an investigator over the weekend.

The Commonwealth objects to Jacobs's claim of prejudice when he was denied a brief continuance because Jacobs did not indicate how a continuance would have benefitted him. Finally, the Commonwealth asserts Jacobs's claims amount to harmless error.

The trial court heard Jacobs's motion and the Commonwealth's response. Jacobs's motion to exclude was overruled and his motion for a continuance was denied. Caldwell testified about the incident and the note, but not about the note's contents. Caldwell also testified about the dismissive responses from Moore and Jacobs.

We review the trial court's decision to permit the testimony of Caldwell under an abuse of discretion standard. *Beaty v. Commonwealth,* 125 S.W.3d

196, 202 (Ky. 2003), abrogated on other grounds by *Geary v. Commonwealth*, 490 S.W.3d 354 (Ky. 2016). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (2000) (citing *Commonwealth v. English*, 993 S.W. 2d 941, 945 (1999)).

In our analysis, we must first determine whether the Commonwealth providing the statement on the Thursday before trial began Monday violated the forty-eight-hour rule found in RCr 7.26. It is clear, that prior to Wednesday evening neither party had any indication that Caldwell was a potential witness. Caldwell's arrival Wednesday evening at the Lebanon police station was not at police request. Caldwell's statement can aptly be described as dropping out of thin air. There is no indication the Commonwealth or the police withheld from Jacobs the identity of the witness or the statement.

A review of the orders and documents in this case reveals no written order of discovery in the file provided for our review—nor does Jacobs provide us with a citation for such. The trial court's handwritten arraignment order has no indication that discovery was ordered. The record includes notices of discovery and motions for reciprocal discovery filed by the Commonwealth. Jacobs's motions regarding discovery and counseling records are also included. However, no written order of discovery exists in the record we have before us.

Absent an order, we begin with the text of RCr 7.26:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all

> statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

There is no language within this rule indicating how an intervening weekend is to be calculated. Jacobs's motion to exclude Caldwell's statement references RCr 7.24 and RCr 7.26, but not RCr 1.10. On appeal, Jacobs raises RCr 1.10 in support of his argument on appeal. RCr 1.10 states in relevant part: "(a) . . . . When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." While we might agree that RCr 1.10 applies to the circumstances of this case, we note the trial court found that the Commonwealth provided the statement as soon as possible and remarked that it did not know what else the Commonwealth could have done. We also note that Caldwell did not testify as to the letter's contents; rather, Caldwell testified about Moore's, Jacobs's, and his own reactions to the note.

The Commonwealth directs our attention to RCr 9.24. The rule reads as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

The trial court observed that any evidence against a defendant is prejudicial, and that was true of Caldwell's testimony. In this case, Jacobs's appointed counsel asserted investigative services were unavailable over the weekend due to funding constraints except in special circumstances, but no witness was called to provide testimony to support that claim or explain what "special circumstances" merited the assistance of a weekend investigator. No witness was called to explain to the trial court what steps had been taken once the statement was received on Thursday or were being taken once trial began on Monday. Caldwell was not the first witness called to testify and jury selection consumed most of the first day of trial. Simply stated, the record clearly indicates the claim of prejudice, but no facts in support of it.

Caldwell's testimony about the love note being an indicator of a real problem is less significant in hindsight than it was when it occurred. This case did not turn on Caldwell's testimony. The case centered on what Katy had to say, Chesser's efforts to help her daughter, the police investigation, and Jacobs's actions and testimony. The admission, therefore, of Caldwell's testimony was not inconsistent with substantial justice. As we have held, "even if the forty-eight-hour rule is violated, automatic reversal is not required. Some prejudice must be found, or the error, if any, is harmless." *Gosser v. Commonwealth*, 31 S.W.3d 897, 905 (Ky. 2000), abrogated on other grounds by *Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky. 2009) (citation omitted).

The trial court's decision to overrule the motion to exclude the testimony of Caldwell or, in the alternative, to grant a continuance was not an abuse of

discretion. The decision was not arbitrary as there were no indications that the police or the Commonwealth withheld Caldwell's identity or his statement to gain an advantage. Nothing in the record supports Jacobs's claim that a brief continuance would have provided him with investigative opportunities he did not have in the days and hours that were available to him once the statement was provided. In summary, we find no error meriting reversal on this issue.

C. Prior-incarceration Testimony

Jacobs claims the trial court erred when it overruled his motion for a mistrial because Sergeant Keene told the jury Jacobs had been "locked up." The trial court denied the motion and gave the jury an admonition.

Prior to Sergeant Keene telling the jury Jacobs was locked up, Moore testified that "me and him both had been in prison." Jacobs did not object. Furthermore, when Jacobs testified, he informed the jury he was a convicted felon and repeatedly talked about his struggles with addiction, relapses, and how Brittany saved him. Jacobs testified about alcohol, pain pills, methadone, and going to Moore and Chesser's home to obtain and use drugs. The Commonwealth impeached Jacobs with an arrest for controlled substances during a time when he claimed he was clean and sober. In response, Jacobs said the drugs he was charged with were different than the pain pills Brittany had saved him from and that he had been addicted to at one time in his life.

The legal standard for granting and reviewing mistrials is clear. "It is well established that the decision to grant a mistrial is within the trial court's discretion, and such a ruling will not be disturbed absent a showing of an

abuse of that discretion." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (2004). "[M]istrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings and there is a 'manifest necessity for such an action.'" *Id* at 68 (quoting *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (2002). It is also critical to note that "a finding of manifest necessity is a matter left to the sound discretion of the trial court." *Commonwealth v. Scott,* 12 S.W.3d 682, 684 (Ky. 2000).

Moreover,

> In reviewing a decision to grant a mistrial, the trial court must have a measure of discretion. "The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that at any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred."

Grimes v. McAnulty, 957 S.W.2d 223, 225 (Ky. 1997) (quoting *Arizona v. Washington,* 434 U.S. 497, 513 (1978)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire*, 11 S.W.3d at 581 (citing *English*, 993 S.W.2d at 945).

In reviewing the trial court's admonition, there is a strong presumption a jury will follow the instructions it is given. Concerning this presumption, we previously said:

> A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error. *Mills v. Commonwealth,* 996 S.W.2d 473, 485 (Ky. 1999) (holding that "there is nothing for us to review" when trial court cured the Commonwealth's reference to defendant's prior incarceration for an unspecified crime and the defendant failed to "present any argument to rebut the

> presumption that the trial court's admonition cured the error."). *See also Maxie v. Commonwealth,* Ky., 82 S.W.3d 860, 863 (2002); *Alexander v. Commonwealth,* Ky., 862 S.W.2d 856, 859 (1993), *overruled on other grounds by Stringer v. Commonwealth,* Ky., 956 S.W.2d 883 (1997).

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). *Johnson* also made clear there were limited occasions when the presumption in favor of admonitions would not be sustained:

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, *Alexander, supra,* at 859; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial." *Derossett v. Commonwealth,* 867 S.W.2d 195, 198 (Ky. 1993); *Bowler v. Commonwealth,* 558 S.W.2d 169, 171 (Ky. 1977).

Id. at 441.

As we said in *Bartley v. Commonwealth*, 400 S.W.3d 714, 736 (Ky. 2013), we do not expect a jury to erase from their minds what they have heard. We do not expect testimony or evidence to be "unheard." *Id* at 736. We do expect that instructions from the trial court will make clear what jurors are to disregard and what they are not allowed to consider.

In this case, while describing his investigation, Sergeant Keene said that he was trying to locate Jacobs to see if Jacobs would give him access to other cell phones Jacobs possessed. When asked if he obtained the phones, Sergeant Keene said he did, when Jacobs got "locked up." Jacobs raised an immediate objection and moved for a mistrial. During discussions with

counsel, the Commonwealth noted Jacobs had not objected when Moore talked about he and Jacobs both having been in prison in the past. Jacobs's counsel asserted she had not caught the earlier reference because she had a hard time hearing Moore.

The trial court overruled the motion for a mistrial and gave the following admonition:

> Alright ladies and gentlemen, I need to give you an admonishment to you, and I need to make sure you listen very, very closely to this because it's important. Alright? There might have been an assertion at some point during the testimony that you've heard about the defendant possibly—about Mr. Jacobs—possibly having been in jail at some point. First of all, I don't know if he has been in jail—and that hasn't been proven. But, you need to understand whether or not he has been in jail means nothing to this case. That has absolutely nothing to do with the facts that you have to decide, and that is not to be considered by you in any way. And that testimony, whether true or not, whatever it might have been, is not evidence, and you are in no way to consider that whatsoever in your decision in this matter. And that's the admonishment to you.

Jacobs correctly asserts that the jury should not have been informed that he had been in jail. Normally, admission of information about a defendant's prior record is limited and proper admission is often restricted to impeachment under KRE 609 if he chooses to testify or to the sentencing phase. In some circumstances, prior convictions may be admissible under KRE 404. Jacobs compares Sergeant Keene's statement to admitting mug shots or a defendant appearing in shackles. Jacobs claims an admission such as this impinges on his presumption of innocence.

The Commonwealth responds that the statement was cumulative and harmless, further referencing *Delaware v. Van Arsdall* which stated:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

106 S. Ct. 1431, 1438 (1986).

The Kentucky rule regarding harmless error reads:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

In applying the facts in this case to the above standards, Sergeant Keene saying Jacobs had been locked up did not affect the substantial rights of the parties. The crucial issues in this case centered around whether the jury believed Katy's allegations that Jacobs perpetrated acts of sexual abuse on her. Sergeant Keene's reference did not carry any details about what Jacobs had been locked up for including whether it was a felony, whether that resulted in a conviction, or any other damaging and highly prejudicial information. It was less prejudicial than Moore saying he and Jacobs had both served time and Moore's joke about incarceration when he said it took ten minutes to get in and

ten years to get out. It is noteworthy that Moore's comments drew no objection.

We have held that the admission of improper evidence is not enough to warrant a mistrial in a case where said evidence was first admitted without objection. In *Parker v. Commonwealth*, 291 S.W.3d 647, 658 (Ky. 2009), this Court held that a comment regarding a witness's fear of retribution was admitted in error. However, the trial court in that case admonished the jury. After discussing the narrow exceptions to the presumption that admonitions are curative, we stated:

> But this case does not fall within those exceptions because the improper testimony was relatively brief in nature given the lengthy trial. *And defense counsel did not object when Wright first mentioned fearing retribution and, in fact, raised that issue himself during cross-examination*. Also, although not mentioned by the parties, the record reflects that at one point, [the witness] testified without objection that he did not want to "turn against" Parker because he feared for his safety. In short, we believe the trial court's admonition was a sufficient curative measure, rendering a mistrial unnecessary.

Id. (emphasis added). Here, just as in *Parker*, a statement about Jacobs being "locked up" was not objected to the first time it was mentioned—only later, when Sergeant Keene brought it up during his testimony. Furthermore, when Jacobs testified, the jury learned from him that he was a convicted felon, used illegal controlled substances, and engaged in significant illegal drug consuming behavior around the Moore and Chesser home.

In summary, the solitary reference by Sergeant Keene about Jacobs being locked up was harmless error. The trial court did not act arbitrarily and

did not abuse its discretion when it denied the motion for a mistrial for which there was no manifest necessity. The admonition given by the trial court was clear and unequivocal. There is nothing in the record to indicate the jury could not or did not follow the admonition.

We hold the trial court did not abuse its discretion when it overruled Jacobs's motion for a mistrial based on a claim he suffered undue prejudice when Sergeant Keene said Jacobs had been locked up.

D. Prior Consistent Statements

Jacobs claims as his fourth allegation of error that he "suffered undue prejudice when the Commonwealth repeatedly asked him to characterize Katy as fabricating her story and then used that to 'open the door' to evidence the trial court already ruled inadmissible." Jacobs concedes the error was initially unpreserved but argues it was later preserved by his objection when the Commonwealth sought to put Melanie on the witness stand and play the recording she made of her conversation with Katy in rebuttal. Jacobs seeks review of these claims based on the objection that was made to the testimony and recording, and a review under palpable error for objections that were not made to the Commonwealth's questions. After review of the record, we hold the Commonwealth's questions and the admission of the previously excluded evidence did not amount to reversible error.

The issue revolves around three pieces of evidence the Commonwealth sought to admit. The trial court ruled pretrial that a single torn up and reassembled page from Katy's diary, Melanie's testimony about conversations

between she and Katy about Jacobs engaging in sex acts with Katy, and the recording Melanie made of a conversation with Katy were excluded from evidence. The trial court ruled that unless Jacobs raised a claim of fabrication, the three items amounted to bolstering evidence. The trial court noted that the items could become admissible under KRE 801A, which reads in relevant part:

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing… and the statement is:
>
> . . .
>
> (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive

During Jacobs's cross-examination of Katy, counsel asked her about a statement she made to her pediatrician weeks after the last alleged act of sexual abuse occurred. In response, Katy admitted that she had told her doctor that she had not had sex. The Commonwealth sought admission of the diary page, Melanie's testimony, and the recording. The trial court allowed the Commonwealth to admit evidence of Katy's prior consistent statement, but limited the Commonwealth to the admission of one of the three items. The Commonwealth chose to admit the re-assembled diary page containing Katy's prior descriptions about the sexual acts that took place in the neighbor's garage between her and Jacobs after the Dickens Christmas Parade. The descriptions in the diary entry aligned with Katy's trial testimony.

When the Commonwealth rested its case-in-chief, the proof of sexual crimes consisted primarily of Katy's testimony about sexual acts between her and Jacobs. Included in Katy's testimony was the torn-up and reassembled diary page. Caldwell testified about one love note. Katy, Chesser, and other witnesses testified about Katy's emotional breakdown when Jacobs brought Brittany, his new girlfriend, to the Lake Avenue home. The remaining witnesses for the Commonwealth testified primarily about background information, dates, or the course of the police investigation.

During Sergeant Keene's testimony, he verified one part of Katy's account of sexual intercourse in the van. Katy had taken Sergeant Keene and her mother to the lumber yard location where she said Jacobs had sexual intercourse with her in the van multiple times. Sergeant Keene was familiar with the lumber yard, warehouses, and headquarters because he had patrolled there for several years. From his patrol days in that area, Sergeant Keene said the police often got early morning calls concerning criminal activity in this area. The lumber yard was in a business district and few people were in the area late at night or in the early morning hours.

However, the place where Katy took Sergeant Keene and her mother was unknown to him. In all his years patrolling, Sergeant Keene had never been there, and he was unaware it existed. The spot Katy took them was behind the warehouses and had a thick row of trees on one side. Access to the location was by a dirt road not easily seen from any of the main roads. With no houses

nearby and ordinarily few people around, it was a suitable location for illicit activity. Sergeant Keene noted his surprise that the area existed.

From the perspective of Jacobs's defense at the close of the Commonwealth's case, witnesses had confirmed on cross-examination that Katy had a crush on him. Evidence from Katy's closet (a shirt and hat belonging to Jacobs that Katy stole from his bag of laundry without his knowledge) were arguably proof of that crush. When Jacobs brought a new girlfriend to the Moore and Chesser home, Katy had an emotional meltdown. Katy conceded that was due to jealousy.

Jacobs chose to testify in his own defense and the following exchange occurred during his cross-examination:

Commonwealth:	Why would she say these things?
Jacobs:	What she is accusing me of? I have no idea. I did not—I am not a child molester. At all. And I know that. God knows that, and that's—as long as God knows that, I am all right with that. You can take—people can say whatever they want.
Commonwealth:	So, she totally fabricated all of this?
Jacobs:	Yes, ma'am. She sure did. I am not a child molester. I never, ever, ever would I do this to a kid. I promise you. Promise you.
Commonwealth:	That entry into that diary, sir, was total fabrication as well?
Jacobs:	Well, a piece of paper will lay there and let you write whatever you want on it, you know. Won't they?
Commonwealth:	So, her testimony today was total, complete fabrication?
Jacobs:	Yeah, yeah it was. I don't know. She—I know [Katy's] got mental problems. But I never dreamed of her accusing me of something like

this. Never. I cared for them kids. I loved them kids like they were my own. I been around kids my whole life, and no—no kid has ever accused me of anything like this. Never.

Commonwealth: And you—

Jacobs: I would kill somebody if I caught them hurting a kid. I would. You wouldn't have to worry about no cops.

Commonwealth: So, someone who does this should be treated harshly?

Jacobs: Yes. Yeah. They should be hung. And that's why I am mad for being accused about it. But what can you do when a little girl at this age? You know she's got mental problems.

Commonwealth: Okay. So, what do you mean by that, sir? She told us she has ADHD.

Jacobs: Every night her mom and dad would tell her to take her crazy medicine. That's why I felt sorry for her.

No objections were made to the questions or answers. After Jacobs testified, the defense closed its case and renewed its motions for directed verdict. The Commonwealth then sought to put Melanie on the stand in rebuttal to play the recording she had made. Jacobs's counsel objected and further said:

> I realize I made a mistake in not objecting to [the Commonwealth's] questions. It's all on me. She improperly asked my client to comment on another witness's truthfulness. I believe there is caselaw on point that is not permissible. I did miss that objection and I will admit that and if it is part of an 11.42 later, I will own it.

The trial court overruled the objection and noted that during trial was not the appropriate time to discuss matters related to a future ineffective assistance of counsel claim. The trial court further found that

since Jacobs stated Katy totally fabricated everything, Melanie could testify, and the recording could be played. The trial court accepted the Commonwealth's position that Melanie's testimony and the recording qualified as prior consistent statements admissible to rebut a claim of recent fabrication.

Melanie testified that Katy talked about sex between her and Jacobs that occurred in the old house in her bedroom. Melanie remembered Katy telling her that Katy and Jacobs had sex three times in the van. The recording of the conversation between Katy and Melanie was then played. On the recording, Katy said she and Jacobs had a three-year relationship, she had sex with Jacobs on multiple occasions, she loved him, and she was going to marry him.

As noted above, the Commonwealth's questions to Jacobs about Katy's testimony and the diary entry drew no objections and will be reviewed under a palpable error standard. That standard has multiple components and is set out as follows:

> Under RCr 10.26, an unpreserved error may be reviewed on appeal if the error is "palpable" and "affects the substantial rights of a party." Even then, relief is appropriate only "upon a determination that manifest injustice has resulted from the error." *Id.* An error is "palpable," only if it is clear or plain under current law. *Brewer v. Commonwealth,* 206 S.W.3d 343 (Ky. 2006). Generally, a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth,* 160 S.W.3d 744, 762 (Ky. 2005). We note that an unpreserved error that is both palpable and prejudicial, still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice; in other words, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or

> jurisprudentially intolerable." *Martin v. Commonwealth,* 207 S.W.3d 1, 4 (Ky. 2006).

Miller v. Commonwealth, 283 S.W.3d 690, 695 (Ky. 2009).

"When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin*, 207 S.W.3d at 5.

Jacobs's objection to allowing Melanie to testify and the recording to be played will be reviewed under an abuse of discretion standard. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English,* 993 S.W.2d at 945.

Here, the cross-examination questions at issue dealt with Jacobs's opinion as to Katy's truthfulness. The questions dealt with what Katy said happened between her and Jacobs and the diary entry. The Commonwealth's questions used the words "total," "complete," and "fabrication." There is no ambiguity in the questions or their meaning. Under long standing case authority in this Commonwealth, it is error to ask a witness to comment on another witness's truthfulness. *See Moss v. Commonwealth of Kentucky*, 949 S.W.2d 579 (Ky. 1997); *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997); *Hall v. Commonwealth*, 862 S.W.2d 321 (Ky. 1993); *Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992).

However, as noted above, since the error was not preserved, we must determine whether it was palpable. We have said: "[e]rror can be found

[palpable] only if it is more likely than ordinary error to have affected the judgment." *Ernst*, 160 S.W.3d at 762. The questions at issue in this case were not so far beyond ordinary error that they affected the judgment. The case did not hinge on Jacobs's opinion as to whether Katy fabricated her story. Katy's and Jacobs's versions of events had been presented to the jury. Jacobs's testimony during direct examination included him denying that anything sexual had happened between him and Katy. In answering the questions at issue here, Jacobs's passionate denials and assurances that he was not a child molester may well have been strategic. The record is otherwise replete with objections by Jacobs's counsel to hearsay, form of the question, child sexual abuse accommodation syndrome, and other issues, but there is no objection here. That silence may be something other than an omission. "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Commonwealth v. York*, 215 S.W.3d 44, 48 (Ky. 2007).

After review, we hold neither the Commonwealth asking Jacobs whether Katy fabricated the charges against him nor his answers in the affirmative amounted to palpable error. The error did not "so seriously affect[] the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.' *Miller*, 283 S.W.3d at 695 (quoting *Martin,* 207 S.W.3d at 4). The questions were short, limited and only a small part of the overall questioning. The questions were not shocking or disturbing—and it was already obvious to the jury that if it believed Jacobs's version of events, it had to disbelieve Katy's. While, as noted, our case law makes it clear that it is error

for a witness to be asked to comment on the truthfulness of another witness's testimony, this error could have been cured at trial by a simple objection. Had the defense objected to the first instance of the Commonwealth asking Jacobs whether Katy had fabricated the allegations, the trial court could have put a stop to that line of questioning before Jacobs even provided an answer. However, since the defense did not do so, the jury heard his answers; we also note that the defense did not object after Jacobs had provided an answer and seek an admonition. Under these circumstances, we hold there was no palpable error.

Jacobs also claims the trial court erred when it permitted Melanie to testify and permitted the Commonwealth to play the audio recording she made of a conversation with Katy. After Jacobs's testimony, the trial court accepted the Commonwealth's argument that Jacobs opened the door to prior consistent statements by claiming Katy's testimony was fabrication. The trial court ruled that under KRE 801A, Melanie's testimony and the recording were now admissible as prior consistent statements. Jacobs objected, and counsel admitted she made a mistake in not objecting to the Commonwealth's questions to Jacobs about Katy fabricating everything.

As we have acknowledged, "Kentucky Rules of Evidence (KRE) 801A(a)(2) allows an out-of-court statement by the witness, otherwise excluded by the hearsay rule, to be admissible as long as it is 'offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence

or motive.'" *Murray v. Commonwealth*, 399 S.W.3d 398, 403 (Ky. 2013) (quoting KRE 801A(a)(2)).

The admission of Melanie's testimony and the recording must be viewed in the context of the entire trial. The pretrial ruling by the trial court excluded the three items of evidence: the torn-up and reassembled diary page, Melanie's testimony, and the recording Melanie made. As such, the trial court ruled all three items inadmissible unless Jacobs later made them so. The record is clear that he did by alleging a recent fabrication by Katy.

During cross examination of Katy, defense counsel asked if she told her pediatrician that she had never had sex. Katy answered in the affirmative. The question arose directly from records provided in discovery. In response, the Commonwealth sought to admit all three items of evidence that contained prior consistent statements. The trial court balanced the single question Jacobs asked against the Commonwealth's sought-after response and permitted a single piece of evidence to be admitted. The Commonwealth selected the torn-up and reassembled diary entry.

The Commonwealth argued it was allowed to prove its case and vigorously objected to being limited to one prior consistent statement. "And we have consistently held that the Commonwealth may 'prove its case by competent evidence of its own choosing . . . ." *Hall v. Commonwealth*, 468 S.W.3d 814, 825 (Ky. 2015) (quoting *Pollini v. Commonwealth,* 172 S.W.3d 418, 424 (Ky. 2005). However, the trial court maintains control over the admission and flow of evidence. The trial court is the gatekeeper of evidence and its

decision limiting the Commonwealth to the single choice of the three items was a measured response to the single question asked by the defense. Furthermore, the Commonwealth is not the Appellant in the case before us—and the trial court's limitation on the evidence at that point in the proceeding is not before us.

Furthermore, the trial court's later decision to permit Melanie to testify and the Commonwealth to play the recording was also a reasoned response to Jacobs's answers—in which he responded multiple times that Katy's version of events was a fabrication. While, as noted, our case law indicates Jacobs should not have been asked to characterize another witness's testimony as being untruthful, he was not required or compelled to respond or agree that everything Katy said was a lie. Jacobs was not forced to say the diary entry was a complete fabrication. It was entirely possible for Jacobs to maintain his innocence without saying or agreeing that Katy was a liar. However, Jacobs did not do that. It was Jacobs's answers, not the Commonwealth's questions (to which his counsel did not object), that made the remaining two pieces of originally excluded evidence admissible.

Jacobs took the stand and assumed the risks associated with cross examination. What our predecessor Court said decades ago applies with equal force today:

> When a witness takes the stand in his own behalf, he assumes a dual capacity, (1) as an accused, and (2) as a witness. . . . In such capacity, he was subject to all the obligations and liabilities of any other witness, including that of being impeached. He was likewise entitled to all the rights and immunities of any other witness.

Keene v. Commonwealth, 210 S.W.2d 926, 929 (Ky. 1948), *overruled on other grounds by Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957).

In summary, we hold there was no manifest injustice in the Commonwealth's improper questions and we further hold the trial court did not err when it allowed Melanie to testify and the Commonwealth to play the recording she made in response to Jacobs's answers that Katy's testimony and her diary entry were fabrications. We hold the trial court committed no reversible error as to Jacobs's claims in this argument.

E. Directed Verdict

Jacobs claims the trial court erred when it denied his motions for directed verdict. He moved for directed verdict as to all charges at the close of the Commonwealth's case and renewed that motion at the close of all evidence. We begin the analysis with the legal standards.

The legal standard for a trial court in deciding whether to grant a directed verdict motion is clear: "[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." *Trowel v. Commonwealth*, 550 S.W.2d 530, 533 (Ky. 1977). Furthermore,

> The trial court must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion, and a directed verdict should not be given unless the evidence is insufficient to sustain a conviction. The evidence presented must be accepted as true. The credibility and the weight to be given the testimony are questions for the jury exclusively.

Commonwealth v. Sawhill, 660 S.W.2d 3, 5 (Ky. 1983). The standard for appellate review is equally clear: "[o]n appellate review, the test of a directed

verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

Jacobs contends that the Commonwealth failed to present sufficient evidence to overcome Jacobs's presumption of innocence as to any of the charges. Apart from his general argument that "[t]he Commonwealth failed to present any sufficient evidence that would prove beyond a reasonable doubt that [Jacobs] engaged in sexual contact with [Katy]," he specifically argues there was not sufficient evidence that Katy was under the age of twelve at the time of any of the alleged incidents of alleged sexual contact occurred. A review of the facts is necessary for this analysis.

The testimony adduced at trial provides a rough timeline. Katy testified she knew the sexual abuse began when she was eleven because she "didn't know right from wrong at that time." The family house burned in January 2016 when Katy was twelve. Katy and other witnesses used that significant event as a time reference. Katy's birthdate was April 6, 2003.

Katy testified regarding three occasions of abuse she said happened before the house burned. The first event involved kissing and Jacobs fondling her buttocks the evening her dad walked Melanie home. The second was sexual intercourse on the freezer in the bathroom. The third event took place in the neighbor's garage after the Dickens Christmas Parade and included mutual oral sex.

Katy testified that she was in eighth grade and had just turned fifteen (the trial was in April after her birthday). Jacobs asserts that based on school years, Katy must have been twelve years old when the three events listed above occurred. However, there was no testimony as to such elicited at trial. This is merely conjecture and may or may not be accurate. For example, if Katy had failed seventh grade, it could *both* be true that Katy was eleven when she was in sixth grade *and* that she was fifteen and in eighth grade at the time of trial.

Chesser testified the small freezer was only in the bathroom at the old Lake Avenue house and never in the new house. The Commonwealth introduced a picture of the bathroom showing the freezer. Chesser also testified about times she was in the hospital with severe seizures and periods of time when she and Moore were separated with marital problems. Katy tied some of her age claims to when her mother was gone or in the hospital. Chesser's dates were at odds with Katy's testimony about her age.

The Commonwealth asserts in its brief that the events Katy described happening in the old house occurred in the fall of 2014, not 2015, which meant Katy was eleven. The trial court gave the jury choices in the instructions including under age twelve or in the alternative under age fourteen or under age sixteen based on the charge. The factual argument over Katy's age boils down to Katy saying she was eleven and other evidence pointing to her being twelve.

The jury returned guilty verdicts consistent with Katy's testimony that she was eleven. A jury is permitted to make that finding and we are unwilling to substitute our decision for theirs. We note,

> "'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.'"

Jenkins v. Commonwealth, 496 S.W.3d 435, 445 (Ky. 2016) (quoting *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011))).

"Our courts have long held that a jury is free to believe the testimony of one witness over the testimony of others." *Minter v. Commonwealth*, 415 S.W.3d 614, 618 (Ky. 2013). "The testimony of a single witness is enough to support a conviction." *Id.* at 618 (citing *Gerlaugh v. Commonwealth,* 156 S.W.3d 747, 758 (Ky. 2005)). Further, "[t]he testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence." *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

We conclude the trial court did not err in denying the motions for directed verdict based on Katy's age. The trial court noted Katy's testimony that she was eleven when some of the acts occurred. The trial court must assume for purposes of directed verdict motions that her testimony was true. As stated above, the jury would decide what weight to give that testimony and

Katy's credibility. When the sexual abuse occurred and what Katy's age was at the time were issues left to the jury to resolve. It would not be unreasonable in light of the evidence as a whole for the jury to find guilt based on how old Katy said she was when she was abused.

Apart from his argument that the Commonwealth did not present sufficient evidence proving that Katy was under the age of twelve at the time the sexual abuse occurred, Jacobs also argues that it did not present sufficient evidence that Jacobs had engaged in sexual contact with Katy. He points out that Melanie testified she did not believe Katy at first, that Moore went to talk to Jacobs about the allegations in case he had not abused his daughter, and the County Attorney told Chesser there was nothing he could do when she spoke to him about the case. However, whether other witnesses who testified believed Katy's allegations of sexual abuse is without consequence.

As we have stated in our analysis of a similar issue:

> Appellant gives us plenty of reasons to disbelieve Tonya, but the substance of her testimony describing Appellant's role in the crime is not so extraordinarily implausible or inherently impossible that it is manifestly without probative value or patently unworthy of belief; it could have happened as she testified. Consequently, we conclude that the credibility and weight to be given to Tonya's testimony remained within the province of the jury, and therefore, was necessarily included in the body of evidence to be considered when deciding whether a directed verdict was proper.

Ross v. Commonwealth, 531 S.W.3d 471, 477 (Ky. 2017). Just as the Appellant in Ross, Jacobs gives us "plenty of reasons to disbelieve" Katy. However, what he does not show is that her testimony describing the sexual acts she alleged Jacobs perpetrated upon her was "so extraordinarily implausible or inherently

impossible that it is manifestly without probative value or patently unworthy of belief." *Id.*

For the reasons discussed above regarding Katy's age, we also hold that the trial court did not err in denying Jacobs's motions for directed verdict on the basis of conflicting testimony as to Katy's credibility and the facts surrounding the crimes.

The above discussion does not resolve the remaining issue of whether a directed verdict for the offense of tampering with a witness should have been granted. Jacobs claims there was no evidence, even in the light most favorable to the Commonwealth, that Jacobs called Sergeant Keene to attempt to get him to avoid appearing or testifying at the trial.

KRS 524.050 reads, in pertinent part:

> (1) A person is guilty of tampering with a witness when, knowing that a person is or may be called as a witness in an official proceeding, he:
>
> (a) Induces or attempts to induce the witness to absent himself or otherwise avoid appearing or testifying at the official proceeding with intent to influence the outcome thereby; or
> (b) Knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of the witness.

We note that KRS 524.050(1) does not require the "official proceeding" in which the person "may be called as a witness" be a trial. At the time of Jacobs's phone calls, Sergeant Keene was still investigating the case involving Katy's allegations. Jacobs had neither been charged with a crime regarding Katy nor had his case been presented to the grand jury. At the time of the phone calls,

there was no trial on the immediate horizon. It is not unreasonable to conclude that Jacobs, as a convicted felon with multiple prior offenses, was aware that grand jury proceedings had to occur before he could be indicted. It is then not unreasonable to infer Jacobs was attempting to affect Sergeant Keene's testimony at whatever proceeding may occur—including proceedings in front of a potential grand jury.

Although Jacobs never directly asked Sergeant Keene not to testify or threatened him regarding any potential testimony, the trial court described the calls as an irrational rant or inferred threat. Viewing the evidence in the light most favorable to the Commonwealth, Jacobs's inferred threat can be viewed as aimed at getting Sergeant Keene to cease his investigation. If successful, the threat could have resulted in Sergeant Keene stopping his investigation, and not charging Jacobs, or testifying in front of the grand jury. That conclusion is sufficient for the trial court to have denied the motion for directed verdict. As to reasonable inferences, we previously said:

> An inference is the act performed by the jury of inferring or reaching a conclusion from facts or premises in a logical manner so as to reach a conclusion. A reasonable inference is one in accordance with reason or sound thinking and within the bounds of common sense without regard to extremes or excess. It is a process of reasoning by which a proposition is deduced as a logical consequence from other facts already proven.

Martin v. Commonwealth, 13 S.W.3d 232, 235 (Ky. 1999).

It is common sense to infer that Jacobs had a motive when he made the calls. The jury could decide if the rant was something other than an attempt to stop the investigation. The jury would decide the weight and credibility to

assign the testimony of Sergeant Keene and Jacobs and the weight to give the recordings. The trial court had sufficient evidence before it to deny this motion for a directed verdict. We hold it did not abuse its discretion in denying Jacobs's motions for directed verdict.

F. Double Jeopardy

Four of Jacobs's convictions resulted from events during a single "episode" of sexual contact in a neighbor's garage following the Dickens Christmas Parade. Jacobs claims that the multiple convictions for the same act violated the prohibition against double jeopardy. Jacobs asserts the issue was preserved during arguments for directed verdict or if not, it is reviewable under palpable error pursuant to RCr 10.26. Regardless, we are bound to review a double jeopardy claim even if it is improperly preserved. *Early v. Commonwealth*, 470 S.W.3d 729 (Ky. 2015).

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution mandates that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const, amend. V; *see also* Ky. Const. § 13. We have held that the Fifth Amendment and Section 13 of the Kentucky Constitution are "identical in . . . their prohibition against double jeopardy." *Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky. 1985).

The sex acts at issue happened while the family lived at the old house on Lake Avenue. Katy testified she was eleven years old at the time. Katy's description of what happened lasted approximately two minutes and minced few words. Katy said the acts began after Jacobs, Katy, and her little sister

returned from the Dickens Christmas Parade. Jacobs told Katy to leave the family garage where her father was working on something and join him a dozen steps away at the neighbor's garage. Once inside the neighbor's garage, Jacobs began kissing Katy.

Jacobs unbuckled his pants and made Katy perform oral sex on him, then Jacobs pulled down her pants and performed oral sex on her. Katy was certain no sexual intercourse happened in the garage. When asked if anything else happened, Katy said Jacobs touched her vaginal area and made her touch his genital area. The activity stopped when Chesser yelled for Katy to take her nightly medicine.

Based on Katy's testimony, the trial court fashioned multiple instructions for various crimes. Related to these events in the neighbor's garage, the jury ultimately returned guilty verdicts for two counts of first-degree sexual abuse, one count of first-degree sodomy, and one count of first-degree unlawful transaction with a minor. The instructions are set out as follows:

> INSTRUCTION NO. 6(A)
>
> FIRST-DEGREE SEXUAL ABUSE (COMPLAINING WITNESS UNDER AGE OF 12)
>
> You will find the Defendant, Thomas Jacobs, guilty of First-Degree Sexual Abuse under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about December, 2014, following the Dickens Parade, and before the finding of the Indictment herein, Thomas Jacobs subjected [Katy] to sexual contact at Margaret King's garage by touching her vaginal area;

AND

B. That at the time of such contact, [Katy] was less than 12 years of age.

INSTRUCTION NO. 7 (A)

FIRST-DEGREE SEXUAL ABUSE (COMPLAINING WITNESS UNDER AGE OF 12)

You will find the Defendant, Thomas Jacobs, guilty of First-Degree Sexual Abuse under this Instruction, if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about December, 2014 following the Dickens Parade, and before the finding of the Indictment herein, Thomas Jacobs subjected [Katy] to sexual contact at Margaret King's garage by having her touch his penis;

AND

B. That at the time of such contact, [Katy] was less than 12 years of age.

INSTRUCTION NO. 8(A)

FIRST-DEGREE SODOMY

You will find the Defendant guilty of First Degree Sodomy under this Instruction if, only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about December 2014, following the Dickens Parade, and before the finding of the Indictment herein, Thomas Jacobs engaged in deviate sexual intercourse with [Katy] at Margaret King's garage by placing his mouth on her vaginal area;

AND

B. That at the time of such occurrence, [Katy] was less than 12 years of age.

INSTRUCTION NO. 9(A)

FIRST-DEGREE UNLAWFUL TRANSACTION WITH A MINOR

> You will find the Defendant guilty of First Degree Unlawful Transaction with a Minor under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about December, 2014, following the Dickens Parade, and before the finding of the Indictment herein, Thomas Jacobs knowingly induced, assisted or caused Katy to place her mouth on his penis at Margaret King's garage:
>
> AND
>
> B. That Katy was less than 16 years of age;
>
> AND
>
> C. That Thomas Jacobs knew Katy was less than 16 years of age.

Jacobs claims these instructions violated double jeopardy and are cumulative punishment for the same conduct. He asserts the touching of his mouth on Katy's vaginal area met the elements for both sexual abuse and sodomy, as sexual touching (for the sexual abuse charge) was an inevitable part of deviate sexual intercourse (for the sodomy charge). Jacobs further argues that Katy placing her mouth on his penis met the elements for both sexual abuse and unlawful transaction with a minor. Jacobs claims these acts were a single course of conduct and therefore merit one conviction. We disagree.

We previously said, "[g]enerally, the prohibition against double jeopardy shields a defendant from a second prosecution for the same offense after either conviction or acquittal, but it also prohibits multiple punishments for the same offense." *Jordan,* 703 S.W.2d at 872 (*citing Ohio v. Johnson,* 467 U.S. 493 (1984)). However, cumulative punishment is permitted by the double jeopardy clause "[w]here the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature . . . intended that each violation be a separate offense." *Garrett v. United States*, 105 S. Ct. 2407, 2411 (1985). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 103 S. Ct. 673, 678 (1983).

In *Blockburger v. United States,* the United States Supreme Court held double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, so long as each statute "requires proof of an additional fact which the other does not." 284 U.S. 299, 304 (1932). While Kentucky courts departed from the *Blockburger* rule for a time, this Court stated in *Commonwealth v. Burge*: "we return to the *Blockburger* analysis. We are to determine whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not. Put differently, is one offense included within another?" 947 S.W.2d 805, 811 (Ky. 1996) (internal citations omitted).

We begin with a review of relevant statutory language regarding the crimes for which the jury was instructed. As to sexual abuse, KRS 510.110 reads, "(1) A person is guilty of sexual abuse in the first degree when: . . . (b) He or she subjects another person to sexual contact who is incapable of consent because he or she: . . . 2. Is less than twelve (12) years old." "Sexual contact" is defined in 510.010(7) as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." As to sodomy, KRS 510.070 reads: "(1) A person is guilty of sodomy in the first degree when: . . . (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he: . . . 2. Is less than twelve (12) years old." "Deviate sexual intercourse" is defined in KRS 510.010(1) as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another . . . ." Finally, KRS 530.064 reads: "(1) A person is guilty of unlawful transaction with a minor in the first degree when he or she knowingly induces, assists, or causes a minor to engage in: (a) Illegal sexual activity . . . ."

Reviewing Katy's testimony, it is clear she described two separate acts of oral sex: Jacobs placing his mouth on Katy's vagina and Jacobs making Katy place her mouth on his penis. These crimes were listed separately in the jury instructions. The sodomy instruction referenced Jacobs placing his mouth on Katy's vagina (which meets the definition of deviate sexual intercourse required for a sodomy conviction) and the unlawful transaction with a minor instruction referenced Jacobs inducing, assisting, or causing Katy to place her mouth on his penis. Katy testified that she was eleven when these sexual acts occurred

and the necessary age requirement for both first-degree sodomy and first-degree unlawful transaction with a minor were met if the jury found that she was truthful as to her age.

Sodomy and unlawful transaction with a minor are separate crimes requiring proof of different elements. Sodomy requires proof of deviate sexual intercourse, while unlawful transaction with a minor requires proof the defendant induced, assisted, or caused the victim to engage in illegal sexual activity.

Jacobs argues that even if the instructions as to sodomy and unlawful transaction with a minor did not violate his right to be free from double jeopardy, his convictions for sexual abuse amounted to double jeopardy violations. According to Jacobs, if the jury found that he had sodomized Katy by placing his mouth on her vaginal area, it *had* to also find that he committed sexual abuse by touching her vaginal area; and, likewise, as the other sexual abuse charge—if the jury found he had induced Katy to place her mouth on his penis for the unlawful transaction with a minor charge, it had to find that he had committed sexual abuse by having Katy touch his penis. We have addressed these arguments in the past, and disagree with Jacobs that the charges against him denied him his right to be free from double jeopardy.

We look first at Katy's testimony concerning the acts of abuse. When Katy testified about Jacobs touching her vaginal area (the basis of the sexual abuse charge), that touching was different than the touching that occurred when Jacobs placed his mouth on Katy's vaginal area (the basis of the sodomy

charge). It is also clear that when Jacobs made Katy touch his penis, that was separate from when Jacobs made Katy place her mouth on his penis. Notably, after Katy described the two acts of oral sex during her testimony, she was asked if sexual intercourse occurred on that occasion in the garage and she said it did not. Katy was then asked if anything else happened and she said yes: that Jacobs touched her genital area and made her touch his. It is not unreasonable to conclude that Katy described four separate acts of sexual gratification even though they were not separated by any measurable amount of time. The four separate acts Katy described, the legislature prohibited.

Jacobs asserts that he may not be punished for multiple acts arising from a single occurrence based on the language of KRS 505.020 which states in relevant part:

> (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
>
> . . .
>
> (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

Jacobs relies on *Commonwealth v. Grubb*, 862 S.W.2d 883 (Ky. 1993). In *Grubb*, the Commonwealth was limited from carving out multiple offenses from a single impulse and limited to only the most serious charge. The single impulse test has not been adopted by this court, and *Grubb* relies on *Ingram v. Commonwealth*, 801 S.W.2d 321, (Ky. 1990) which was expressly overruled by *Burge*, 947 S.W.2d 805. Therefore, Jacobs's reliance on *Grubb* is misplaced.

As to sodomy and sexual abuse, we previously stated:

> Appellant argues that first-degree sexual abuse is a lesser-included offense of first-degree sodomy in the sense that the "sexual contact" necessary to prove sexual abuse is a necessary component of sodomy. Nevertheless, here the separate charge of sexual abuse is based not on incidental contact, but on a separate act of sexual gratification. The fact that the two sexual acts occurred either simultaneously or nearly so is irrelevant.

Hampton v. Commonwealth, 666 S.W.2d 737, 739 (Ky. 1984). The same is true herein. Katy testified to separate touching accounting for the sexual abuse charge than that of the sodomy charge.

As to unlawful transaction with a minor and sexual abuse, we previously said:

> Each requires an element of proof that the other does not. The unlawful-transaction statute requires an element of proof that is not found in the sexual-abuse statute: proof that the defendant induced, assisted, or caused the minor to engage in the act. The sexual-abuse statute, on the other hand, requires an element of proof not found in the unlawful-transaction statute: proof that the defendant is twenty-one years or older and that the victim is less than sixteen years old. Applying the *Blockburger* test, Yates was not subjected to double jeopardy by being convicted of both crimes.

Yates v. Commonwealth, 539 S.W.3d 654, 665–66 (Ky. 2018). While *Yates* dealt with different subsections of the sexual abuse statute, the crimes herein still required proof of different elements. Here, the sexual abuse charge did not require proof that Jacobs was any particular age, it did require proof that Katy was under the age of twelve—an element not required by the unlawful transaction with a minor statute.

In this case, the acts described by Katy violated statutes containing different elements as noted above. The four acts Katy described were different

acts of sexual gratification, not merely incidental contacts. Katy's testimony included her age, Jacobs's inducement to have sex with him, oral sex by Katy on Jacobs, oral sex by Jacobs on Katy, Jacobs sexually touching Katy, and Katy sexually touching Jacobs. All of these are separate elements in the applicable statutes making legislative intent clear and thereby permitting multiple punishments.

In summary, the trial court correctly provided the jury with multiple jury instructions based on Katy's description of four separate acts of sexual gratification that happened in the neighbor's garage. We hold there was no error in providing the jury with the four choices given in the instructions. We further hold Jacobs was not deprived of his right to be free from double jeopardy in the convictions for the four crimes. The trial court's rulings were grounded in established precedent and supported by sound legal principles.

G. Cumulative Error

Finally, Jacobs seeks reversal of his conviction under "cumulative error, the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair. We have found cumulative error only where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). Jacobs acknowledges this issue is unpreserved but seeks review. We will review under a palpable error standard. RCr 10.26 reads, "[a] palpable error which affects the substantial rights of a party may be considered by the court

on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." "Palpable error affects the substantial rights of the party and results in manifest injustice. Furthermore, an appellant claiming palpable error must show that the error was more likely than ordinary error to have affected the jury." *Boyd v. Commonwealth*, 439 S.W.3d 126, 129-30 (Ky. 2014). The "required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin*, 207 S.W.3d at 3.

We have found no single error sufficiently prejudicial as to merit reversal and we further find the combination of alleged errors do not create a manifest injustice. As this Court has held, "[w]hat it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." *Yates*, 539 S.W.3d at 666 (quoting *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003)). Upon review, we do not believe the result would have been different without any of the alleged irregularities sought by Jacobs to be identified as cumulative error. We find no manifest injustice in the trial court's rulings.

III. CONCLUSION

For the foregoing reasons, we affirm Jacobs's convictions and corresponding sentences.

All sitting. All concur.

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