

RENDERED: OCTOBER 12, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000961-MR

MARCUS JAMON MYRICK

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT  
HONORABLE STOCKTON B. WOOD, JUDGE  
ACTION NO. 10-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, STUMBO, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Marcus Jamon Myrick, appeals the May 31, 2011, final judgment of conviction of the Mason Circuit Court for criminal attempt to commit rape in the first degree, and for which he received a ten year sentence of imprisonment. On appeal, Myrick argues that the testimony of a child was improperly admitted by the court, that the prosecution gave a misleading

statement at the conclusion of trial which could have influenced the jury to give a more strict penalty, and that the court erred in failing to direct a verdict for the defense. Following a review of the record, the arguments of the parties, and the applicable law, we affirm.

On May 20, 2010, a 911 call was made from 110 East 6<sup>th</sup> Street in Maysville, Kentucky, during the early morning hours. The call was made by J.H., who reported that Myrick had been “on top of [her], naked, trying to dig his thing inside of [her].” Officer Micah Amstutz of the Maysville Police Department responded to the residence at approximately 4:30 a.m. to find J.H. angry and upset. J.H., her roommate Angela Spillman, and two children were present. Detective Kenneth Fuller arrived shortly thereafter, and began an investigation which led to Myrick’s arrest the following day. On June 24, 2010, Myrick was indicted for rape in the first degree. He pled not guilty, and the matter proceeded to trial on March 21-22, 2011.

During the course of the trial, J.H. testified that she lived at 110 East 6<sup>th</sup> Street at the time of the incident. She lived there with her then seven-year-old son J.M., her friend Angela, and Angela’s daughter. Angela was dating Myrick’s brother, Justin Myrick at the time. The night before the incident, Angela asked if Justin could come over, and J.H. agreed. Justin arrived at the residence between 11:00 p.m. and midnight, and Myrick was with him. J.H. knew both Justin and Myrick, as they were cousins of her son, J.M.’s father, Larry Myrick. Once they arrived, J.H., Angela, Justin, and Myrick spent time in the living room watching

movies and drinking. J.H. testified that she had one drink. The children were asleep in separate bedrooms. J.H. testified that she went to bed between 1:00 and 2:00 a.m. When she went to bed, Angela and Justin were on the couch in the living room, and Myrick was on the loveseat. J.H. went to J.M.'s room and got in bed with him. J.H. testified that she was wearing sweatpants and a t-shirt and that she got under the covers and laid on her stomach. J.H. testified that she was awakened because J.M. was shaking her and stating that his dad was there. J.H. testified that upon waking, she realized that her sweatpants and underwear had been removed, and a completely naked man was on her back with his hands on her thighs. J.H. testified that she could feel him attempting to penetrate her and that upon asking who it was, the man responded "Sssssh, it's Poppy,"<sup>1</sup> several times. J.H. immediately knew that it was Myrick and testified that he grabbed her thighs and attempted to pull her up. J.H. testified that she yelled at him to get off of her, and tried to fight him off. J.H. stated that she managed to roll over and kicked Myrick to the floor, after which time he ran out of the room and began putting on his clothes in the dining room. J.H. ran past Myrick into the living room and asked for a phone, and yelled at Justin to get Myrick out of the house. Justin and Myrick ran out a side door. J.H. then called 911.

Thereafter, sexual assault nurse examiner Jane Fultz performed an examination on J.H. Nurse Fultz testified that she did not observe any tears, bruises or swelling to J.H.'s vagina during her exam, and that she was not sure if

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<sup>1</sup> Poppy is Myrick's nickname.

there had been any vaginal or anal penetration. However, Nurse Fultz did testify that she observed redness in J.H.'s vaginal canal during the exam, which she felt was indicative of penetration of some sort. Nurse Fultz testified that J.H. had not reported any recent consensual sex.

Forensic biologist Misty Holbrook also testified below. She examined evidence from the sexual assault evidence collection kit. Holbrook testified that she found no semen or "biological," and that all of her testing was negative.

Detective Fuller testified below concerning his investigation, and stated that he spoke with J.H. and Angela after arriving at the scene and also returned later in the day to interview J.M. Detective Fuller also interviewed Myrick. During the interview, Myrick admitted to being at the residence, but stated that he was in the bathroom "when all this was going on," and that he "ran out" when J.H. started yelling and screaming. Myrick indicated that it must have been someone else, and identified two men who reportedly came to the front porch of the residence earlier in the evening.

J.M. was also called to testify for the Commonwealth. Myrick moved to preclude J.M. from testifying both before and during the trial on the grounds that his testimony was cumulative to the testimony of J.H. and was also unduly prejudicial. Those motions were denied.

Prior to giving his testimony, J.M. was questioned by the court concerning his competency to testify. J.M. indicated that he knew the difference between a truth and a lie, and demonstrated that knowledge by saying that it was a

lie when the court said a white piece of paper was black, and that it was the truth when the court said the paper was white. J.M. also indicated that he knew that he was supposed to tell the truth when in court, and promised to do so on three occasions.

During his testimony, J.M. indicated that he was in bed with his mom when he woke up and saw “someone ... standing over there on the side of the bed.” He initially indicated that he did not see anybody else in bed, but then indicated that someone was on top of his mom when he woke up.<sup>2</sup> J.M. stated that he did not move after waking up, and that he did not know who the man was because all of the lights were off in the room but that it “looked like [his] dad standing there.” J.M. indicated that his mom was asleep, but that she woke up. J.M. stated that “nothing” happened when she woke up, and indicated that the man did not stay on top of her. When asked what the man did, J.M. testified that he did not see, and that the man did not say anything to his mom nor did he remember her saying anything to him. J.M. testified that he saw the man leave the room. J.M. testified that the man had a jacket on and that he saw him get a belt. When asked what his mother did, J.M. testified that he did not know, that she got up and went into the living room and that he tried to go back to sleep. When asked how she seemed, J.M. testified that he “couldn’t tell ‘cause it was dark.”

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<sup>2</sup> During J.M.’s testimony, the Commonwealth was permitted to play J.M.’s recorded interview with Detective Fuller in order to refresh his recollection after J.M. indicated that he remembered when someone else got in bed with him and his mom on the day in question, but then indicated that he did not remember what happened.

Myrick also testified in his own defense. He denied the allegations against him, and testified that J.H. invited Justin and himself to the residence and drove them there. Myrick testified that eventually J.H. went to bed with her son and that Justin and Angela fell asleep on the couch. According to Myrick, when everyone went to sleep, he went to the bathroom and then walked home at around 2:00 a.m. because he had to work that day. Myrick denied going into the bedroom with J.M. and J.H., or even seeing the bed.

Justin and Angela also testified for the defense. Justin testified that he woke up around 3:00 or 4:00 a.m. when J.H. came into the living room saying she needed to use the phone, and to get Myrick out of her house. Angela testified that she had awoken and was sitting on the couch when J.H. came into the living room, saying that she had been raped and needed to use the phone. Neither Justin nor Angela saw Myrick in the residence after waking up, and they both testified that Angela drove Justin home.

Myrick moved for a directed verdict at the close of the Commonwealth's case, arguing that there was no evidence, scientific or otherwise, that would prove that a rape occurred. That motion was denied. He renewed that motion at the close of evidence, again pointing to a lack of physical evidence, and the motion was again denied. The trial court subsequently instructed the jury on rape in the first degree as well as the lesser offenses of criminal attempt to commit rape in the first degree and sexual abuse in the first degree. Following deliberations, the jury found Myrick guilty of criminal attempt to commit rape in

the first degree and imposed a ten-year sentence. On May 2, 2011, the trial court sentenced Myrick accordingly. It is from that conviction and sentence that Myrick now appeals to this Court.

As his first basis for appeal, Myrick argues that the court below erred in determining J.M.'s competency to testify in front of the jury. He argues that the court improperly prejudiced the jury, and should have conducted the hearing in chambers, with both attorneys present, and prior to the start of trial. The Commonwealth argues that the court's decision in this regard was not in error, but further notes that the issue was unpreserved, a fact confirmed by our own review of the record.

In his brief to this Court, Myrick directs our attention to where he asserts that the alleged error is preserved. The exchange to which he directs our attention<sup>3</sup> is merely a discussion between the child and the court as to the difference between the truth and a lie, as evidenced by the exchange previously mentioned herein regarding the black and white paper. During this portion of the exchange, there is no objection by Myrick's counsel. Myrick then directs our attention to the substantive questioning by the court concerning the child's memory of the evening, during which the court plays the tape of the exchange between the police officer and the child in order to refresh the child's memory. There is an objection by defense counsel at this portion of the trial, concerning whether the

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<sup>3</sup> Myrick directs our attention to VR 1: 03/21/2011; 2:10:14 p.m. through 2:10:59 p.m. insofar as the competency determination is concerned.

testimony was cumulative and prejudicial.<sup>4</sup> Myrick does not direct our attention to any portion of the record where his counsel raised the issue of whether the court could properly determine the child's competency in the presence of the jury.

It is well-established that a new theory of error cannot be raised for the first time on appeal. *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). In other words, an appellant will not be permitted to feed one can of worms to the trial judge and another to the appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), overruled on other grounds by *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010). Certainly this Court may consider an unpreserved issue if the error is deemed to be palpable pursuant to RCr 10.26. However, Myrick has neither requested palpable error review pursuant to RCr 10.26, nor briefed that issue. Accordingly, we decline to address this argument further herein. *See Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008).

As his second basis for appeal, Myrick argues that the testimony of J.M. was cumulative or unduly prejudicial. He argues that J.M.'s testimony was inconsistent, that it was evidence which the jury heard through other witnesses at trial, and that it was unreliable. The Commonwealth disagrees, arguing that J.M. and J.H. were the only witnesses to what happened in the bedroom on the morning in question. Moreover, the Commonwealth asserts that the testimony of J.M. was not entirely duplicative and that even if it was, it was critical to the issues in the case, as there were no other witnesses, and as its probative value clearly was not

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<sup>4</sup> See TR 56, VR 03/21/11, 9:03:40-09:05:00.



substantially outweighed by any prejudicial effect. It argues that the trial court was well within its discretion to allow the testimony, and urges this Court to affirm.

Upon review, we are in agreement with the Commonwealth and the court below. In addressing this issue, we note that trial courts are given substantial discretion in ruling on such matters. *See Brock v. Commonwealth*, 947 S.W.2d 24, 29 (Ky. 1997). Indeed, it is well-established that the balancing of the probative value of proffered evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Further, excluding evidence “because of a ‘needless presentation of cumulative evidence’ must be exercised with caution ...” Robert G. Lawson, *The Kentucky Evidence Law Handbook*, §2.10[5] at 93 (4<sup>th</sup> Ed. 2003). This is especially the case “where the evidence goes to issues of central importance.” *Id.* (quoting Mueller & Kirkpatrick, *Federal Evidence*, §96 (2d Ed. 1994).

*Sub judice*, J.M. was one of only two witnesses to the alleged rape, the other being the victim herself. Thus, the probative value of his testimony was substantial. While J.M. may not have been able to testify with certainty that a rape occurred, he did confirm that there was a man in the room who climbed on top of his mother. In light of the fact that Myrick denied any involvement, attacked the credibility of J.H. and asserted that her allegations were fabricated, the testimony of J.M. partially corroborated J.H.’s version of what occurred and was both relevant and probative. Certainly, we agree with the trial that any prejudice which

occurred was substantially outweighed by the probative effect of the testimony. The trial court considered the undue prejudice argument raised by Myrick, and in its discretion, allowed J.M. to testify. We do not believe this was a decision which was arbitrary, unreasonable, or unfair, and accordingly, we affirm.

As a third basis for appeal, Myrick argues that the court below erred in denying his motion for directed verdict. Twice during the course of the trial below, Myrick requested a directed verdict on the basis that insufficient scientific evidence was presented to convict him of rape in the first degree beyond a reasonable doubt. He notes that there was an absence of physical evidence,<sup>5</sup> including an absence of any positive testing from the rape kit, and that other witnesses in the home stated that nothing had occurred. Further, he asserts that the testimony of J.H. was inconsistent, and argues that these factors supported the granting of a directed verdict in his favor.

In response, the Commonwealth argues that the court properly denied Myrick's motions. It asserts that while Myrick was indicted for rape in the third degree, he was ultimately convicted of the lesser offense of criminal attempt to commit rape in the first degree. Thus, it argues that any error by the trial court in failing to grant a directed verdict on the charge of rape in the first degree was clearly harmless. Moreover, the Commonwealth asserts that none of Myrick's arguments warranted a directed verdict, and notes that, as set forth in *Robinson v.*

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<sup>5</sup> While Myrick indicates that there was a complete lack of physical evidence to corroborate the testimony of J.H. below, we note that Nurse Fulz testified that she observed redness in J.H.'s vaginal canal during the sexual assault exam which she testified was indicative of penetration.

*Commonwealth*, 459 S.W.2d 147, 150 (Ky. 1970), Kentucky follows the common law rule that the unsupported testimony of the prosecutrix, if not contradictory or incredible, or inherently improbable, may be sufficient to sustain a conviction of rape. Thus, the Commonwealth asserts that contrary to Myrick's claim, the Commonwealth need not produce physical or "scientific" evidence to establish that a rape occurred, and that the testimony of J.H. alone was sufficient to establish the elements necessary for conviction of rape in the first degree.

The Commonwealth asserts that a directed verdict would only have been warranted below had it been clearly unreasonable for the jury to convict on the primary offense of rape, and clearly unreasonable to convict on any of the other lesser included offenses of criminal attempt to commit rape in the first degree or sexual abuse in the first degree. Accordingly, it argues that the directed verdict was properly denied. Concerning Myrick's claim that inconsistencies in the testimony of J.H. warranted a directed verdict, the Commonwealth argues that the credibility of witness testimony is exclusively within the province of the jury, and that accordingly the court appropriately denied the motion.

Upon consideration of a motion for a directed verdict, "the trial court must 'draw all fair and rational inferences from the evidence in favor of the party opposing the motion, and a verdict should not be directed unless the evidence is insufficient to sustain the verdict.'" *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky.1996) (quoting *Spivey v. Sheeler*, 514 S.W.2d 667, 673 (Ky.1974)). Upon review by an appellate court, "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 [or liability], only then the defendant is entitled to a directed verdict[.]” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citations omitted). We review this argument with these standards in mind.

In reviewing the arguments of the parties on this issue, we note that our courts have previously held that:

A motion for directed verdict of acquittal should only be made (or granted) when the defendant is entitled to a complete acquittal, that is, when looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment, or of any lesser included offenses.

*Campbell v. Commonwealth*, 564 S.W.2d 528, 530-31 (Ky. 1978). *Sub judice*, a review of the testimony and evidence submitted indicates that the evidence was sufficient to support a conviction, particularly on one of the lesser included offenses beyond a reasonable doubt. Accordingly, we do not believe the court below erred in denying Myrick’s motion for directed verdict, and we affirm.

As his final basis for appeal, Myrick argues that the Commonwealth erred during its closing argument by stating that he was “essentially on probation,” when in fact he was on a pretrial diversion. Myrick argues that this was a substantial error of an extraordinary nature justifying relief, and requests palpable error review pursuant to RCr 10.26. He argues that the jury should only have been informed of any actual convictions, and that the use of the phrase “essentially on

probation” could have influenced the jury to give a sentence different from that which it ultimately did. Accordingly, he requests reversal.

In response, the Commonwealth acknowledges that during the penalty phase of the case, it introduced evidence of Myrick’s criminal history by reading from certified documents, one of which was a certified copy of Indictment No. 08-CR-140 from the Mason Circuit Court for flagrant non-support. Another was a copy of an order granting pretrial diversion from a flagrant non-support case. The Commonwealth read from the pretrial diversion order that Myrick had been granted pretrial diversion for a period of five years on January 23, 2009.

Thereafter, the Commonwealth stated as follows during its closing argument, “And he was essentially on probation for a flagrant non-support case that was done back in 2008. While he was on that essential probation he committed this offense ... During a time when he should have been walking a straight and narrow line, he wasn’t.”<sup>6</sup>

While acknowledging that Myrick was not actually on probation, the Commonwealth asserts that wide latitude should be given during closing argument, and that its characterization of being “essentially on probation” was within the proper bounds of closing arguments, noting that probation and pretrial diversion share certain similarities. Alternatively, the Commonwealth argues that even if the statement was improper, it did not rise to the level of egregious prejudice necessary for relief pursuant to RCr 10.26. It asserts that the jury knew that Myrick had

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<sup>6</sup> VR 03/22/2011, 4:10:38-4:11:10.

received pretrial diversion in the flagrant non-support case, and that the Commonwealth's characterization of the diversion as being "essentially probation" would not have prejudiced him any more than the introduction of his criminal record and the facts of the trial already had.

With this latter assertion, we agree. In order for an error to rise to the level of being a palpable error pursuant to RCr 10.26, the party claiming palpable error must show a 'probability of a different result or an error so fundamental as to threaten a defendant's entitlement to due process of law.' *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006)). *Sub judice*, as the jury had already clearly been told that Myrick was actually on pretrial diversion, we find that any error which may have occurred in the characterization of the diversion in the Commonwealth's closing argument was simply not of a nature substantial enough to justify reversal pursuant to RCr 10.26. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the May 31, 2011, judgment and sentence of the Mason Circuit Court.

ALL CONCUR.

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