

RENDERED: AUGUST 18, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001023-MR

GHIAS ARAR

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 13-CR-000866

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Ghias Arar (“Arar”) appeals from the Jefferson Circuit Court’s judgment and sentence, entered June 26, 2015, following conviction at jury trial for multiple counts of sexual abuse. Because the Commonwealth concedes a lesser-included instruction was appropriate for one of the charged offenses, yet was not provided by the circuit court, we reverse one of Arar’s convictions for first-

degree sexual abuse and remand for further proceedings. We affirm the circuit court as to all other issues.

BACKGROUND

In February 2013, Tara Batrice had recently moved to Kentucky from Colorado with her husband and two children. Despite being only about thirty-seven years old, Tara was a very ill woman. She suffered from vascular bone disease, fibromyalgia, migraines, and had a history of epileptic seizures. At the time, she was also recovering from an operation in which both of her hips had been replaced, and thus required the use of a walker. Tara had been referred to Arar, a board-certified neurologist working in Louisville, Kentucky, by her treating physician.

Tara's appointment with Arar took place on or about February 22, 2013. In the course of her appointment, and despite her unwillingness to participate in such activities, Arar pinned Tara to the examination table with his body weight, kissed and fondled her breasts, and rubbed her vagina. Tara kept telling Arar she wanted to leave. Arar eventually removed himself from the examination table, and Tara managed to get to her walker. When she was attempting to leave, Arar turned toward her and began masturbating. After ejaculating on the sleeve of Tara's jacket, Arar attempted to clean himself with some tissues. Tara surreptitiously collected some of the used tissues as evidence, fearing that no one would believe her if she simply told them about the incident. She left the doctor's office and called her parents in order to ask what she should

do. Tara ended up driving to the SANE (Sexual Assault Nurse Examiner) program at University of Louisville Hospital, where personnel were able to treat her and collect the physical evidence. Forensic testing would later show the substance on Tara's jacket and the tissues to be semen matching Arar's DNA.

Tara hired an attorney to pursue civil litigation against Arar, and the publicity surrounding the civil suit induced several other women to come forward. Lisa Ward would later testify that she had an appointment with Arar on December 10, 2012, in which Arar touched her breasts and nipples with his stethoscope, while ostensibly checking her heart and lung sounds. At one point, Arar lifted Lisa from the examination table, and began hugging her. Lisa's three-year-old daughter was in the room with her during this appointment.

Despite these events, Lisa returned for a second appointment at Arar's office on February 12, 2013. She decided to risk another visit because she needed to pick up her magnetic resonance imaging (MRI) test results for an upcoming disability hearing. Lisa anticipated the visit would only take five or ten minutes, and was not even certain that Arar would be present. However, Lisa did see Arar when she arrived. He once again checked her heart and lungs with his stethoscope, and was more aggressive about trying to pull up on Lisa's shirt, while Lisa was just as intent about pulling her shirt down. Eventually, Arar succeeded in getting under Lisa's shirt and bra, and began fondling her breasts. He was agitated when Lisa refused to remove her pants so he could examine her inner thigh. Later in the visit, Arar began to hug Lisa and pressed against her to the point where she could feel

his erection through his pants. She was able to leave the doctor's office shortly thereafter.

Jessica Curtis suffers from lupus, as well as back and nerve issues. She would later testify about her appointment with Arar at his office on July 3, 2012. During the appointment, Arar rubbed her back, shoulders, and thighs. Jessica declined Arar's request for her to remove her camisole. Nonetheless, he reached beneath her clothing with his stethoscope and touched her bare breasts in the process. He then advanced upon her and tried several times to kiss her, but she repeatedly turned her head away. She did not report the incident at the time because she did not believe she had any way to prove the incident occurred.

Stacey Melvin suffers from chronic headaches. She would later testify she went to Arar's office on January 17, 2013, because she was concerned the headaches could indicate a more serious health problem. In a now-familiar pattern, Arar touched Stacey's bare breasts under the guise of listening to her heart with his stethoscope. Uncomfortable with how Arar was pulling up her shirt, she pulled her shirt down, using the excuse that she needed a "tummy tuck." After groping her breasts, Arar stated they could "work something out" with regard to the expense of a tummy tuck. He also told Stacey she did not need plastic surgery on her breasts, "because they're perfect the way they are."

Stacey was scheduled to return to Arar's office for an electroencephalogram (EEG) one week later, but she did not go to that appointment because she was uncomfortable with the doctor's conduct. However,

after suffering through a headache that lasted three days, she relented and decided to go back to Arar's office for testing. On an earlier occasion, she had gotten an EEG from Arar's office without ever seeing the doctor. Therefore, Stacey believed she could return for another EEG without seeing Arar. Unfortunately, when Stacey returned on January 29, 2013, Arar was in the office. In the process of checking her heartbeat, Arar placed his hands underneath Stacey's clothing and rubbed her breast and nipple. Stacey did not initially report these events because she did not think anyone would believe her. Stacey would later testify she went to Arar for help, but she believed the doctor was just helping himself.

On March 21, 2013, the Jefferson County grand jury returned an indictment against Arar, charging him with the following: one count of first-degree sexual abuse¹ for the incident against Tara Batrice on February 22, 2013; one count of first-degree sexual abuse for the incident against Lisa Ward on February 12, 2013; and six counts of third-degree sexual abuse² based on the remaining allegations. Following a week-long jury trial, Arar was found not guilty of two counts of third-degree sexual abuse against a party not involved in this appeal, but guilty of all remaining counts of the indictment stemming from the aforementioned testimony. On June 26, 2015, the trial court sentenced Arar to two terms of three years each for the two first-degree sexual abuse charges. The court

¹ Kentucky Revised Statutes (KRS) 510.110(1)(a), a Class D felony.

² KRS 510.130, a Class B misdemeanor.

ordered the terms to be served concurrently, for a total sentence of three years' imprisonment. This appeal follows.

ANALYSIS

Arar presents four issues on appeal. For his first issue, he contends the court erred by improperly limiting his cross-examination of Tara Batrice. Prior to her move to Kentucky, Tara had undergone physical rehabilitation at a facility in Colorado, following her double-hip replacement surgery. A former nurse from the Colorado facility, Marianne Santiago, had contacted defense counsel's investigator about one particular incident that occurred during Tara's recovery. According to Santiago, Tara filed a complaint alleging abuse when Santiago refused to provide her with her prescribed pain medications. This led to Santiago being suspended from work for two days while an investigation took place. Following the investigation, she was reinstated without being disciplined.

Arar wished to cross-examine Tara about this incident, arguing this was directly linked to his defense theory: Tara is addicted to narcotics, and when she is denied access to those medications, she retaliates with false allegations of abuse against medical providers. Over the course of the week-long trial, the circuit court conferred with counsel extensively on the issue in periodic bench conferences. The court initially believed the incident may be relevant and was inclined to allow cross-examination on the issue, but wanted to see more evidence. On the last day of trial, the Commonwealth was able to provide subpoenaed documentary evidence from Colorado, in the form of Santiago's personnel file and

Tara's medical records. The Commonwealth's interpretation of the Colorado incident was that no formal complaint was ever lodged against the nurse. Santiago decided on her own to not provide Tara with her prescribed medications, and Tara's husband, not Tara herself, responded by going to the charge nurse.

The court reviewed the records from the bench before counsel, and found no evidentiary basis for the points Arar wished to make on cross-examination. The Colorado records merely indicated the following: Tara was at the facility following her hip surgery; while there, she had her medications adjusted by healthcare professionals; Tara's family had input into the adjusted medications; and Santiago had a variety of employment issues. The court did not consider any of this to be direct evidence of anything for Arar's trial. Ultimately, the court held that under *Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2012) and *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010), the defense failed to show a factual basis supporting its version of the Colorado incident, and so the proposed cross-examination relating to the incident would not be permitted.

“An appellate court's standard of review for admission of evidence is whether the trial court abused its discretion.” *Brewer v. Commonwealth*, 206 S.W.3d 313, 320 (Ky. 2006) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (quoting *English*, 993 S.W.2d at 945).

Arar contends the circuit court's limitation on cross-examination "creat[ed] Constitutional error." We disagree. "The right to cross-examine witnesses is . . . [a]n essential aspect of the Sixth Amendment Confrontation Clause . . . [b]ut that right is not absolute," and "trial courts have broad discretion to impose reasonable limits on such cross-examination[s]." *Newcomb v. Commonwealth*, 410 S.W.3d 63, 85 (Ky. 2013) (internal quotation marks and footnotes omitted). "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986)) (emphasis omitted). "[T]rial judges enjoy wide latitude 'to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant[.]'" *Dennis*, 306 S.W.3d at 473 (quoting *Delaware v. Van Arsdall*, 475 U.S. at 679, 106 S.Ct. 1431).

Arar argues he was entitled to cross-examine Tara, based upon Kentucky Rules of Evidence (KRE) 608(b). KRE 608(b) permits cross-examination of a witness on prior bad acts not resulting in a criminal conviction, insofar as the acts comment on the purported dishonesty of the witness. However, KRE 608(b) does not *require* admission, but merely *permits* this form of cross-

examination at the discretion of the trial court. Furthermore, the cross-examiner must have:

a factual basis for the subject matter of his inquiry. [KRE 608(b)] vests the trial court with broad discretion in its application, and in exercising that discretion the court should assess both the sufficiency of the examiner's factual predicate as well as the prior bad act's relevance to the witness's truthfulness or untruthfulness.

Rogers v. Commonwealth, 366 S.W.3d 446, 454-55 (Ky. 2012) (internal quotation marks omitted). Applying these principles, we do not find an abuse of discretion in the court's decision to deny cross-examination on a matter insufficiently supported by the factual predicate. "[A] connection must be established between the cross-examination proposed to be undertaken and the facts in evidence."

Davenport v. Commonwealth, 177 S.W.3d 763, 768 (Ky. 2005) (quoting *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997)). Here, the circuit court found no factual basis supporting Arar's interpretation of the events in Colorado and appropriately denied cross-examination on the matter. We decline to find an abuse of discretion.

Arar's next two issues concern his conviction for first-degree sexual abuse against Lisa Ward. For his second issue, Arar contends he was entitled to a directed verdict because the Commonwealth did not prove the element of "forcible compulsion" contained within KRS 510.110(1)(a). We need not consider this argument because the Commonwealth concedes Arar's third issue: the circuit court should have provided an instruction for third-degree sexual abuse as a lesser-

included offense. In the trial court's discussions with counsel about the jury instructions, Arar argued the first-degree sexual abuse charge against Lisa Ward more closely resembled third-degree sexual abuse. The Commonwealth stated it believed there was enough evidence to find first-degree sexual abuse, but admitted, "I don't think it would be inappropriate to give a lesser-included of sex abuse third." Without elaboration on its reasoning, the circuit court declined to do so.

A trial court's decision on whether to give a particular instruction is reviewed for abuse of discretion. *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015). "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Hunt v. Commonwealth*, 304 S.W.3d 15, 30 (Ky. 2009) (quoting *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999)). "Refusal to allow such an instruction, when supported by the evidence presented, constitutes reversible error." *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995).

Arar's argument, both here and at trial, revolves around the question of whether Lisa Ward was subjected to forcible compulsion. "A lesser-included offense is an offense that includes the same or fewer elements than the primary offense." *Clark v. Commonwealth*, 223 S.W.3d 90, 94 (Ky. 2007) (citations omitted). Absent a finding of forcible compulsion, the evidence would support a charge of third-degree sexual abuse, in which the accused is alleged to have "subject[ed] another person to sexual contact without the latter's consent." KRS

510.130. The Commonwealth conceded at trial that a lesser-included instruction for third-degree sexual abuse was appropriate, and reiterates that point in its brief. The record also demonstrates that Arar requested the lesser-included instruction on this charge. We must therefore reverse the conviction for first-degree sexual abuse as to Lisa Ward and remand for further proceedings.

For his fourth and final issue, Arar contends the form of the trial court's jury instructions resulted in a violation of the Kentucky Constitution's unanimous jury requirement. In discussing unanimity problems, the Kentucky Supreme Court has disallowed "a general jury verdict based on an instruction including two or more separate instances of a criminal offense." *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013). Here, the instructions numbered 1, 2, and 4 were formatted in such a way that the connector "AND/OR" was used between specific factual findings to be initialed by the jury foreperson. By way of example, the relevant portion of the verdict form corresponding to Instruction Number One states as follows:

If we have found the defendant guilty under this verdict form, that finding is based on our unanimous finding that the defendant, on February 12th, 2013, did the following:

___ He touched her bare breast with his fingers or stethoscope;

AND/OR

___ He grabbed her butt cheeks with his hand;

AND/OR

___ He fondled her bare legs;

AND/OR

___ He leaned against her, gave her a hug, and tried to kiss her.

We have initialed each statement that we as a jury unanimously found as a basis for this verdict.

FOREPERSON

We may not reach the merits of Arar’s argument, however, because the “AND/OR” connectors Arar now considers problematic were inserted at his request during trial, and thus constitute invited error. “[I]nvited errors that amount to a waiver, *i.e.*, invitations that reflect the party’s knowing relinquishment of a right, are not subject to appellate review.” *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011) cited with approval in *Thornton v. Commonwealth*, 421 S.W.3d 372, 376-77 (Ky. 2013). “Generally, a party is estopped from asserting an invited error on appeal.” *Quisenberry* at 37 (citing *Gray v. Commonwealth*, 203 S.W.3d 679, 686 (Ky. 2006)). Arar argues the error was so profound as to require us to review for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26. “Under Criminal Rule 10.26, an unpreserved error may only be corrected on appeal if the error is both palpable and affects the substantial rights of a party to such a degree that it can be determined manifest injustice resulted from the error. For error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. The rule’s requirement of manifest injustice requires showing . . . [a]

probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Young v. Commonwealth*, 426 S.W.3d 577, 584 (Ky. 2014) (citations and internal quotation marks omitted). However, "palpable error review is unavailable when a party tenders instructions that are substantially similar to those ultimately given by the trial judge." *Webster v. Commonwealth*, 438 S.W.3d 321, 324 (Ky. 2014) (citing *Thornton v. Commonwealth*, 421 S.W.3d 372, 376-77 (Ky. 2013)). Accordingly, we decline to find error on this issue.

CONCLUSION

For the foregoing reasons, we REVERSE the Jefferson Circuit Court's judgment and conviction finding Arar guilty of first-degree sexual abuse as to Lisa Ward, but AFFIRM as to all other issues, and REMAND for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Annie O'Connell
Theodore S. Shouse
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky