RENDERED: AUGUST 7, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002068-MR

CHRISTOPHER GRIGSBY — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 11-CR-00054

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND VANMETER, JUDGES.

VANMETER, JUDGE: Christopher Grigsby was convicted of sexual abuse first degree by the Marion Circuit Court and received a five-year sentence. Grigsby appeals a number of the trial court's evidentiary rulings, including the exclusion of previous allegations of sexual abuse by the victim. Because we believe that the

exclusion of those previous allegations inhibited Grigsby's constitutional right to present a meaningful defense, we reverse and remand for a new trial.

I. Factual and Procedural Background.

Grigsby was indicted by the Marion Circuit grand jury and originally charged with thirteen sex crimes[1] involving his step-daughter, A.B., the daughter of Grisgby's wife, Crystal. A.B. was five years old when the charges arose. After a jury trial, Grigsby was acquitted of all charges, except one. He was convicted of sexual abuse in the first degree, as a lesser included offense of the original charge of rape in the first degree.

II. Standard of Review.

In *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000), the Kentucky Supreme Court stated, "abuse of discretion is the proper standard of review of a trial court's evidentiary rulings. The same standard applies under the Kentucky Rules of Evidence[]" (internal citations omitted). The test for abuse of discretion is "'whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *McDaniel v. Commonwealth*, 415 S.W.3d 643, 655 (Ky. 2013) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

III. Issues on Appeal.

[1] Grigsby was charged with two counts of rape in the first degree, four counts of sodomy in the first degree, one count of sexual abuse in the first degree, and six counts of incest.

Grigsby challenges a number of the trial court's evidentiary rulings: a) excluding the victim's testimony of other allegations involving sexual contact: b) admitting into evidence an electric blanket seized by a deputy sheriff and its semen evidence despite a gap of seventy-six days in its chain of custody; c) permitting introduction of Grigsby's DNA from the blanket without confirming the source of other unknown DNA on the blanket; and d) permitting medical opinion evidence without a proper foundation. And finally, Grigsby challenges, under palpable error review, the jury instruction used to convict him of sexual abuse first degree. We address these issues in turn, with additional facts as necessary.

A. Exclusion of Previous and Contemporary Allegations of Sexual Activity.

Grigsby filed a pretrial motion to permit testimony of A.B.'s claims that an eight-year-old, D.D., had performed sodomy on her over a year prior to the allegations involving Grigsby, and that this act had been witnessed by her six-year-old brother, M.G. In addition, Grigsby sought to introduce A.B.'s allegation of a similar act by M.G. The trial court denied the motion based on *Capshaw v. Commonwealth*, 253 S.W.3d 557 (Ky. App. 2007); finding that since the allegations had not been shown to be demonstrably false, they were inadmissible. Grigsby argues the trial court erred, and that since the evidence was not presented as evidence of A.B.'s character, he was denied his right to present a meaningful defense.

KRE[2] 412 provides:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> > (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> >
> > (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions:
>
> > (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
> >
> > (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> >
> > (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> >
> > (C) any other evidence directly pertaining to the offense charged.

KRE 412 is commonly known as the "rape shield" law. In *Capshaw*, after analyzing earlier cases, this court held that "Kentucky's Rape Shield law applies to prior accusations to the extent that the statements are (1) true or (2) have not been proven to be demonstrably false. And, even if proved to be demonstrably false, the allegations must survive a balancing test." 253 S.W.3d at 565. In other

[2] Kentucky Rules of Evidence.

words, prior accusations are admissible only if they are shown to be "demonstrably false."[3] The court further stated that "'demonstrably false' is self explanatory: '[p]rior accusations are demonstrably false where the victim has admitted the falsity of the charges or they have been disproved.'" *Id.* (citation omitted). In this case, A.B.'s allegations have not been shown to be demonstrably false, and thus would be inadmissible under the *Capshaw* analysis.

Notwithstanding, Grigsby argues that in *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010), the Kentucky Supreme Court effectively modified the *Capshaw* ruling such that "KRE 412 must be construed, as must all the rules of evidence, in a manner that does not contravene [a defendant's] constitutional right to present a meaningful defense[.]" *Id*. at 40. The Court expounded at length on the tension between KRE 412 and a defendant's right to present a meaningful defense:

> As these cases establish, [a defendant] has a right under the federal Constitution (and the Kentucky Constitution as well) to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. [683,] 690, 106 S.Ct. 2142[, 90 L.Ed.2d 636 (1986)] (quoting from *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)); *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003). That right, grounded in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution, includes, of course, Montgomery's right to testify on his own behalf, *Rock v. Arkansas*, [483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)], and his right to cross-examine the

[3] In addition, a demonstrably false accusation must also survive a balancing test to be admissible, *i.e*., "the probative value of the evidence [must] outweigh[] its prejudicial effect." *Id*. (quoting *Berry v. Commonwealth*, 84 S.W.3d 82, 91 (Ky. App. 2001)).

witnesses against him. *Davis v. Alaska*, [415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)]. Indeed, "an accused's right to present his own version of events in his own words," the United States Supreme Court has explained, is "[e]ven more fundamental to a personal defense than the right of self-representation." *Rock*, 483 U.S. at 52, 107 S.Ct. 2704. The Supreme Court has recognized, moreover, that "a proper and important function of the constitutionally protected right of cross-examination" is "the exposure of a witness' motivation in testifying." *Delaware v. Van Arsdall*, 475 U.S. [673,] 678–79, 106 S.Ct. 1431[, 89 L.Ed.2d 674 (1986)] (citation and internal quotation marks omitted). These rights must be balanced, however, against both the wide latitude trial judges retain "to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," *id*. at 679, 106 S.Ct. 1431, and the broad latitude state rule makers have "to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).

In *Michigan v. Lucas*, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991), the Supreme Court addressed the need to balance these competing concerns in the context of a rape shield law. The Court reversed a decision by the Michigan Court of Appeals holding that the notice requirement in Michigan's rape shield law violated, per se, the Sixth Amendment in all cases where it was used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant. Noting that the Michigan statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy," *id*. at 150, 111 S.Ct. 1743, the Court asserted that the Sixth Amendment right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id*. at 149, 111 S.Ct. 1743 (*quoting from Rock*, 483 U.S. at 55, 107 S.Ct. 2704). In upholding the rape shield law's notice provision, the Court emphasized

that any restrictions on a criminal defendant's right to confront witnesses and to present relevant evidence, "'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Id.* at 151, 111 S.Ct. 1743 (*quoting from Rock*, 483 U.S. at 56, 107 S.Ct. 2704).

In the wake of *Lucas* and *Rock*, numerous courts have held that with those cases the Supreme Court established a balancing test for evaluating, on a case-by-case basis, Confrontation Clause and other Sixth Amendment challenges premised upon the exclusion of evidence. Under that test, courts must "determine whether the rule relied upon for the exclusion of evidence is 'arbitrary or disproportionate' to the 'State's legitimate interests.'" *Barbe v. McBride*, 521 F.3d 443, 457 (4th Cir. 2008) (*quoting from Quinn v. Haynes*, 234 F.3d 837, 849 (4th Cir. 2000) and discussing what the Fourth Circuit has referred to as the "*Rock–Lucas* principle"). *See also, e.g.*, *United States v. Pumpkin Seed*, 572 F.3d 552 (8th Cir. 2009); *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007); *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005); *LaJoie v. Thompson*, 217 F.3d 663 (9th Cir. 2000). The Supreme Court itself has applied this standard in *Holmes v. South Carolina,* [547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)] and *United States v. Scheffer, supra.*

An evidentiary exclusion is not arbitrary if it meaningfully furthers a valid purpose the rule was meant to serve. *Holmes, supra; United States v. Pumpkin Seed, supra*. In determining whether the exclusion is disproportionate, courts have weighed "the importance of the evidence to an effective defense, [and] the scope of the ban involved" *White v. Coplan*, 399 F.3d at 24 (citing *Davis* and *Van Arsdall*), against any prejudicial effects the rule was designed to guard against. *Barbe, supra; LaJoie, supra*. Exclusions have been found invalid where the probative value of the excluded evidence was substantial, *White; Barbe*, and where the trial court failed to consider its probative value, *Holmes*, but they have been upheld where the probative value of the excluded evidence was deemed slight, *Pumpkin Seed; Quinn. Cf. Van Arsdall* at 680, 106 S.Ct. 1431 (holding that a

defendant states a violation of the Confrontation Clause where "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.").

4. The Trial Court's Rulings Reflect a Proper Balancing of The Competing Interests.

With this constitutional background in mind, we turn again to KRE 412. Although we have not often had occasion to consider the application of KRE 412(b)(1)(C), the residual exception to the rule, in the few cases we have considered we have adopted an approach much like and completely consistent with the balancing of interests required under the federal constitution. In *Barnett v. Commonwealth*, 828 S.W.2d 361 (Ky. 1992), for example, we construed a virtually identical provision in KRE 412's predecessor statute, and held that in the face of medical evidence establishing that the young victim had been sexually active, evidence of the victim's sexual contact with her brother was crucial to the defense and should have been admitted as "directly pertaining" to the charged offense. Similarly, in *Anderson v. Commonwealth*, 63 S.W.3d 135 (Ky. 2001), we again held that evidence of the child victim's prior sexual activity "directly pertained" to the charges inasmuch as it provided the defense's only means of countering medical evidence showing that the victim had been sexually active. In *Woodard v. Commonwealth*, 219 S.W.3d 723 (Ky. 2007), *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997), and *Violett v. Commonwealth*, 907 S.W.2d 773 (Ky. 1995), on the other hand, we held, respectively, that marginally probative collateral evidence concerning the victim's prior sexual activity, evidence of the victim's remote and doubtfully relevant prior acts, and cumulative evidence of the victim's alleged conspiracy with her boyfriend to "get the defendant out of the way" did not outweigh the purposes of the rule and so did not "pertain directly" to the charged offenses. We add little to this precedent by holding now that evidence of a sexual offense victim's prior sexual behavior pertains directly to the charged offense and thus

is admissible under the KRE 412(b)(1)(C) residual exception if, and only if, exclusion of the evidence would be arbitrary or disproportionate with respect to KRE 412's purposes of protecting the victim's privacy and eliminating unduly prejudicial character evidence from the trial.

In this case, Montgomery sought to introduce evidence that K.B. had passed a sexually explicit note at school, that she had posted sexually explicit material on the internet, that she had behaved in a sexually suggestive manner toward her brother's friends, and that she had made statements about having had sex with her brother. Montgomery first argues that this evidence was probative of K.B.'s sexual knowledge and was necessary to counter the jury's likely presumption that she would not have known about intercourse or about male ejaculation unless Montgomery had in fact abused her. As Montgomery notes, several courts have ruled evidence of a young victim's prior sexual experience admissible on this alternative-source-of-knowledge ground. *See State v. Budis*, 125 N.J. 519, 593 A.2d 784 (1991) (collecting cases); *State v. Jacques*, 558 A.2d 706 (Me. 1989). In most of those cases, however, the victim was very young at the time he or she made the allegations, generally under eleven; the victim had had a well-documented prior experience; and the details of the prior experience were strikingly like the details of the alleged offense. Here, while K.B. conceded at trial that in 2002 when she first accused Montgomery of "rape" she did not even know what the term meant, by May 2005, when she first made her more detailed allegations in this case, she was fourteen years old, old enough in our sexually saturated culture to have acquired a great deal of sexual knowledge. K.B.'s jury was thus not likely to presume, as in the case of younger victims, that K.B.'s knowledge must have derived from experience. The evidence Montgomery sought to introduce, moreover, does not clearly establish a similar prior incident, one the details of which could account for some particularly striking detail in her accusations against Montgomery. In terms of sexual detail, indeed, K.B.'s accusations were fairly generic, the sort of detail a teenager might know,

> and thus the excluded circumstantial evidence, no striking details of which have been brought to our attention, would have added little, if anything, to the jury's understanding of K.B.'s knowledge. On the other hand, the excluded evidence posed a substantial threat of casting K.B.'s character in a bad light and distracting the jury from the real issues in the case, the principal evils which KRE 412's shield is intended to avoid. With respect to K.B.'s knowledge, therefore, the exclusion of the evidence was neither arbitrary nor disproportionate, and on that ground, accordingly, the trial court did not
>
> abuse its discretion under KRE 412 or deprive Montgomery of any constitutional right.

Montgomery, 320 S.W.3d at 41-43.

We have included this extensive quotation from *Montgomery* because it highlights the balancing that the trial court must undertake: to weigh the value of A.B.'s testimony to Grigsby's defense, in the context in which Grigsby intended to use such evidence, against the potential for such evidence to violate A.B.'s privacy or produce unduly prejudicial character evidence. The trial court failed to conduct this balancing test. We have reviewed the record and have applied the requirements in *Montgomery* to this case. Grigsby intended to use testimony regarding A.B.'s prior experience with sexual abuse to show that A.B. had prior knowledge, despite her very young age, of certain aspects of sexual conduct. He did not intend to use the testimony as evidence of A.B.'s character or to expose her. While the trial court focused solely on whether A.B.'s allegations were demonstrably false under the holding in *Capshaw*, Grigsby sought to present the testimony, which, if true, would tend to show that A.B. had knowledge of sexual

acts which she gained prior to the alleged incident with Grigsby and which is directly pertinent to the charges against him. We believe the exclusion of this evidence contravened Grigsby's constitutional right to present a meaningful defense, and thus reverse and remand for a new trial including this evidence.

On retrial and since Grigsby was acquitted of every charge except one count of sexual abuse in the first degree, double jeopardy will prevent his retrial of any other offense arising out of the factual allegations in the indictment. *See Couch v. Maricle*, 998 S.W.2d 469, 471 (Ky. 1999) (holding that if "the conviction of the lesser-included offense is reversed on appeal, the defendant cannot be retried upon any other higher degrees of the offense[]"). Since some of Grigsby's other arguments on appeal may arise on remand, we will address each argument below.

B. Chain of Custody of Electric Blanket.

The victim, A.B., testified that Grigsby had vaginal and anal intercourse with her during the spring of 2011. A.B., during a forensic interview in April 2011, stated that some "white stuff" issued from Grigsby and some got on an electric blanket nearby. As a result of that information, Deputy Sheriff Anthony Rakes and Deputy Sheriff John Dearing went the following day, April 15, 2011, to Grigsby's home and took possession of the electric blanket and placed it in a brown paper bag and then put it in the trunk of Deputy Rake's cruiser.[4] Megan Dillary, an employee of the Kentucky State Police Central Forensic Laboratory testified that she received an electric blanket from Deputy Rakes on July 1, 2011.

[4] Deputy Dearing testified as to the seizure of the blanket, because Deputy Rakes was killed in the line of duty in November 2012.

Jimmy Clements, the Marion County Sheriff and official evidence custodian for his office, was unable to testify as to when Deputy Rakes delivered the blanket to and removed the blanket from the evidence locker. The blanket tested contained semen and DNA confirmed as Grigsby's.

Prior to trial, Grigsby moved to suppress evidence of the blanket and the DNA results based on the Commonwealth's inability to prove the chain of custody. The trial court denied the motion on the basis that the chain of custody had been sufficiently established.

The Commonwealth concedes that "a chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis." *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998). The Kentucky Supreme Court, however, has also noted that "[e]ven with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'" *Id.* (quoting *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989)). "Gaps in the chain normally go to the weight of the evidence rather than to its admissibility." *Rabovsky*, 973 S.W.2d at 8. (citing *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988).

More recently, in *Hunt v. Commonwealth*, 304 S.W.3d 15, 29 (Ky. 2009), the court held that

> "[t]he requirement of ... identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." KRE 901(a). "All possibility of tampering does not have to be negated. It is sufficient ... that the actions taken to preserve the integrity of the evidence are reasonable under the circumstances." *Thomas v. Commonwealth*, 153 S.W.3d 772, 778 (Ky. 2004).

In *Hunt*, the defendant argued that the chain of custody had an impermissible gap due to the collecting officer drying the defendant's clothes in the officer's wood shed prior to submitting to the lab. The court affirmed the trial court, holding that "no realistic possibility [exists] that someone could have broken into [the] wood shop and planted [the victim's] blood on it." 304 S.W.3d at 29.

Similarly, in this case, even assuming that the blanket stayed in the trunk of Deputy Rakes' cruiser for over two months, Grigsby points to no reasonable scenario by which his DNA might have been surreptitiously planted on the blanket. Grigsby's argument is that the DNA might have degraded in hot weather. Degradation clearly did not occur since Grigsby's DNA was confirmed to have been on the blanket. The trial court did not err in denying the motion to suppress.

C. Failure to Exclude Blanket's DNA Evidence Based on Failure to Test/Compare Crystal Grigsby's DNA.

After preliminary testing confirmed the presence of Grigsby's DNA on the blanket, the KSP crime lab performed tests in order to attempt to determine if A.B.'s DNA was on the blanket. The lab was unable to confirm the presence of A.B.'s DNA on the blanket. The Commonwealth further did not submit a DNA sample from Crystal, despite her testimony that Grigsby and she had had sexual intercourse on the bed and that the blanket was kept nearby. The trial court denied Grigsby's motion to exclude the DNA test results as more prejudicial than probative.

Under KRE 402, the general rule is that "[a]ll relevant evidence is admissible[.]" One major exception to admissibility is provided by KRE 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice[.]" The weighing of probative value versus undue prejudice is left to the sound discretion of the trial judge. *Rake v. Commonwealth*, 450 S.W.2d 527, 528 (Ky. 1970). A trial court's ruling under KRE 403 is reviewed for abuse of discretion. *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). Having reviewed the record, we are unable to say that the trial judge abused his discretion in not excluding Grigsby's DNA evidence.

D. Failure to Exclude Hearsay Evidence.

Grigsby objected to two instances of hearsay testimony. First, Dr. Christina Knicely, a pediatrician, who performed a physical exam on A.B., testified that A.B. was found to be a normal seven year old with no bruises, cuts,

dilation, enlargement or spreading of the vaginal or anal areas. To this testimony, Dr. Knicely added that studies of abuse found persons examined in 95% of cases would appear normal. Grigsby's objection was overruled. Second, Crystal testified that A.B. told her that Grigsby and A.B. had been "having sex." Again, Grigsby's objection was overruled.

We anticipate that that this evidence will largely be irrelevant on retrial, since the only remaining charge is sexual abuse in the first degree. We will not, however, undertake to direct the parties with respect to their strategic decisions, and thus will comment briefly on this evidence. With respect to Dr. Knicely's testimony regarding studies, we do not believe a sufficient foundation was laid, as required by KRE 803(18), to establish this testimony as "learned treatise" testimony, and the trial court erred in overruling the objection. *See Harman v. Commonwealth*, 898 S.W.2d 486, 490-91 (Ky. 1995) (holding that expert witness had "laid a sufficient foundation to establish this treatise as a 'learned treatise' and a reliable authority on the subject[]"). By contrast, Dr. Knicely only cited unnamed studies. At any new trial on remand, we assume this deficiency may be cured.

As to Crystal's testimony, her statement that A.B. told her that Grigsby and A.B. had been "having sex" was admitted when A.B. herself was available to testify. KRE 801A(a) may provide an exception relevant to Crystal's testimony regarding A.B.'s statement. This rule[5] allows the hearsay statement to be admitted

[5] KRE 801A(a) sets forth rules governing prior statements of witnesses, and provides:

when the statement is "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." *See Schambon v. Commonwealth*, 821 S.W.2d 804, 810-11 (Ky. 1991) (stating "[o]ur law is that once a witness's credibility has been attacked by charges of recent fabrication or improper influence, rebuttal evidence may be introduced to show that the witness made a prior consistent statement at a time when there was no improper influence or motive to fabricate[]")(quoting *Eubank v. Commonwealth*, 210 Ky. 150, 275 S.W. 630 (1925)). Again, rather than make a sweeping declaration concerning the admissibility of this testimony, on retrial, if a party wishes to introduce this testimony, KRE 801A(a)'s requirements are to be complied with.[6]

E. Error regarding Jury Verdict Form.

> (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 is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> (1) Inconsistent with the declarant's testimony;
>
> (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; or
>
> (3) One of identification of a person made after perceiving the person.

[6] Our review of the record is that no effort was made to argue that A.B. had recently fabricated the allegation contained in the statement, or that she was improperly influenced or had an improper motive. Crystal's testimony in this instance only served to vouch for the truthfulness of A.B.'s statement, which is impermissible. *See Dickerson v. Commonwealth*, 174 S.W.3d 451, 472 (Ky. 2005) (stating "[i]t is improper to permit a witness to testify that another witness has made prior consistent statements, absent an express or implied charge against the declarant of recent fabrication or improper influence[]").

Finally, Grigsby argues that the jury verdict form for the one offense of which he was convicted, sexual abuse in the first degree, was erroneous since the jury was not provided a place to find him "not guilty." As previously noted, *supra*, the guilty verdict on this count was the result of the jury finding Grigsby guilty of a lesser offense of the original charge of rape in the first degree. This argument is rendered moot by the reversal and remand for retrial only on one count of sexual abuse in the first degree.

IV. Conclusion.

The Marion Circuit Court's judgment is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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