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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001920-MR

JETH NELSON — APPELLANT

v. — APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 15-CR-00464

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, D. LAMBERT AND J. LAMBERT, JUDGES.

ACREE, JUDGE: Jeth Nelson appeals from the McCracken Circuit Court's December 6, 2016 final judgment sentencing him to fifteen years' imprisonment after a jury found him guilty of first-degree rape. We affirm.

FACTS AND PROCEDURE

In late October 2014, N.R., a California resident, travelled to Paducah, Kentucky to visit her childhood friend, Honey Hastings. N.R. was separated from her husband. Honey arranged a blind date for N.R. with Chase Hawes. Over the span of a few days, N.R. and Hawes went on four dates and twice had sexual intercourse. Both times the couple used a condom. N.R. denied her sexual encounters with Hawes caused any abrasions or bruising. Hawes confirmed that he used protection, and testified at trial that he did not hurt N.R. intentionally or unintentionally during their sexual encounters.

On Saturday, November 1, 2014, N.R. went to Hawes's house early in the evening. Hawes and several other individuals were there, including Nelson and Hawes's five-year-old son. The adults were drinking alcohol and playing cards. N.R. had a lot to drink.

After midnight, N.R., Nelson, Hawes, and a juvenile left the house to get more alcohol. Their car was stopped by the police. The officer arrested Hawes on an outstanding warrant, and called the juvenile's grandmother to pick him up. N.R. and Nelson were permitted to leave the scene. They returned to Hawes's house so N.R. could collect her cell phone, purse, and two bags.[1] Arriving at the house, N.R. checked on Hawes's minor son and found he was sleeping peacefully. To her knowledge no one else was in the house.

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[1] N.R. was scheduled to fly home to California on November 2, 2014.

N.R. testified that Nelson started making sexual advances toward her. She rejected his advances, stating she was not interested. N.R. wanted to leave[2] and repeatedly, but unsuccessfully, called Honey to pick her up. N.R. testified Nelson quickly became aggressive. They ended up in a bedroom and Nelson removed her clothing despite N.R.'s attempts to push him away. N.R. testified Nelson grabbed the back of her head pulling her hair, pushed her head toward him, and put his penis in her mouth past her lips and teeth.

Nelson then grabbed her arms and was on top of her, trying to have sex with N.R. She continually told him to stop, tried wiggling and moving away, said he was hurting her, and asked why he was doing this. Nelson responded that he knew that she wanted this. N.R. tried to stop Nelson by reminding him there was a kid in the next room and that she did not want to get pregnant. N.R. testified that nothing dissuaded him.

N.R. testified the more she resisted the more force Nelson used to subdue her. He penetrated her vaginally and was not wearing a condom. N.R. testified, "I told him he was hurting me. He was just thrusting himself at me, hard. Over and over. And he wasn't stopping. It was hurting. I felt like I was ripping, and I just kept trying to lift him off of me." She did not think Nelson ejaculated.

Afterward, Nelson drove N.R. to Honey's house.

[2] N.R. did not have a vehicle at Hawes's house.

The next morning, N.R. told Honey what happened with Nelson. She also called and told her husband. N.R.'s husband called the police. Honey took N.R. to the emergency room.

Kristy Schwetman, a Sexual Assault Nurse Examiner (SANE), examined N.R. at the hospital. She had been a registered nurse for twenty-three years and been certified as a SANE for the past fifteen years. She testified to conducting between 100 and 150 sexual-assault examinations and described the procedure for doing so.

The SANE observed seven injuries on N.R.: (1) a 2 cm abrasion on her right shoulder; (2) a 3x2 cm bruise on her left interior hip; (3) a 7 cm redness on the back of N.R.'s neck in the area of her hairline; (4) a 2 cm abrasion on her right buttocks; (5) a 4 cm bruise on her left forearm; (6) an abrasion at the 5 o'clock position inside her vagina; and (7) two friction tears (at the 7 and 8 o'clock position) in the rectal area. The SANE testified the injuries were caused by force and trauma and, in her opinion within a reasonable degree of medical certainty, the vaginal and rectum injuries would have been painful when inflicted.

The SANE testified that N.R. expressed that she was in pain during the examination. The SANE also administered medications, an injection, and various pills to prevent sexually transmitted diseases and pregnancy. She collected samples from N.R. for DNA testing. The parties later stipulated that Nelson's DNA was found in the vaginal swab taken from N.R.

Detective Sarah Martin introduced an additional twenty-three photographs depicting bruising that developed on N.R. after the sexual assault examination. Deputy Trent Hardin testified he took some photographs before giving the camera to the SANE to take additional photographs. Deputy Hardin also collected N.R.'s clothing. None of the clothing was torn.

Detective Darrin Frommeyer investigated. He spoke with N.R. on November 2, 2014, after the SANE's examination. He later had N.R. call Nelson; during the call, Nelson denied having sex with N.R.

Detective Frommeyer interviewed Nelson a few days later. Nelson again denied having sex with N.R., and denied that he could have been mistaken due to his intoxication.

The detective interviewed Nelson via telephone in June 2015 after DNA testing revealed Nelson's DNA was present on N.R.'s vaginal swab. Nelson again denied having sex with N.R. Detective Frommeyer then asked Nelson if there was a reason why his DNA would have come back on the test. Nelson said, "no." The detective asked his question again, and Nelson said, "Right, I, so, my DNA did come back on her?" "Yeah," answered Detective Frommeyer. The detective then asked if the sex was consensual. Nelson said he would call right back. He never did.

On October 9, 2015, the McCracken County grand jury returned an indictment charging Nelson with first-degree rape and first-degree sodomy - oral

sex. A two-day trial commenced on September 6, 2016. The defense theory was that the sexual activity was consensual.

At trial, Scotty Hasty testified he was in the bathroom at Hawes's house when N.R. and Nelson returned. Hasty was on the phone with his wife. The bathroom fan was running. Hasty testified at trial he could hear people having sex. He described it as sounding like "someone was getting pounded," and that it sounded like "he's tearing that up." He did not know who was having sex. Hasty testified he did not hear anyone scream, yell, or say "no" or "get off me." He testified he heard moaning coming from a female and it lasted for a couple of minutes.

Hawes's mother, Roxanna Langston, also testified. On the night of his arrest, Hawes called her from jail and asked that she pick up his son and lock up his house. When Langston arrived at Hawes's residence, she loudly announced that she wanted everyone out of the house. She made the announcement while standing in front of the dining room table. There was a bedroom right off the dining room and the door was closed. That door opened, and out came N.R. and Nelson. N.R. was dressed. Nelson was only wearing pajama pants. Nelson sat at the dining room table; N.R. stood behind him. As Nelson was talking, N.R. touched him on the shoulder and told him to calm down.

Langston testified it appeared N.R. was with Nelson. She was unaware of N.R.'s relationship with her son. Langston testified N.R. seemed

upset, but she did not know why. N.R. and Nelson were both very intoxicated. N.R. did not mention being assaulted. N.R. and Nelson left together.

Blake McIntosh had been at Hawes's house earlier that night. He returned around 2:30 AM to 3:00 AM; Langston was already there. McIntosh testified N.R. was also there and looked scared and upset. She told him she wanted to go with him and his girlfriend. N.R. followed McIntosh around, and was holding onto his shirt. McIntosh testified N.R. said she did not want to go with Nelson. McIntosh was unable to give N.R. a ride to Honey's house.

Nelson testified in his own defense. He admitted having sex with N.R. Nelson testified he asked her if she wanted to have sex and she said, "yes," and they proceeded to the bedroom. He denied having oral sex. He denied raping her. Nelson testified N.R. did not tell him to stop. She did not tell him he was hurting her. He stated she was moaning and appeared to be enjoying herself. He testified the sexual contact was consensual. He admitted he did not use a condom.

Afterward Nelson drove N.R. to Honey's home. He figured he would be staying the night there with N.R., but Honey told him to leave. He complied. Nelson explained his denial about having sex with N.R. when she called him and when interviewed by Detective Frommeyer stating he had heard previously that he was being accused of raping N.R. and was scared.

The jury found Nelson guilty of first-degree rape, but acquitted him of first-degree sodomy. It recommended a sentence of fifteen years' imprisonment.

The circuit court sentenced Nelson accordingly by final judgment entered December 6, 2016. Nelson appealed. Additional facts will be developed.

ANALYSIS

Nelson claims three errors occurred during his criminal trial, each of which deprived him a fair trial and require his conviction to be set aside. He argues the circuit court erred by: (1) preventing Nelson from eliciting testimony about the identity of a person who called 911; (2) allowing improper hearsay testimony; and (3) allowing the SANE to testify that N.R.'s injuries were caused by force. Nelson also asserts the cumulative effect of the errors deprived him of a fair trial.

We review the circuit court's decision to admit or exclude evidence for an abuse of discretion. *Fairley v. Commonwealth*, 527 S.W.3d 792, 797 (Ky. 2017). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

A. Identity of the 911 Caller

In opening statement, the prosecutor stated that on the morning after the alleged rape, N.R. told Honey what had happened, and "police were called." On direct examination, N.R. testified that she disclosed the rape and sodomy to Honey and her husband the next morning and that the "police were called." On cross-examination, N.R. admitted she did not call the police herself, but assumed it

was Honey who notified the police. The undisputed fact is that N.R.'s husband called 911.

Nelson sought to elicit testimony about the identity of the 911 caller. He argues the circuit court denied him his right to present a complete defense when it would not allow him to do so. Nelson claims the circuit court's ruling along with the prosecutor's comments in opening statement and N.R.'s testimony left the jury with the impression that Honey and N.R. called 911. This is significant, Nelson argues, because the fact that N.R. did not report the alleged assault to the police makes it more likely that she was embarrassed or ashamed of having had sexual intercourse with Nelson while on the cusp of a relationship with Hawes. Nelson also asserts the error cannot be harmless because, during deliberations, the jury inquired as to the identity and time of the 911 call.[3] We do not find Nelson's argument persuasive.

First, let us take a closer look at the facts. On the second day of trial, defense counsel was cross-examining Deputy Trent Hardin, the officer who accompanied N.R. to the hospital. Defense counsel asked, "And you got word from dispatch, right, to make the call . . . to go see her?" Deputy Hardin responded in the affirmative. Defense counsel then asked to approach the bench.

Defense counsel told the court, "I want to know from him, what information did he get from dispatch, did he get any information as to who made the call to 911, or did he investigate who made the call. That's what I want to ask

[3] The circuit court declined to answer the jury's questions.

him." The Commonwealth objected on hearsay and relevancy grounds. The circuit court stated, "Who made the call to 911, that's what you want to know?" Defense counsel responded, "I want to know if he knows, if it was reported to him who made the call. Arguably, that's hearsay, that's why I wanted to approach . . . the guy who called said, "I'm [N.R.'s husband's name]."[4] The circuit court sustained the Commonwealth's objection.

Nelson argues the circuit court's ruling is perplexing, because it would not allow Deputy Hardin to testify as to the identity of the 911 caller. He argues the caller's identity is not a "statement" subject to our hearsay rules. The Commonwealth counters that defense counsel's discussions at the bench conference did not properly preserve the issue and, even if preserved, Deputy Hardin was incompetent to testify about the 911 caller's identity, as he was sent to the scene by dispatch and had nothing to do with the 911 call whatsoever.

Both parties' arguments miss the mark.

The issue was preserved. When probed by the circuit court, Nelson's counsel specifically stated, "I want to know if he knows, ***if it was reported to him who made the [911] call***. Arguably, that's hearsay, that's why I wanted to approach." (emphasis added). But the highlighted question could have been answered without running afoul of hearsay rules. *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) ("[A]n appellant preserves for appellate review only those issues fairly brought to the attention of the trial court.").

[4] We have chosen not to include N.R.'s husband's name to protect N.R.'s identity.

Equally clear is that Deputy Hardin's response to the highlighted question would not have yielded what Nelson tells this Court he wanted – the identity of the 911 caller. That answer unquestionably would have been hearsay. Hearsay constitutes an out-of-court statement "offered in evidence to prove the truth of the matter asserted." KRE[5] 801(c). And it would be hearsay upon hearsay because the dispatch could say nothing more than that the person who called identified himself. *See id.*; KRE 802 (hearsay is not admissible at trial). When asked by the circuit court for an exception to the hearsay rule that would have allowed the deputy to reveal the name, Nelson's counsel had no answer. The deputy clearly had no personal knowledge of the caller's identity. Therefore, the circuit court properly disallowed any question of the deputy that would elicit it.

We also reject Nelson's contention that the circuit court's ruling left the jury with the "damaging" impression, due to the prosecutor's opening statement and N.R.'s testimony, that N.R. called 911. The prosecutor stated in opening that the police were called, nothing more. N.R. admitted on cross-examination that she did not call the police. Furthermore, Deputy Frommeyer was asked by defense counsel if there was any proof to N.R.'s assertion that she and Honey called the police and he said no. While no evidence was admitted as to who indeed called 911, defense counsel did more than an adequate job of establishing that neither N.R. nor Honey was the caller.

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[5] Kentucky Rules of Evidence.

In sum, we see no reversible error mandating a new trial. On this issue, we affirm.

B. Hearsay Testimony

Nelson also argues that the circuit court erred when it allowed Blake McIntosh to testify as to an out-of-court statement made by N.R. At trial, the Commonwealth and McIntosh engaged in the following exchange:

Commonwealth:	Did she [N.R.] appear to you to be upset?
McIntosh:	Yes.
Commonwealth:	Did she talk or say any words to you?
McIntosh:	She told me she wanted to go with us.
Commonwealth:	What was she doing at or about the time she was saying she wanted to go with you?
McIntosh:	She was following me. She had a hold of my shirt and just following right behind us.
Commonwealth:	**Did she make any statements in reference to the defendant Nelson?**
McIntosh:	**She said, specifically, she said she didn't want to go with him.**

Nelson only objected to the question and answer highlighted above. He raised no objection to McIntosh's prior responses.

Nelson argues that McIntosh's testimony that N.R. stated "she did not want to go with him" constitutes inadmissible hearsay. The Commonwealth

responds that McIntosh's testimony was admissible as an exception to the hearsay rule because it was not offered for its truth that N.R. did not want to go with Nelson. Alternatively, the Commonwealth asserted that the statement indicated N.R.'s mental or emotional state, KRE 803(3), or as a present sense impression. KRE 803(1).

The circuit court's basis for allowing McIntosh's testimony is not entirely clear. But it appears from the video record that the circuit court was convinced that the testimony did not qualify as hearsay because it was not offered for its truth. The circuit court stated, "So [the testimony] is offered to imply something traumatic had happened to her or something along those lines. Not that she really wanted to go with [McIntosh]." The Commonwealth responded, "It's just a circumstance that leads up to how it ends up that the victim actually leaves with the man who just raped her."

Considering this exchange, we cannot say the circuit court abused its discretion in allowing McIntosh's testimony. If an out-of-court statement is offered for *any* purpose other than for its truth, the hearsay rule will not necessarily prevent its admissibility. *See* KRE 801(c) (a statement is hearsay only if offered to prove the truth of its contents). The hearsay character of a statement cannot be determined until the offeror reveals what the statement is being offered to prove, *i.e.*, its relevancy.

The circuit court accepted the Commonwealth's contention that the statement was not being offered for its truth – that N.R. did not want to go with

Nelson – but to demonstrate N.R. had experienced a traumatic event and was upset. It then admitted the statement as excepted from the hearsay rule. Its decision is not unreasonable, and we cannot say the circuit court abused its discretion.[6]

Even if we presumed the testimony did not fit neatly into the hearsay exception and found error, we would also find the error harmless. The applicable rule, RCr[7] 9.24, requires us to disregard an error if it is harmless. A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765; *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009).

We are convinced that McIntosh's testimony that N.R. said, "I don't want to go with him," did not *substantially* influence the conviction. In addition to this statement, McIntosh also testified that N.R. was following him, was holding onto his shirt and said, without objection from Nelson, that she wanted to go with

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[6] Nelson had the option to ask for a limiting instruction by which the circuit court would have ordered the jury to consider McIntosh's statement for only the specific purpose it was offered. This would have prevented the jury from misusing the testimony. He chose not to request a limiting instruction. But we are also mindful that limiting instructions often call the jury's attention to an improper use of the evidence that left alone the jury would not have noticed.

[7] Kentucky Rules of Criminal Procedure.

McIntosh. Furthermore, McIntosh's testimony was but a small part of the overall evidence presented against Nelson. There was more than ample evidence and testimony, set out above, from which the jury could find Nelson raped N.R. We are not convinced that one sentence from McIntosh, even if hearsay, so substantially influenced the jury that without it Nelson would not have been convicted.

C. SANE's Testimony

Nelson next argues the circuit court erred when it allowed the SANE to testify that N.R.'s injuries were caused by force. He contends the SANE was not an expert qualified to testify that the victim's injuries were the result of trauma and force, or that the infliction of those injuries would have been painful. We disagree.

Nelson filed a pre-trial motion *in limine* to exclude or limit the SANE's testimony. Specifically, he sought to prevent the SANE from testifying that the injuries she observed on N.R. were caused by force, arguing that such testimony would not pass muster under *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). At Nelson's request, the circuit court held a *Daubert* hearing prior to trial.

At the *Daubert* hearing, the SANE, after describing her qualifications, background, and training, testified N.R.'s injuries were consistent with force, that they were trauma injuries, and they were consistent with sexual assault. She further opined, on cross examination, that "the vaginal abrasion showed much

force and typically would not occur from a consensual sex act." She explained that vaginal bruising is uncommon, and it takes "major force" to cause an injury in this area of the body.

The SANE acknowledged that she normally does not examine individuals who have had consensual sexual activity. She testified it would be rare for someone to get an injury like N.R. sustained from consensual sex. She stated that this opinion – that injuries similar to that sustained by N.R. did not occur from consensual sex – had been subjected to peer review multiple times, but she was unable to provide specific references. She did not know the potential for error in expressing this opinion. When asked if she was making a judgment call on the degree of force, the SANE agreed that there was no test to measure force. She reiterated that she regularly observes trauma and injuries in the ER as her primary job and is familiar with such injuries and their causes.

Defense counsel argued the SANE's testimony failed to satisfy *Daubert*. The circuit court opined that the SANE's testimony did not "fit" well under *Daubert*, which addresses highly technical science. It further stated that it is well known that force can cause bruises and injuries, and the SANE's testimony was admissible under the SANE's general understanding of the medical field based on twenty years of training, medical education, and extensive experience.

At trial, the SANE described the seven injuries she observed in her examination of N.R. She testified the injuries resulted from force or trauma and, in her opinion within a reasonable degree of medical certainty, the vaginal and rectum

injuries would have been painful when inflicted. With respect to the friction tear, the SANE explained that it took force to cause the redness and tearing of the skin. Notably, unlike the SANE's testimony offered during the *Daubert* hearing, she did *not* testify that the injuries observed would typically not occur from a consensual sexual act. She also did *not* testify that the injuries were consistent with sexual assault or rape.

Nelson continues to challenge the circuit court's decision to allow the SANE to testify that N.R.'s injuries were caused by force and would have been painful when inflicted. He argues, as he did before the circuit court, that her testimony fails to satisfy *Daubert*.

KRE 702 governs the admissibility of expert testimony. That rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
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> (1) The testimony is based upon sufficient facts or data;
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> (2) The testimony is the product of reliable principles and methods; and
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> (3) The witness has applied the principles and methods reliably to the facts of the case.

KRE 702. In other words, "scientific testimony or evidence admitted [must be] not only relevant, but reliable." *Daubert,* 509 U.S. at 589, 113 S.Ct. at 2795; *Futrell v.*

Commonwealth, 471 S.W.3d 258, 282 (Ky. 2015) ("Under *Daubert,* a trial court's task in assessing proffered expert testimony is to determine whether the testimony both rests on a reliable foundation and is relevant to the task at hand.").

In the case before us, the SANE's testimony explaining that force caused N.R.'s injuries is certainly relevant to whether Nelson committed the crime of first-degree rape.[8] KRE 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *Futrell*, 471 S.W.3d at 285 (to be relevant, the testimony "must relate to a material issue in the case and it must 'fit' the case in the sense that there must be 'a valid scientific connection' between the expert's specialized knowledge and the pertinent inquiry confronting the trier of fact" (citation omitted)). Our focus, then, is on reliability.

In making its reliability determination, the circuit court must determine "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Toyota Motor Corp. v. Gregory,* 136 S.W.3d 35, 39 (Ky. 2004) (quoting *Daubert,* 509 U.S. at 592–93, 113 S.Ct. at 2786). This allows Kentucky courts to balance our "liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the

[8] We pause to emphasis, again, that, contrary to Nelson's argument to this Court, the SANE did not opine at trial that N.R.'s injuries were consistent with nonconsensual sexual intercourse.

other." *Futrell*, 471 S.W.3d at 282 (quoting *Best v. Lowe's Home Ctrs., Inc.,* 563 F.3d 171, 176-77 (6th Cir. 2009)).

There is no "definitive checklist or test" for determining whether testimony is based on a reliable scientific foundation. *Futrell*, 471 S.W.3d at 282. *Daubert* suggests a nonexclusive list of factors that might influence a finding of reliability, including whether the principle, theory, or method in question "can be (and has been) tested," whether it "has been subjected to peer review and publication," whether it has a "known or potential rate of error," and whether it enjoys acceptance within "a relevant scientific community." 509 U.S. at 593-94, 113 S.Ct. at 2796-97.

The overarching concern under KRE 702 is the scientific validity of the evidence; its reliability depends upon whether it is rooted in sound scientific methodology. *See Fugate v. Commonwealth*, 993 S.W.2d 931, 934 (Ky. 1999) (a key factor under *Daubert* and KRE 702 is "whether proposed scientific expert opinion is based on scientific knowledge and is therefore sufficiently reliable to be admitted into evidence"). Unreliable scientific evidence is inadmissible because it will not assist the jury to understand the evidence or accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts. *City of Owensboro v. Adams*, 136 S.W.3d 446, 451 (Ky. 2004) (*Daubert* is designed "to protect juries from being bamboozled by technical evidence of dubious merit" (citation omitted)). *Daubert* and KRE 702 together assist the

circuit court, acting as the gatekeeper of evidence, to sort untested or invalid theories from those grounded in "good" science. *Adams*, 136 S.W.3d at 450.

Nelson argues that the SANE's "force" testimony fails every *Daubert* factor, and that the circuit court therefore abused its discretion by allowing that testimony to be introduced. Nelson fails to appreciate the origin of the SANE's opinion. The SANE's testimony was simply that force caused N.R.'s bruises and abrasions. Her opinion was based on years of work as a sexual assault nurse examiner, and her training and background. We agree with the circuit court that the proposition that force causes bruises and abrasions is rooted in sound scientific methodology. It is not a novel or untested scientific theory.

In *Futrell*, *supra*, our Supreme Court deemed scientifically reliable and relevant the admission of a child abuse pediatric expert's opinion that fatal injuries suffered by a 17-month-old victim were inflicted, and were not accidental. It found the opinion was adequately supported by the expert's familiarity with a voluminous body of case reports concerning injuries like those suffered by the child in that case and the physician's experience as a consultant in more than 3000 cases of potential child abuse, in most of which she had herself examined the child. *Futrell*, 471 S.W.3d at 283.

As in *Futrell*, the SANE's opinion that the bruises and abrasions she observed on N.R. were caused by force was supported by the SANE's training and extensive experience examining victims of sexual trauma and abuse. "The cause of an injury may be within the ambit of an expert witness's specialized knowledge

and is properly admissible subject to the trial judge's KRE 702 determination." *Ratliff v. Commonwealth,* 194 S.W.3d 258, 270 (Ky. 2006). The fact that the SANE's testimony did not "fit" squarely under *Daubert* does not automatically render it inadmissible.

As is common with almost all evidentiary decisions, a circuit court's decision "as to the admissibility of expert witness testimony under *Daubert* [is] generally entitled to deference on appeal because trial courts are in the best position to evaluate first[-]hand the proposed evidence." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004). The circuit court in this case properly exercised its discretion. We see no abuse.

Nelson also contends that the SANE was not qualified to testify as an expert under KRE 702 because she was "not . . . qualified by knowledge, skill, experience, training, or education." The SANE was not an ob-gyn, or even a nurse practitioner in an ob-gyn practice, thereby exposed to "normal non-victimized" genitalia, Nelson argues, and for this reason, the SANE was not qualified to testify as an expert.

Nelson's argument is unpersuasive. The SANE was more than qualified to offer her professional opinion as to whether N.R.'s injuries were caused by force. She described her extensive experience as a registered nurse and a sexual assault nurse examiner along with her education and training. This testimony falls within the parameters of the SANE's professional experience and

background. Her lack of exposure to non-sexual abuse victims does not diminish or negate her ability to testify in this manner.

D. Cumulative Error

Finally, Nelson argues that the cumulative effect of the errors he has raised deprived him of a fair trial. Because we have found no error in any of the allegations brought by Nelson, we likewise hold that there is no cumulative error. *See Woodall v. Commonwealth*, 63 S.W.3d 104, 134 (Ky. 2001).

CONCLUSION

We affirm the McCracken Circuit Court's December 6, 2016 final judgment finding Nelson guilty of first-degree rape and sentencing him to fifteen years' imprisonment.

ALL CONCUR.

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