

RENDERED: AUGUST 28, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001916-MR

ALBERT R. MERCADO

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 10-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, KRAMER, J. LAMBERT, JUDGES.

KRAMER, JUDGE: Albert R. Mercado appeals the Carter Circuit Court's judgment convicting him of second-degree rape and sentencing him to seven years of imprisonment. After a careful review of the record, we affirm because the bolstering of Mercado's stepdaughter's credibility did not amount to palpable

error, Mercado's speedy trial rights were not violated, and the circuit court was required to instruct on the lesser-included offense.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mercado was indicted in April 2010 on the charges of first-degree rape and three counts of first-degree sodomy. All of the charges alleged that his stepdaughter, who was the purported victim, was physically helpless at the time he committed the crimes against her. The stepdaughter was then thirteen years old.

Mercado moved for a modification of his bond in May 2010, but his motion was denied. Mercado orally requested a speedy trial during his arraignment in June 2010, but he did not request a trial date be set at that time considering that large amounts of discovery had not been provided to him.

Mercado filed a written motion for a speedy trial in November 2010. A hearing was conducted on that motion on December 6, 2010, during which the jury trial was scheduled for March 1, 2011. Mercado also informed the court during that hearing that he still had not received various discovery items, including Mercado's interview by law enforcement and the Hope's Place¹ interview of his stepdaughter, both of which had been mentioned during an earlier hearing in August 2010 as having not been provided to the defense yet. The court stated that copies of those interviews should be turned over to the defense. Over the next couple of months, several other hearings were held, and during each of these hearings, the defense

¹ According to trial testimony, Hope's Place is a children's advocacy center that provides services to child victims of sexual abuse, including forensic interviews, forensic medical exams, and counseling.

reiterated that Mercado's interview still had not been turned over to the defense, and the court stated each time that it needed to be provided to them. During the hearing in late February 2011, the court expressed its irritation with the fact that Mercado's interview still had not been provided to the defense, and the court told the Commonwealth that if law enforcement did not provide it to the Commonwealth by that Friday (presumably so the Commonwealth could give it to the defense), the court was going to hold a show cause hearing. The court noted that it had been almost one year since Mercado's arrest, he had been in custody that entire time, and the interview of Mercado was presumably conducted soon after his arrest. No show cause hearing was ultimately conducted, however, so we assume that the interview was provided to the defense by the deadline set by the court.

In April 2011, Mercado moved the court to reconsider the issue of bond due to the fact that the DNA analysis still had not been completed. The court ordered the DNA hair analysis to be provided by July 11, 2011. Mercado still was not released on bond.

During a pretrial conference in July 2011, Mercado orally moved to dismiss the case against him on the basis that his right to a speedy trial had been violated. The court denied Mercado's motion to dismiss. The court reasoned that during the February 2011 pretrial conference, which was conducted about one week before the trial was originally scheduled to begin on March 1, 2011, Mercado's counsel advised the court that he would not be available for trial on

March 3, 4, or 7, 2011, due to a previously scheduled family vacation. At that time the circuit court had asked defense counsel if he was trying the case, and he responded that he was. The trial was expected to take at least four days to complete. The circuit court had stated that it was not feasible to begin a trial when defense counsel would not be present for two of the first four days of trial.

Defense counsel had told the court during that February 2011 pretrial conference that another attorney in his office who had handled some of the pretrial hearings in Mercado's case might be able to represent Mercado during trial while primary counsel was on vacation. However, the court decided to continue the case because counsel had said he was trying the case, not the other attorney from his office.

Additionally, the circuit court noted in its written order denying Mercado's motion to dismiss the case that when defense counsel had requested a continuance, the court had informed him that it would not be able to reschedule the trial for a time immediately after his vacation because the court had various other trials scheduled in the upcoming months. The court also noted that when counsel was informed that trial would not be rescheduled immediately, counsel did not object to the continuance of the trial and did not assert that it would violate Mercado's right to a speedy trial. Further, the circuit court reasoned as follows:

[T]his Court has repeatedly inquired about the status of discovery and has pushed the Commonwealth to turn over the discovery information as soon as possible to ensure that [Mercado] has received all information. Given the circumstances of this case, there has obviously been no denial of [Mercado's] rights. This case is one which involved lab analysis and DNA testing. It is well

known that an extensive delay occurs when the completion of DNA testing at the Kentucky State Police Crime Lab is necessary. Such delay is regrettable yet unavoidable due to the fact that only one lab conducts DNA testing.

Therefore, the circuit court denied Mercado's motion to dismiss the case on speedy trial grounds.

Mercado's jury trial began in July 2011. Before the case was submitted to the jury, the circuit court granted Mercado a directed verdict on one of the charges of first-degree sodomy because the evidence presented regarding that charge did not constitute first-degree sodomy, but it could constitute the lesser-included offense of first-degree sexual abuse. Therefore, the charge of first-degree sexual abuse was submitted to the jury in place of one of the counts of first-degree sodomy. Mercado was ultimately convicted of second-degree rape (a lesser-included offense of first-degree rape), and he was acquitted of the remaining charges. He was sentenced to serve seven years of imprisonment, to be served consecutively "with the misdemeanor sentence imposed in Carter District Court Case No. 10-M-00171."

Mercado filed a motion for a belated appeal, so this Court remanded the matter to the circuit court for an evidentiary hearing "to determine whether movant, implicitly or explicitly, waived the right to appeal." The circuit court held the hearing and entered its findings of fact and conclusions of law concerning Mercado's waiver of his right to appeal. This Court then granted Mercado's motion for a belated appeal.

On appeal, Mercado contends that: (a) a witness for the Commonwealth improperly bolstered his stepdaughter's credibility by saying her demeanor was typical of a victim; (b) Mercado was denied his right to a speedy trial; and (c) the circuit court erred when it instructed the jury on a lesser-included offense over his objection.

II. ANALYSIS

A. BOLSTERING OF STEPDAUGHTER'S CREDIBILITY

Mercado first alleges that a witness for the Commonwealth improperly bolstered his stepdaughter's credibility by saying that her demeanor was typical of a victim. Mercado acknowledges in his brief that this issue was not preserved for our review, but he asks us to review it for palpable error. Kentucky Rules of Criminal Procedure (RCr) 10.26 provides as follows: "A palpable error which affects the substantial rights of a party may be considered . . . 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."

[T]he requirement of "manifest injustice" as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .

[The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

Erica Brown, the executive director of Hope's Place, testified as a witness for the Commonwealth. Ms. Brown attested that she conducted the forensic interview of Mercado's stepdaughter at Hope's Place and, during the interview, she "found [the stepdaughter's] demeanor to be typical of a victim." Mercado argues that although Ms. Brown did not testify concerning what his stepdaughter said to her, by making this statement, Ms. Brown vouched for the truthfulness of his stepdaughter's statements, which he contends was improper.

In *Hoff v. Commonwealth*, 394 S.W.3d 368 (Ky. 2011), the Kentucky Supreme Court held:

It is well-settled that a witness cannot vouch for the truthfulness of another witness. . . . In *Bell [v. Commonwealth]*, 245 S.W.3d 738 (Ky. 2008), *overruled on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008)], this Court stated that it was error to allow a social worker to testify that a child sounded "spontaneous" and "unrehearsed" in describing sexual abuse. *Bell*, 245 S.W.3d at 744-45. Although the social worker in *Bell* did not literally say that she believed the child to be truthful, her opinion about the child's truthfulness was implicit in her statements, and so her testimony was impermissible bolstering. *Id.* at 745 n.1.

This Court has held that social workers and psychologists are not qualified to testify that they believe a child has been sexually abused based on the child's demeanor.

Hoff, 394 S.W.3d at 376.

Because Ms. Brown implied that Mercado's stepdaughter was truthful in her allegations, Ms. Brown's testimony constituted impermissible bolstering. However, we must discern whether the bolstering amounted to palpable error because Mercado did not preserve this claim for appellate review. Considering that Mercado's stepdaughter testified at trial that Mercado attempted to penetrate her genitals while she was in and out of consciousness (from blacking out due to drinking the alcohol Mercado had bought), we do not find that a substantial possibility exists that Mercado would have been acquitted on the second-degree rape charge in the absence of Ms. Brown's improper bolstering. Therefore, the impermissible bolstering did not amount to palpable error, and this claim lacks merit.

B. SPEEDY TRIAL

Mercado next alleges that he was denied his right to a speedy trial. This claim was preserved for our review.

Mercado contends that he was arrested in late March 2010 and indicted on April 23, 2010. He asserts that he was arraigned approximately one month later, on May 21, 2010, and he was appointed an attorney at that time. Mercado eventually retained private counsel, who entered an appearance during the August 2, 2010 pretrial conference. Counsel asked the court to hold another pretrial conference two weeks later to allow him time to review the discovery that had already been entered in the case. Mercado alleges that during the August 16, 2010 pretrial conference, his counsel informed the court that the defense did not

have certain items of discovery, and the court scheduled the next pretrial conference for October 2010 to ensure the discovery was provided. He also contends that his counsel orally moved for a speedy trial during the August 16, 2010 hearing, and that counsel filed a written motion for a speedy trial in November 2010. Mercado states that his counsel again requested a speedy trial on December 6, 2010, and that the defense told the court there were still discovery items that had been previously requested but had not been provided to the defense. The court asked about trial dates and scheduled the trial to begin on March 1, 2011. At the pretrial conference in January 2011, items of discovery still had not been provided to the defense. Some of this discovery had been provided to Mercado's prior defense counsel, but it was not given to the counsel who was representing him in January 2011. During the February 7, 2011 pretrial conference, the defense again informed the court that there were certain items of discovery that had not been provided to the defense. Defense counsel told the court that he believed the defense would be ready for trial on March 1, 2011, other than the discovery issues.

Another pretrial conference was held on February 21, 2011. In his opening brief, Mercado accurately summarizes what occurred at that conference. He states that the circuit court

inquired about the missing lab results or reports for the DNA. The Commonwealth responded that the police had contacted the lab and that the lab was testing something. The Commonwealth noted that the testing would be completed in two weeks. The trial was scheduled for March 1, 2011, thus the DNA testing would not be completed in time for trial. The Commonwealth stated

that [one of its witnesses] would be unavailable until March 4. One of [Mercado's] attorneys, Mr. Joy, then stated that he would be out of town March 3, 4 and 7. After these facts were presented, the trial court inquired about specific items of discovery, including surveillance footage from the Super Quick parking lot, that were still outstanding. The Commonwealth said that they had received the Super Quick parking lot footage, and provided it to defense counsel while he stood at the podium that day. This was less than two weeks before the trial was set to begin. [Mercado's] interview with the police had still not been provided. The trial court was ["irritated"] at the state of the discovery compliance at this point. The trial court then observed that defense counsel was going to be out of town on certain days. Defense counsel stated that he wished for a short continuance. The trial court then stated that [it] did not have a date available in the near future. The trial court said [it] was booked until mid-April. The defense then said that if that was the case, Mr. Curtis, defense counsel's law partner, could try the case on the date given, as Mr. Curtis was familiar with the case. Indeed, Mr. Curtis appeared frequently on [Mercado's] behalf during pretrial conferences. The trial court remarked that the defense [did not] even have the defendant's statement at this point. The trial court ordered that the statement be turned over by a date certain or [it] would schedule a "show cause" hearing. . . . The [court] then asked the Commonwealth about the state of the analysis of forensic evidence. The Commonwealth was still unsure what types of forensic evidence [were] still being analyzed. . . . The defense . . . moved for a modification of bond [because Mercado] was still in custody. The trial court did not grant a bond [that Mercado] could [pay at that time].

(Citations omitted).

A status hearing was held on March 7, 2011, during which the circuit court asked what progress had been made in completing the DNA testing. The Commonwealth informed the court that it had received some DNA test results, but

that they wanted to also test clothing and a hair. The Commonwealth stated that the lab said that it would expedite the testing of the clothing and hair. The court noted it would take a while for the DNA testing to be completed. The court discussed bond and asked the Commonwealth to talk with the stepdaughter's family about Mercado possibly being released on bond. The court asked the Commonwealth to file a status report concerning the stepdaughter's thoughts regarding bond by that Friday. The Commonwealth did not file a status report.

At the next hearing on April 4, 2011, the court asked the Commonwealth what the stepdaughter's stance was on Mercado being released on bond. Mercado's stepdaughter was opposed to bond, but the court nevertheless ordered that Mercado could be released on home incarceration and informed him of his restrictions and that if he violated his restrictions, his home incarceration would be revoked. However, Mercado was never released on home incarceration because the residences he had listed as places where he could stay during his home incarceration were too close to his stepdaughter's home.

During the May 2, 2011 hearing, the Commonwealth informed the court that the laboratory needed a head hair sample from Mercado in order to complete testing. Defense counsel objected, stating that a pubic hair sample was provided a year prior. The Commonwealth stated that the lab wanted a head hair sample this time. However, Mercado's head was shaved bald at the time of the hearing. Trial was scheduled for July 2011, and the court stated that trial would not be postponed any further for DNA testing. The court told the Commonwealth

that if a sample could be provided and the lab could get it tested before the trial, that was fine, but the trial would not be postponed any further due to testing delays because Mercado had been in custody for more than a year.

Another pretrial hearing was held in July 2011. During that hearing, the court noted that Mercado had let his hair grow so that a sample could be taken, but nobody had come to collect the sample and there was insufficient time left before trial for the lab to conduct any DNA testing, so the court informed Mercado that he could resume cutting his hair as he wished. Also during that hearing, defense counsel orally moved to dismiss the case on the basis that Mercado's right to a speedy trial had been violated. The court denied the motion, finding that the case had been scheduled for trial in March 2011, but defense counsel had informed the court approximately one week before that trial was scheduled to begin that counsel would be unavailable on March 3rd, 4th, and 7th. The court stated that it was not fair for counsel to request a continuance of trial because counsel would be unavailable and then later claim that the defendant's right to a speedy trial had been violated after the continuance was granted. The circuit court also entered a written order denying Mercado's motion to dismiss the case on the grounds that his right to a speedy trial had been violated.

“In evaluating a claim of a speedy trial violation, we consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant.” *Bratcher v. Commonwealth*, 151 S.W.3d 332, 344 (Ky. 2004). “The

factors are balanced and [n]o single one of these factors is determinative by itself.”

Dunaway v. Commonwealth, 60 S.W.3d 563, 569 (Ky. 2001) (internal quotation marks and citation omitted).

The first factor we must consider is the length of the delay.

The analysis begins by determining if the delay was presumptively prejudicial to the defendant; for if it was not, the defendant’s rights were not violated and the inquiry ends. As the [United States Supreme Court] stated in *Barker [v. Wingo]*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972): “Length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors.” *Id.* at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. Determining whether a delay was presumptively prejudicial requires examining two elements: the charges and the length of the delay.

Whether a delay is presumptively prejudicial depends, in part, on the charges involved. That is, “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.” *Id.* at 531, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. . . .

The second element, length of the delay, is the time between the earlier of the arrest or the indictment and the time the trial begins.

Dunaway, 60 S.W.3d at 569 (internal citations omitted).

In the present case, Mercado was charged with first-degree rape and three counts of first-degree sodomy. These are serious and somewhat complex charges. Regarding the length of the delay, sixteen months passed between Mercado’s arrest and his trial. Under the facts of this case, we find this delay to be presumptively prejudicial.

The second factor we must consider are the reasons for the delay, *i.e.*, whether the delay is attributable to the government or to the defendant. There are “three categories of reasons for delay: (1) a deliberate attempt to delay the trial in order to hamper the defense; (2) a more neutral reason such as negligence or overcrowded courts; and (3) a valid reason, such as a missing witness.” *Dunaway*, 60 S.W.3d at 570 (internal quotation marks and citation omitted). In the present case, the circuit court noted that trial was originally scheduled to begin on March 1, 2011, which was slightly less than one year after Mercado’s arrest, but during the February 21, 2011 hearing, defense counsel moved for a continuance of the trial on the basis that he had a scheduled vacation on March 3rd, 4th, and 7th. “It is well settled that a defendant will not be heard to complain of a lapse of time attributable to continuances he sought and received from the trial court.” *Preston v. Commonwealth*, 898 S.W.2d 504, 506 (Ky. App. 1995) (internal quotation marks and citation omitted). The circuit court found the defense’s request for a continuance was the reason for the delay. When defense counsel requested the continuance, the court told him that the court’s docket was booked until mid-April 2011. Thus, defense counsel’s continuance only accounts for one and a half months of the delay, because Mercado was not tried until July 2011.

During that same February 21, 2011 pretrial hearing--before defense counsel requested a continuance--the Commonwealth informed the court that DNA testing should be completed within two weeks. In other words, DNA testing was not going to be complete before trial was scheduled to begin on March 1, 2011,

and it would not have been completed until approximately March 7, 2011, despite the fact that the item to be tested had apparently been at the laboratory waiting to be tested for many months at that point. Regardless, because the item had been at the laboratory waiting to be tested for many months, we find this is a neutral reason for the delay through March 7, 2011, so it does not weigh against the Commonwealth through that point in time.

Moreover, during the hearing on March 7, 2011, the Commonwealth informed the court that it also wanted to test some clothing and a hair.

Approximately two months later, on May 2, 2011, the Commonwealth informed the court that the laboratory needed a head hair from Mercado in order to complete testing. This was more than thirteen months after his arrest, and the Commonwealth still had not even collected the hair from Mercado at that point that it needed to have tested. Although the laboratory never did collect the hair from Mercado for testing, it appears that the subsequent delay before trial began in July 2011 (with the exception of the one and half months due to defense counsel's continuance) was due primarily to the delay in waiting for them to collect and test the hair. We realize that three months (*i.e.*, from mid-April, after the continuance ended, until trial began in July 2011) might not be an unreasonable delay for DNA testing (if it had, in fact, occurred), but we cannot ignore the fact that the Commonwealth did not even inform the court that it needed to collect and test one of Mercado's head hairs until thirteen months after he had been arrested. Consequently, three months of the delay weighs against the Commonwealth.

However, considering that only three months of the sixteen-month delay weighs against the Commonwealth, the three-month delay weighs only slightly in Mercado's favor. *See Vanlier v. Carroll*, 535 F.Supp.2d 467, 481-82 (D. Del. 2008).

The third factor we must consider is whether the defendant asserted his right to a speedy trial. As previously noted Mercado orally requested a speedy trial, and he subsequently filed a written motion for a speedy trial. Therefore, this factor weighs in Mercado's favor.

The fourth factor involves a determination of what prejudice, if any, the defendant suffered as a result of the delay. In preventing prejudice to the accused caused by the delay, the court is interested in three things: (1) "prevent[ing] oppressive pretrial incarceration"; (2) "minimiz[ing] anxiety and concern of the accused"; and (3) "limit[ing] the possibility that the defense will be impaired." *Dunaway*, 60 S.W.3d at 571-72 (internal quotation marks and citation omitted). "The possibility of prejudice alone is not sufficient to support the position that speedy trial rights have been violated. It is the burden of the defendant to establish actual prejudice." *Preston*, 898 S.W.2d at 507. Mercado contends he was prejudiced in the sense that he was held in custody for the entire time until he was tried, and he also lost his job. He further alleges that if the circuit court had enforced his right to a speedy trial, the DNA testing would not have been completed, and because DNA testing was allegedly central to the Commonwealth's case, he likely would not have been convicted.

As for Mercado's claim that he was prejudiced because he was held in custody the entire time from his arrest until trial, as discussed previously, the circuit court was willing to release him on home incarceration if Mercado identified a suitable residence where he could stay. However, the only residences Mercado identified within Kentucky were a residence that was either next door or right behind his stepdaughter's house, and another residence only a couple of miles from her house, both of which the court found were too close to his stepdaughter to be suitable places for his home incarceration. Under the facts of this case, we find no error in the circuit court's determination that these residences were not suitable locations for Mercado's home incarceration.² Thus, Mercado could have been released on home incarceration if he had only identified a suitable location where he could stay. Therefore, this allegation of prejudice lacks merit.

Regarding Mercado's allegation that he was prejudiced because he lost his job, that is not one of the three things mentioned previously that might demonstrate the accused was prejudiced by the delay. Thus, this claim lacks merit.

Mercado further claims that he was prejudiced when the circuit court failed to enforce his right to a speedy trial because if it had enforced it, the DNA testing would not have been completed and he likely would not have been

² If the locations under scrutiny were in a large city, a court might rightfully find that a residence two to three miles away from the purported victim's residence qualifies as a suitable location, but under the facts of this case, there was no error in the circuit court deciding that the distance needed to be greater. However, we doubt that a residence next door to or in the immediate vicinity of the alleged victim's residence will ever be an appropriate location for home incarceration.

convicted. Mercado misinterprets what the court means when we say that to prevent prejudice, we are concerned with “limit[ing] the possibility that the defense will be impaired.” The types of impairment to the defense that the court is concerned with are those such as when memories fade over time and witnesses die, not the “impairment” caused to the defense when DNA testing is finally completed and the test results implicate the defendant. Therefore, Mercado has failed to show that he was prejudiced by the delay in bringing him to trial.³

In conclusion, the three-month delay weighed slightly in favor of Mercado. But balancing that factor against Mercado’s failure to demonstrate actual prejudice, we find that the circuit court properly found that Mercado’s claim of a violation of his right to a speedy trial lacked merit.

C. LESSER-INCLUDED OFFENSE

Finally, Mercado contends that the circuit court erred when it instructed the jury on a lesser-included offense of rape in the second degree over his objection. Specifically, he alleges that “[i]nstructing the jury on lesser-included offenses that did not carry the requirement of proving physical helplessness prejudiced [him].”

An instruction on a lesser[-]included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt

³ Alternatively, we note that Mercado’s claim that he was prejudiced when the circuit court failed to enforce his right to a speedy trial because if it had enforced it, the DNA testing would not have been completed and he likely would not have been convicted is conclusory. In fact, his stepdaughter testified about the events in question, so the jury still could have convicted Mercado even if the DNA testing had not been completed.

of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense. Further, by its plain terms, RCr 9.54 imposes a duty on the trial court to instruct the jury on the whole law of the case; that is, this rule requires instructions applicable to every state of the case deducible from or supported to any extent by the testimony.

Hudson v. Commonwealth, 385 S.W.3d 411, 416 (Ky. 2012) (internal quotation marks and citations omitted).

A person is guilty of rape in the first degree when:

- (b) He engages in sexual intercourse with another person who is incapable of consent because he:
 1. Is physically helpless; or
 2. Is less than twelve (12) years old.

Kentucky Revised Statutes (KRS) 510.050(b).

Regarding second-degree rape, a person is guilty of that charge when:

- (a) Being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old; or
- (b) He engages in sexual intercourse with another person who is mentally incapacitated.

KRS 510.040.

There was conflicting evidence regarding whether the victim was intoxicated at the time of the rape, rendering her physically helpless. Mercado testified that the victim had nothing to drink, and blood tests supported this.

Nonetheless, the victim, age thirteen at the time, testified that she was intoxicated at the time. Regardless of whether Mercado's or the victim's testimony was given more credibility by the jury, the fact that the victim was under fourteen years of age at the time of the crime patently supported the trial court instructing the jury on the lesser-included offense of second-degree rape. Consequently, this claim lacks merit.

Accordingly, the judgment of the Carter Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Gerhart Landon
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky
Frankfort, Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky