

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

NO. 2017-CA-001519-MR

DONALD JOE BOYD

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE PHILLIP PATTON, SPECIAL JUDGE  
ACTION NO. 16-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, J. LAMBERT, AND THOMPSON, JUDGES.

JONES, JUDGE: Following a trial by jury, Appellant, Donald Joe Boyd, was convicted of one count of first-degree sexual abuse<sup>1</sup> and sentenced to seven years' imprisonment. Boyd now challenges that conviction as a matter of right, alleging numerous counts of error. Following a thorough review of the record and applicable law, we AFFIRM.

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<sup>1</sup> Kentucky Revised Statute (KRS) 510.110.

## I. BACKGROUND

On March 16, 2016, an Ohio County Grand Jury issued an indictment charging Boyd with three counts of first-degree sexual abuse, victim under twelve years of age. These charges stemmed from allegations made by Boyd's step-granddaughter, M.M., that Boyd had inappropriately touched her while she was staying with Boyd on Thanksgiving of 2014. Boyd pleaded not guilty to all charges.

On September 26, 2016, Boyd filed a motion challenging M.M.'s competency to testify at trial and requesting that the trial court conduct a competency hearing pursuant to KRE<sup>2</sup> 601. Boyd asserted that M.M. was only ten years old at the time of the alleged incident and, therefore, might be incompetent to testify. The Commonwealth opposed Boyd's motion, arguing that he had failed to raise any legitimate concern that M.M. was incompetent to testify. In the alternative, the Commonwealth contended that a full-scale evidentiary hearing was unnecessary, and that either an *in camera* interview of M.M. or a brief examination of M.M. once she took the stand to testify would suffice. By order entered February 10, 2017, the trial court reserved the issue of M.M.'s competency until she began her testimony at trial. Following two continuances, a jury trial was scheduled to begin on May 10, 2017.

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<sup>2</sup> Kentucky Rules of Evidence.

On May 8, 2017, the Commonwealth a filed motion stating its intent to introduce KRE 404(b) evidence at trial. The Commonwealth stated that it intended to elicit testimony from M.M. that Boyd had sexually abused her on two prior occasions, which had not been included in the indictment. The Commonwealth's motion was heard before trial on May 10, 2017.

During the pretrial hearing, the Commonwealth stated that when interviewed at the Child Advocacy Center (the "CAC"), M.M. had given details of two other incidents during which Boyd had touched her inappropriately. Because Boyd had never denied that he touched M.M., but disputed only the way in which he had touched her and that he did so for sexual gratification, the Commonwealth argued that these additional incidents demonstrated Boyd's motive or intent. Following Boyd's objection, the trial court ruled that M.M. could not testify as to the specifics of any prior sexual abuse, but could testify that "this [Boyd touching her] happened a lot."

Following impaneling of the jury, Boyd moved the trial court to exclude any reference to Boyd's alleged prior inappropriate touching of M.M. Boyd contended that allowing M.M. to testify that Boyd had inappropriately touched her on multiple occasions when she could only specifically recall three incidents would unduly prejudice the jury against Boyd. He also contended that if M.M. testified that Boyd had touched her many times, he would need to cross-

examine her on that statement, which he could not do without letting in details that had previously been excluded. The Commonwealth argued that M.M. had repeatedly stated that Boyd had inappropriately touched her “many times,” but that she was only able to recall specific details of three incidents. The trial court overruled Boyd’s objection, but designated it a continuing objection.

M.M.’s mother, S.H., testified first for the Commonwealth. S.H. testified that M.M. has known Boyd since she was born and that, until the recent events, they had always had a very close relationship. S.H. stated that M.M. had always referred to Boyd as “Pa” and that M.M. would frequently have overnight visits with Boyd and his wife, Gloria, at their home. S.H. testified that she became aware of the alleged incident when her father found M.M.’s journal and showed it to her. S.H. stated that one of M.M.’s journal entries had caused her to become concerned for M.M.’s safety and well-being, which led her and her father to contact the authorities. She stated that after reading M.M.’s journal, she took steps to ensure that M.M. would no longer be around Boyd. Following S.H.’s testimony, Kentucky State Police Sergeant Chris Baker and Owensboro Police Officer Josh Alsip testified to the process of investigating the charges against Boyd.

Following Alsip’s testimony, the Commonwealth informed Boyd and the trial court that it intended to call M.M. as its next witness. Boyd requested that the trial court conduct a competency hearing of M.M. outside the presence of the

jury. Boyd reminded the trial court that M.M. was now thirteen years old. The trial court noted that a child of that age is presumed to be competent and directed the Commonwealth to begin its examination of M.M. with questions to demonstrate her competency; however, it denied Boyd's request to do so outside of the presence of the jury.

The Commonwealth asked M.M. several questions to establish her competency. M.M. informed the trial court of her age, what grade she was in, where she went to school, and what her favorite school subject was. M.M. stated that she understood what it meant when the judge swore her to tell the truth. M.M. stated that she understood what the difference between a truth and a lie—she indicated that the truth is something that actually happened, and a lie is something that did not happen.

M.M. testified that she has known Boyd for as long as she can remember. She stated that while she was growing up, she considered Boyd to be someone she could trust and love. M.M. testified that she used to spend the night at Boyd's house, but that something had happened with Boyd at his house that made her feel uncomfortable. She stated that the thing that made her uncomfortable had happened more than once, but that the specific incident to which she was referring occurred around Thanksgiving, when she was ten years

old. When questioned as to what Boyd had done to make her feel uncomfortable, M.M. testified that Boyd had touched her inappropriately.

When asked to describe the incident, M.M. testified that she had been in Boyd's spare bedroom watching a movie by herself. M.M. was not sure of the exact time, but stated that it had been nighttime. M.M. testified that she had been wearing her pajamas, which were a top and pants. She stated that she had been wearing underwear, but had not been wearing a bra. M.M. testified that when Boyd came into the room, she had been laying on her stomach on the bed and was facing the television. She said that Boyd had walked into the room and sat on the bed next to her. Boyd asked her if he could rub her back, and M.M. told him that he could. M.M. testified that Boyd had started to rub her back, but then went far lower. She stated that Boyd had touched her on her "rear," and clarified that she meant her butt. M.M. testified that Boyd had touched her with his hand under her pants and underwear. M.M. described the touch as a "grope." She explained that she understood a grope to be a kind of grabbing. M.M. did not remember for how long this touching continued. She stated that it had made her feel uncomfortable and that she and Boyd did not say anything to each other while the touching was occurring.

M.M. testified that Boyd had then asked her if he could rub her stomach. M.M. said no, but Boyd did so anyway. M.M. testified that, while

touching her stomach, Boyd started to go lower towards her vaginal or “crotch” area. M.M. stated that at this point she was laying on her back because Boyd had flipped her over. M.M. testified that Boyd used his hand to touch her under her clothing and underwear around the middle of her hips, below her stomach. She classified this as her lower abdomen area. M.M. stated that Boyd did not touch her vagina, but had tried, which caused her to cross her legs. After she crossed her legs, Boyd used his hand to rub her towards her chest area. M.M. gestured to below her breasts to demonstrate where on her body Boyd had touched her. She stated that she crossed her arms over her chest to stop him. M.M. testified that she felt scared while this was happening and rolled back onto her stomach. Boyd then resumed touching her on her “rear” under her clothing and underwear. M.M. testified that Boyd then took her hand and put it on the area where his penis is. M.M. stated that Boyd had been wearing shorts, and that he had her touch him over his clothing. She testified that she could feel the outline of “something.”

M.M. then told Boyd that she had to go to the bathroom. She then left the room and went to the bathroom to calm down because she was feeling scared and uncomfortable. When M.M. came back into the bedroom Boyd was still there, so she told him that she wanted to go to sleep. M.M. testified that Boyd told her he wanted to lay down with her, but she told him he could sleep somewhere else. M.M. stated that Boyd did leave the room, but then came back and looked through

the door. He left when she said “hello.” A little while later, Boyd returned again, but M.M. pretended to be asleep. M.M. testified that Boyd came into the room and that she thought she saw what she believed to be his penis hanging out of his shorts. M.M. testified that Gloria had been home when the incident happened, but that she had been in her own bedroom sleeping. She testified that this was the last time an incident like this had happened and that she wrote about it in her journal. After her maternal grandfather found her journal, she talked about the incident with adults. M.M. testified that she now felt scared of Boyd.

On cross-examination, M.M. testified that she was not sure what year the incident had happened, but that it was around Thanksgiving. M.M. stated that her mother had driven her to Boyd’s home for Thanksgiving, and that she stayed the night at Boyd’s house following the Thanksgiving celebration. M.M. did not remember what time she woke up the next day or whether she had talked to Boyd the next day. M.M. testified that she had wanted to stay the night at Boyd’s house that night. She stated that she used to stay at Boyd’s house a lot. Normally, M.M. would sleep in the living room, but on this night, she had stayed in the spare bedroom. M.M. stated that Boyd’s house has two bedrooms and is not a big house. M.M. testified that she did not remember any issues with Boyd’s cats that day. She knew that one of the cats had been “put down” shortly after the incident occurred, but she stated that she had not been overly upset by this. M.M testified

that she had gone back to her mother's house the following day because her mother normally did not let her stay away for more than one night. M.M. stated that she knew that Gloria was sleeping on the night of the incident because she was able to see into Gloria's bedroom when she went to the bathroom. M.M. acknowledged that the two bedrooms in Boyd's home are close to each other, and, if she had yelled for help, Gloria would have likely heard her. M.M. testified that the door to the spare bedroom had been left open the entire time that Boyd was in the room with her.

M.M. stated that she remembered being interviewed about the incident at the CAC. She testified that she did not tell anyone at the CAC that Boyd had made her touch his penis. She was unsure if she told anyone that she may have seen Boyd's penis. M.M. stated that her memory is not very good, and was not very good when she was being interviewed at the CAC, so she did not tell her interviewer much. M.M. testified that she had talked about the incident with her mother, the CAC interviewer, Gloria, and her counselor. She had also talked about it with the attorney for the Commonwealth. M.M. testified that her mother had not told her things that had happened and had not made her write anything down. M.M. was unsure if she had been questioned at the CAC about whether Boyd touched her under or over her clothing.

At this time, Boyd was permitted to play a clip of M.M.'s interview at the CAC for M.M. outside of the presence of the jury. During the portion of the interview played, M.M. is heard stating that Boyd did not make her touch him. M.M. also stated that she had been wearing a bra on the night of the incident and that Boyd attempted to touch her underneath her bra. After the clip was played, the jury returned, and cross-examination of M.M. resumed.

M.M. testified that she recalled telling the CAC interviewer that Boyd had touched her on her "boob" underneath her bra. She stated that she was no longer sure whether she was wearing a bra on the night of the incident. M.M. further acknowledged that she had told the CAC interviewer that Boyd had not made her touch him and had not told the CAC interviewer that she had seen Boyd's penis. However, M.M. was adamant that both of those incidents had occurred.

On re-direct, M.M. testified that no one had told her what to say in her testimony and that she was not confused about what Boyd did. M.M. stated that she was ten years old when the incident happened. She testified that she has been in counseling because of the incident and that talking with her counselor had helped her recall some details. Following M.M.'s testimony, Boyd moved for a directed verdict, which was denied.

Boyd testified on his own behalf. He stated that, on the day of the alleged incident, M.M. had arrived at his home in the morning. Boyd estimated that, during the day, approximately ten or twelve people had been over for a Thanksgiving celebration, but by 6:00 pm it had just been M.M., Gloria, and himself in the home. Boyd stated that M.M. had stayed the night at his house hundreds of times. He stated that when M.M. and her cousins were little they would all sleep in the living room, but as M.M. got older she slept in the spare bedroom. Boyd testified that on the night of the alleged incident he had been out in his workshop and came in with two beers. He opened one and began to drink it, but heard M.M. in the spare bedroom watching a movie. Boyd stated that he then went into the spare bedroom to talk to M.M. Boyd admitted to “aggravating” M.M. and touching her, but denied that he touched her inappropriately. Boyd testified that he had sat on the edge of the bed while M.M. was lying there. He started bouncing M.M. on the mattress, and M.M. laughed and appeared to be having a good time. Boyd testified that M.M. rolled onto her back and he smacked her on her belly to aggravate her for being so skinny. After that, he watched a few minutes of a movie with M.M. and then left the room.

Boyd testified that he had still been wearing his regular clothes when he went into the spare bedroom and had not been wearing shorts. He testified that he had no recollection of walking through the house or by the spare bedroom later

that night. Boyd testified that he does sleep in shorts, but that there was no way that M.M. could have seen his penis while he was wearing them because the shorts are 18” long. Boyd stated that after he left M.M.’s room he went to the living room to watch television and finish drinking his beer. He testified that Gloria had been in their bedroom watching television, which he knew because he had walked by and seen her. After watching television for approximately thirty minutes, Boyd went to bed. Boyd testified that he had not gone back into M.M.’s room after leaving and had not walked by to check in on her. Boyd testified that M.M. seemed like her normal self when she woke up the next morning. Boyd stated that she even came into the living room to talk to him and climbed on him. M.M. had planned on staying the whole day at his house, but had to leave earlier than normal because he and Gloria had to take their cat to be euthanized. Boyd testified that M.M. had been very upset about this.

On cross-examination, Boyd stated that M.M. had known him for her entire life and had always referred to him as “Pa.” He acknowledged that in his statement to the police he had said he consumed three beers that day, but was certain that he had only consumed two. He denied being intoxicated on the night of the incident. Boyd testified that he had sat on the bed with M.M. and had touched her back and bounced her. He denied asking M.M. if he could rub her stomach, but stated that he did touch M.M.’s stomach when she rolled over on the

bed. Boyd again stated that he sleeps in short pants, and acknowledged that he has the ability to roll or pull them up. He testified that he had not told either of the investigating officers about anything that happened the morning following the alleged incident. Boyd testified that there had never been any issues between him and M.M. prior to M.M. making these allegations.

At the close of all the evidence, Boyd renewed his motion for a directed verdict, which was again denied. The trial court then instructed the jury. In addition to the instruction on the presumption of innocence and the definition of sexual contact, the jury was instructed as follows on the charges against Boyd:

**Instruction No. 3**

You will find the Defendant, Donald Boyd, guilty of First Degree Sexual Abuse—Victim Under 12 Years of Age under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

1. That in this county on or between November 27, 2014 through November 28, 2014, and before the finding of the Indictment herein, the Defendant subjected [M.M.] to sexual contact when he grabbed her butt the first time with his hand under her pajama pants and underwear.

**AND**

2. That at the time of such contact, [M.M.] was less than twelve (12) years of age.

**Instruction No. 4**

You will find the Defendant, Donald Boyd, guilty of First Degree Sexual Abuse—Victim Under 12 Years of Age

under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

1. That in this county on or between November 27, 2014 through November 28, 2014, and before the finding of the Indictment herein, the Defendant subjected [M.M.] to sexual contact when he touched her lower abdomen with his hand under her pajama pants and underwear.

**AND**

2. That at the time of such contact, [M.M.] was less than twelve (12) years of age.

### **Instruction No. 5**

You will find the Defendant, Donald Boyd, guilty of First Degree Sexual Abuse—Victim Under 12 Years of Age under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

1. That in this county on or between November 27, 2014 through November 28, 2014, and before the finding of the Indictment herein, the Defendant subjected [M.M.] to sexual contact when he placed her hand on his penis over his shorts.

**AND**

2. That at the time of such contact, [M.M.] was less than twelve (12) years of age.

After approximately four hours of jury deliberation, the jury returned to the courtroom and informed the trial court that it was unable to reach a verdict. The trial court asked if further deliberation would be beneficial, to which the foreperson replied that it would not. The Commonwealth then requested a bench conference.

Counsel for both the Commonwealth and Boyd requested that the trial court ask the jury whether it was deadlocked on all charges against Boyd. The Commonwealth requested the trial court to read a charge to the jury regarding further deliberation.

The trial court asked the jury whether it was unable to reach a verdict on any count and the foreperson said that he did not think so. The trial court then read the jury an RCr<sup>3</sup> 9.57 instruction, and the jury resumed deliberation. A little over an hour later, the jury returned a verdict finding Boyd guilty of one count of first-degree sexual abuse under Instruction 4, and acquitting him of the other two counts. The jury recommended a sentence of seven years' imprisonment.

On May 19, 2017, Boyd filed a motion for a new trial and motion for judgment of acquittal. Therein, Boyd contended that it was inconsistent and illogical that a jury could return a guilty verdict under Instruction 4 but not Instruction 3, when those allegations arose from the same nucleus of facts. On June 21, 2017, the trial court entered an order and judgment adjudging Boyd guilty of first-degree sexual abuse. Boyd's sentencing hearing was held on August 17, 2017, at which time the trial court indicated that it would be denying his motions for a new trial and for a judgment of acquittal. On August 18, 2017, the trial court entered a formal sentencing order, sentencing Boyd in accordance with the jury's

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<sup>3</sup> Kentucky Rules of Criminal Procedure.

recommendation. An order denying Boyd's motion for a new trial was entered on August 23, 2017.

This appeal followed.

## **II. ANALYSIS**

On appeal, Boyd alleges the following counts of error: (1) the evidence presented at trial was insufficient to support a conviction; (2) the jury instructions were vague, confusing, incomplete, and tilted towards finding guilt; (3) the trial court erred by allowing prejudicial references to uncharged, alleged prior bad acts; (4) the trial court abused its discretion by permitting M.M. to testify; (5) the Commonwealth committed flagrant misconduct in its closing statement; and (6) the trial court erred by giving an RCr 9.57 charge to the jury. We consider each argument in turn.

### **A. Boyd's Motion for a Directed Verdict**

Boyd argues that the trial court erred in denying his motions for a directed verdict and judgment of acquittal, as he contends that there was insufficient evidence presented to support a finding of guilt. Specifically, Boyd contends that there was insufficient evidence to establish "sexual contact" and that M.M.'s testimony was uncorroborated.

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a conviction be supported by proof of guilt beyond

a reasonable doubt.” *Gribbins v. Commonwealth*, 483 S.W.3d 370, 377 (Ky. 2016) (citing *Jackson v. Virginia*, 443 U.S. 307, 309, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When a criminal defendant moves for a directed verdict, the trial court is required to “draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983); *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977)). “If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given.” *Ibid.* “On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Ibid.*

Boyd’s primary contention is that the Commonwealth failed to prove every element of the offense with which he was charged, as—he contends—it did not put forth any evidence to establish “sexual contact.” Boyd was charged, and ultimately convicted, under KRS 510.110(1)(b)(2). Under the statute, a person is guilty of first-degree sexual abuse when he “subjects another person to sexual contact who is incapable of consent because . . . she . . . is less than twelve (12) years old.” KRS 510.110(1)(b)(2). Sexual contact is defined as “any touching of

the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]” KRS 510.010(7).

Boyd was not convicted for touching a “sexual part” of M.M., but rather for touching her “lower abdomen . . . under her pajama pants and underwear.” Thus, the determinative question is whether the Commonwealth established that M.M.’s lower abdomen constitutes an “other intimate part” of M.M. In *Bills v. Commonwealth*, the Kentucky Supreme Court set out three factors to consider in determining whether a part of the body is considered an “intimate” part: “1) What area of the body is touched; 2) What is the manner of the touching; and 3) Under what circumstances did the touching occur.” *Bills v. Commonwealth*, 851 S.W.2d 466, 472 (Ky. 1993).

The testimony given by M.M. established that Boyd touched her on an intimate part of her body. M.M. testified that Boyd rubbed her on her lower abdomen, or “around the middle of her hips, below her stomach.” Boyd reached his hand underneath her underwear while doing this. While rubbing M.M. on her lower abdomen, Boyd attempted to rub further down, going towards her vaginal area. M.M. testified that this happened at night, when she was alone in a room with Boyd, and that he touched her even after she told him not to. Under the *Bills* factors, this evidence—which, for purposes of a directed verdict motion we must take as true, with all inferences in favor of the Commonwealth—was sufficient to

establish that Boyd touched an “other intimate part” of M.M. *Benham*, 816 S.W.2d at 187; *Bills*, 851 S.W.2d at 472.

To establish sexual contact, a jury must find that the touching of an intimate part of a victim’s body was done for either the defendant’s or the victim’s sexual gratification. KRS 510.010(7). Boyd contends that the Commonwealth failed to present a single piece of evidence to support the conclusion that he touched M.M. for either party’s sexual gratification. “Sexual gratification is a single element of the crime of sexual abuse in the first degree. . . . Intent can be inferred from the actions of an accused and the surrounding circumstances. The jury has wide latitude in inferring intent from the evidence.” *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988). The circumstances of how the touching occurred, as described above, were sufficient for a jury to infer that Boyd touched M.M. for his own sexual gratification.

Boyd additionally argues that a directed verdict of acquittal should have been granted because M.M.’s testimony was uncorroborated. Boyd contends corroboration of M.M.’s testimony was required because much of M.M.’s testimony was inconsistent and self-contradicted. “Corroboration in a child sexual abuse case is required only if the unsupported testimony of the victim is ‘. . . contradictory, or incredible, or inherently improbable.’” *Garrett v. Commonwealth*, 48 S.W.3d 6, 10 (Ky. 2001) (quoting *Robinson v. Commonwealth*,

459 S.W.2d 147, 150 (Ky. 1970)). “Otherwise, discrepancies in the victim’s testimony are matters of credibility going to the weight to be given by the jury to the child’s testimony.” *Id.* (citing *Commonwealth v. Cox*, 837 S.W.2d 898, 900 (Ky. 1992)).

Boyd is correct that M.M. was impeached by her prior statements to the CAC interviewer twice: first, as to whether she had been wearing a bra on the night of the incident and, second, as to whether she told the CAC interviewer that Boyd had put her hand on his penis. Additionally, M.M. admitted that her memory was not good, that she was fuzzy on some details, and that she had testified to more acts of abuse by Boyd than what she described to her CAC interviewer. However, while a couple of M.M.’s statements were self-contradicted, we cannot find that, *in toto*, her testimony was so contradictory, incredible, or inherently improbable as to require corroboration.

After being impeached by her prior inconsistent statement, M.M. admitted that she was unsure as to whether she had been wearing a bra on the night of the incident. M.M. admitted that she had told the CAC interviewer that Boyd did not make her touch him, but she explained that—as time passed giving her the opportunity to process the incident—she was now able to recall details of the incident with more clarity. Besides these inconsistencies, M.M.’s testimony concerning Boyd sexually abusing her was consistent and entirely probable. Much

of Boyd's testimony and M.M.'s testimony was consistent. Both testified that M.M. had been watching a movie—even naming the same movie—alone in a bedroom, that Boyd had come into the room and sat on the bed with M.M., that Boyd had rubbed M.M.'s back, and that Boyd had touched M.M.'s stomach. Naturally, their testimony concerning the way in which Boyd touched M.M. was conflicting. On cross-examination, M.M. did not waiver in her version of the events. Any inconsistencies in M.M.'s testimony could be fairly weighed by the jury in considering her credibility.

A review of the evidence presented at trial demonstrates that a reasonable juror could find Boyd guilty beyond a reasonable doubt. The trial court did not err in denying Boyd's motions for a directed verdict of acquittal.

### **B. Jury Instructions**

Next, Boyd contends that the instructions read to the jury were vague, confusing, incomplete, and worded in a way that was favorable towards the Commonwealth. Specifically, Boyd takes issues with the fact that the jury was not instructed on what constitutes an intimate part of the body for purposes of KRS 510.110(1)(b)(2) and KRS 510.010(7). Additionally, Boyd argues that the way Instruction 4 was worded permitted the jury to reach a finding of guilt upon a conclusion that Boyd had touched M.M.'s lower abdomen, without requiring it to determine whether that touching constituted "sexual contact." Accordingly, Boyd

argues that the jury's finding of guilt under Instruction 4 does not equate a finding that Boyd violated KRS 510.110(1)(b)(2).

Boyd did not properly preserve this claim of error. Under RCr 9.54(2):

No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

“Failure to comply with subsection (2) of RCr 9.54 has been consistently held to prohibit review of alleged error in instructions because of the failure to properly preserve the claimed error.” *Gibbs v. Commonwealth*, 208 S.W.3d 848, 853 (Ky. 2006), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). Boyd did tender proposed jury instructions to the trial court; however, those instructions did not include an instruction or definition as to what constitutes an intimate part of the body. After reviewing the instructions that the trial court proposed to read to the jury, Boyd made no objection.

Nonetheless, Boyd has requested that we review the jury instructions for palpable error under RCr 10.26. “Palpable error relief is available under RCr 10.26 only upon a determination that manifest injustice has resulted from the error.” *Davidson v. Commonwealth*, 548 S.W.3d 255, 261 (Ky. 2018). Manifest

injustice is error that “seriously affect[s] the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

We cannot conclude that the failure to define “other intimate parts” for the jury rises to the level of manifest injustice. “It is the duty of the court in a criminal trial to instruct on the whole law of the case and to include, when necessary or proper, definitions of technical terms used.” *Lawson v. Commonwealth*, 309 Ky. 458, 460, 218 S.W.2d 41, 42 (1949). However, “[a] formal definition is not required to be included in jury instructions where the jury can understand the term without such a definition.” *Commonwealth v. Hager*, 35 S.W.3d 377, 379 (Ky. App. 2000). We note that the jury did not indicate any trouble in understanding what “other intimate parts” might mean. Further, “other intimate parts” is not a technical term, and it is not defined in KRS 510.010. Accordingly, the error—if any—was harmless. *Hager*, 35 S.W.3d at 379 (citing *Sweatt v. Commonwealth*, 586 S.W.2d 289, 292 (Ky. App. 1979)).

Likewise, the wording of the jury instructions does not constitute palpable error. Boyd argues that Instruction 4 merely required the jury to find that he had touched M.M. on her lower abdominal area, without finding that this

touching was sexual contact. This is incorrect. The pertinent language of

Instruction 4 stated:

You will find the Defendant, Donald Boyd, guilty of First Degree Sexual Abuse—Victim Under 12 Years of Age under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

1. That in this county on or between November 27, 2014 through November 28, 2014, and before the finding of the Indictment herein, the Defendant **subjected [M.M.] to sexual contact when he touched her lower abdomen with his hand under her pajama pants and underwear.**

R. at 94 (emphasis added). Sexual contact was defined in Instruction 2 as:

[A]ny touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party. An actual touching is required, but the contact need not be directly with the body. For example, touching another person's sex organs through clothing would be within the purview of this definition.

R. at 91.

Under a plain reading of this language, the jury was instructed to find Boyd guilty under Instruction 4 only if it believed from the evidence that Boyd used his hand to touch M.M. on her lower abdomen under her pants and underwear **and** that the touching constituted sexual contact. The jury was instructed that for a touching to constitute sexual contact, it must be a touching of the sexual or other intimate parts of a person and it must be done for the purpose of gratifying the sexual desires of either person. While Instruction 4 did not break down the

elements in the manner that Boyd suggests they should be in his brief to this Court, it accurately instructed the jury on the law.

### **C. References to Prior Bad Acts**

Boyd next argues that the trial court abused its discretion in permitting M.M. to make references to the effect that Boyd had sexually abused her in the past. He contends that M.M.'s alluding to the fact that Boyd had previously sexually abused had the same prejudicial effect as if M.M. had been permitted to testify to details of the alleged prior sexual abuse. Boyd additionally argues that the trial court's error in permitting M.M. to reference past sexual abuse went uncured, as the trial court failed to admonish the jury not to consider M.M.'s testimony as evidence. "The standard of review of an evidentiary ruling is abuse of discretion." *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (citing *Woodard v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004)). "The test for an abuse of discretion 'is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principals.'" *Id.* (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

Before we can address the merits of Boyd's claim of error, however, we must determine if it was properly preserved for review. Boyd's objection to the Commonwealth's introduction of KRE 404(b) evidence was granted pre-trial; however, the trial court determined that it would be appropriate for M.M. to testify

that Boyd had sexually abused her “many times.” Immediately prior to the start of the Commonwealth’s presentation of its case-in-chief, Boyd objected to M.M. making any references to alleged prior bad acts. While the trial court overruled this objection, it designated Boyd’s objection as a continuing objection. However, Boyd did not make any contemporaneous objections during M.M.’s testimony and did not request an admonition. “[I]t is generally inappropriate to grant a continuing objection to issues pertaining to multiple offers of evidence under KRE 404, which generally, must be individually balanced pursuant to KRE 403.” *Davis v. Commonwealth*, 147 S.W.3d 709, 721 (Ky. 2004) (citing *United States v. Mangiameli*, 668 F.2d 1172, 1177 (10th Cir. 1982)). In this case, however, Boyd’s continuing objection was not to testimony of specific instances of prior sexual abuse; rather, it was to any reference to the fact that Boyd had previously sexually abused M.M. Any testimony simply making a reference to the fact that sexual abuse had occurred “many times” would weigh the same under KRE 403. Accordingly, Boyd’s continuing objection was sufficient to preserve this error for appellate review. It was insufficient, however, to preserve Boyd’s contention that the trial court erred in failing to admonish the jury.

M.M.’s testimony included two references to the alleged fact that “this was the last time anything like this has happened,” and one statement that incidents with Boyd that had made her uncomfortable had happened “more than once.”

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” KRE 404(b). This prohibition includes even “suggestive references” to the defendant’s prior bad acts. *Wiley v. Commonwealth*, 348 S.W.3d 570, 581 (Ky. 2010). However, such evidence may be admissible if offered to demonstrate the defendant’s “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[,]” or if the offered evidence is “so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.” KRE 404(b)(1) and (2). To determine whether proffered “bad act” evidence is proper or improper, it is helpful to assess the evidence under a three-part inquiry into relevance, probativeness, and prejudice. *Bell v. Commonwealth*, 875 S.W.2d 882, 889-91 (Ky. 1994).

“Evidence of similar acts perpetrated against the same victim . . . is ‘almost always admissible,’ under KRE 404(b), because it will almost always be significantly probative of a material issue aside from the defendant’s character.” *Jenkins v. Commonwealth*, 496 S.W.3d 435, 458 (Ky. 2016) (quoting *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002)). This case is no exception. Boyd’s defense below was that, while he had been alone with M.M. on the night of the alleged incident and had touched her, he had not touched M.M. in the way in

which she claimed. Rather, he contended that he had touched M.M. in a familial and playful way, which was meant to be harmless and could not constitute sexual abuse. Thus, M.M.'s making references that Boyd had sexually abused her in the past was relevant to show an absence of a mistake or accident. Further, M.M.'s testimony that Boyd had sexually abused her in the past demonstrated Boyd's motive for sexually abusing M.M., as it tended to show that Boyd found her to be an attractive target of his sexual impulses and, importantly, a target who would not reveal the abuse. *See Jenkins*, 496 S.W.3d at 458. As to the probativeness factor, M.M.'s testimony was sufficient for a reasonable juror to conclude that M.M. had been sexually abused before and that Boyd was the perpetrator. *Id.* at 459.

Even if proffered 404(b) evidence is found to be relevant and probative, however, it can still be excluded if the evidence is unduly prejudicial. *Bell*, 875 S.W.2d at 890. A risk of undue prejudice is inherent in prior-bad-acts evidence, and especially so in sex abuse cases. *Id.* "That risk will vary to some extent with the opprobrium attached to the prior act, *i.e.*, the degree to which the evidence is apt to 'rouse the jury to overmastering hostility.'" *Jenkins*, 496 S.W.3d at 459 (quoting *Newcomb v. Commonwealth*, 410 S.W.3d 63, 77 (Ky. 2013)). "[T]he risk of undue prejudice may be mitigated in some cases by . . . limiting 'how much the jurors are permitted to hear about 'other crimes.'"" *Id.* (quoting

Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.30(5)(e) (5th ed. 2013)).

In the instant case, any risk of undue prejudice to Boyd was properly mitigated. M.M. was not permitted to testify to specific instances of past sexual abuse. Instead, she made only brief and fleeting references to the fact that Boyd had previously sexually abused her. This testimony was necessary to establish Boyd's motive and his lack of mistake or accident. The trial court did not abuse its discretion in allowing it.

#### **D. M.M.'s Competency to Testify**

Boyd next argues that the trial court abused its discretion when it allowed M.M. to testify. Boyd's argument on this point is two-fold—he contends that the trial court erred in failing to hold a formal competency evaluation of M.M. and in concluding that M.M. was competent to testify.

KRE 601(b) states the minimal qualifications of a witness to testify as follows:

A person is disqualified to testify as a witness if the trial court determines that he:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
- (2) Lacks the capacity to recollect facts;
- (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or

(4) Lacks the capacity to understand the obligation of a witness to tell the truth.

It is presumed that all persons, including infants, are competent to testify. KRE 601; *Bart v. Commonwealth*, 951 S.W.2d 576, 579 (Ky. 1997). “It is within the sound discretion of the trial court to determine whether a witness is competent to testify.” *Id.* (citing *Pendleton v. Commonwealth*, 685 S.W.2d 549, 551 (Ky. 1985)).

When a defendant challenges an infant’s competency to testify, “it is the duty of the trial court to carefully examine the witness to ascertain whether she . . . is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth.” *Moore v. Commonwealth*, 384 S.W.2d 498, 500 (Ky. 1964) (citing *Muncie v. Commonwealth*, 308 Ky. 155, 213 S.W.2d 1019 (1948)). Boyd contends that the trial court failed in this duty, as it instructed the Commonwealth to begin its examination of M.M. with questions directed towards her competency to testify as a witness instead of holding a separate competency hearing. We disagree.

Boyd has not cited to any authority supporting his assertion that a trial court *must* hold a separate competency hearing for a child witness. At the outset of its examination of M.M., the Commonwealth questioned M.M. about when she was born, where she went to school, what grade she was in, what her favorite

school subject was, and whether she understood what it meant to tell the truth. M.M. completely answered all questions and demonstrated her ability to distinguish between the truth and a lie through the Commonwealth's use of hypotheticals. This was sufficient examination to determine whether M.M. was competent to testify.

Even still, Boyd argues that M.M.'s testimony, when considered in its entirety, demonstrated that M.M. was not competent to testify. Boyd notes that M.M. testified that her memory is not very good. He also directs our attention to inconsistencies in M.M.'s testimony, discussed *supra* pp. 22-23, and to the fact that M.M. answered many questions with "I don't know," "I don't remember," or "I'm not sure." The fact that M.M. was unable to remember certain details, and even acknowledged that she does not have a good memory, did not make her incompetent to testify as a witness; it only affected the credibility of her testimony. *Price v. Commonwealth*, 31 S.W.3d 885, 891 (Ky. 2000). The same is true of any inconsistencies in M.M.'s testimony. The fact that M.M. responded to questions that she did not know the answer to by saying that she did not know, or could not remember, demonstrates that M.M. took seriously her oath to tell the truth. Having reviewed M.M.'s testimony, we cannot find that the trial court abused its discretion in determining that she was competent to testify.

## E. Commonwealth's Closing Argument

Boyd next argues that the Commonwealth committed flagrant misconduct in its closing argument, such that reversal is necessary. Specifically, Boyd takes issue with the following statement:

[T]his defendant is presumed innocent until the evidence comes in. We're at the point of the case now where the evidence is to you. That presumption is gone because beyond a reasonable doubt the evidence has shown that he has committed the crime.

V.R. 5/11/17; 10:03:25. Boyd did not object to this statement during closing arguments. Accordingly, per Boyd's request, we review it only for palpable error.

“Prosecutorial misconduct is ‘a prosecutor’s improper or illegal act involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment.’” *Commonwealth v. McGorman*, 489 S.W.3d 731, 741-42 (Ky. 2016) (quoting *Noakes v. Commonwealth*, 354 S.W.3d 116, 121 (Ky. 2011)). “Counsel has wide latitude during closing arguments.” *Padgett v. Commonwealth*, 312 S.W.3d 336, 350 (Ky. 2010) (citing *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006)). “The longstanding rule is that counsel may comment on the evidence and make all legitimate inferences that can be reasonably drawn therefrom.” *Id.* (citing *East v. Commonwealth*, 249 Ky. 46, 52, 60 S.W.2d 137, 139 (1933)). Because of this great latitude, when prosecutorial misconduct during closing arguments is alleged, reversal is required “only if the

misconduct is ‘flagrant[.]’” *Id.* (citing *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009)). Additionally, we must consider the closing argument “as a whole.” *Id.*

Boyd is correct that the Commonwealth technically misstated the law. “The presumption of innocence that protects the accused ends when a judgment of conviction is entered against him in the trial court” and not—as the Commonwealth stated—at the close of all the evidence. *Overstreet v. Commonwealth*, 147 Ky. 471, 144 S.W. 751, 753 (1912). “However, a misstatement alone, especially when it is not objected to at trial, does not automatically require reversal.” *Matheney v. Commonwealth*, 191 S.W.3d 599, 606 (Ky. 2006). Having reviewed the Commonwealth’s closing argument in its entirety, this appears to be the only instance where the Commonwealth misstated the law. The jury was instructed on the presumption of innocence. Further, as the jury only found Boyd guilty on one of the three charges brought against him, there is no indication that it was misled by the Commonwealth’s erroneous statement. In sum, the Commonwealth’s misconduct does not rise to the level of “flagrant misconduct” and does not necessitate reversal.

#### **F. RCr 9.57 Charge**

Finally, Boyd contends that the trial court erred in reading an RCr 9.57 charge to the jury. Boyd takes no issue with the language used by the trial

court in charging the jury. Boyd notes that, prior to reading the charge, the trial court asked the jury if it felt that further deliberations would be useful and the jury responded that it “did not think so.” Based on that statement, Boyd contends that the trial court erred in administering the RCr 9.57 instruction at all. Boyd did not object to the trial court reading the charge at trial. Accordingly, we review this claim for palpable error.

The language of RCr 9.57 indicates that a charge should not be read to a jury unless “a jury reports to a court that it is unable to reach a verdict **and the court determines further deliberations may be useful . . . .**” RCr 9.57 (emphasis added). Boyd is correct that the jury informed the trial court that it did not think that further deliberations would be useful. However, a jury’s response that it does not think that further deliberation would be useful does not act as a bar to the reading of an RCr 9.57 charge. “[O]ne can assume that the jurors already had concluded that further deliberations were not useful; otherwise, they would not have ceased their deliberations and returned to open court to report that they were ‘divided.’” *Commonwealth v. Mitchell*, 943 S.W.2d 625, 627 (Ky. 1997).

After asking the jury whether further deliberations would be useful, the trial court asked the jury—at request of counsel for both Boyd and the Commonwealth—whether it was “unable to reach a verdict on any count.” The jury responded no. The trial court then repeated the question, and the jury gave the

same response. At this point, the jury had only been deliberating for approximately four hours and this was its first report of any issue. There was no error in the trial court determining that further deliberations would be useful.

Boyd additionally argues that the trial court acted coercively in giving the RCr 9.57 charge. He argues that this is evinced by the fact that the jury rendered a “clearly compromised and inconsistent verdict on the various counts of the indictment.” Appellant Br. at 25. When it is alleged that an RCr 9.57 charge was coercive, “[o]ur test always has been to look at the language of the statement or instruction itself to determine whether it actually forced an agreement or whether it merely forced deliberations resulting in an agreement.” *Id.* at 628 (citing *Earl v. Commonwealth*, 569 S.W.2d 686 (Ky. App. 1978); *Abbott v. Commonwealth*, 352 S.W.2d 552 (Ky. 1961)). “In that regard, we have long held that statements which merely impress upon the jury the propriety and importance of coming to an agreement do not rise to the level of reversible error.” *Id.* (citing *Lewis v. Commonwealth*, 463 S.W.2d 137 (Ky. 1970); *Boggs v. Commonwealth*, 424 S.W.2d 806, 808 (Ky. 1966); *Collins v. Commonwealth*, 396 S.W.2d 318, 319 (Ky. 1965); *McMillan v. Commonwealth*, 258 Ky. 354, 80 S.W.2d 24 (1935); *Wiley v. Commonwealth*, 246 Ky. 425, 55 S.W.2d 41 (1932)).

The trial court's statement to the jury did not attempt to force an agreement. After reading—verbatim—the language of RCr 9.57(1)(a)-(e), the trial court stated:

Let me ask you to return to the jury room and deliberate further and advise the court a little later if you are able to reach a verdict or are not able to reach a verdict. But I am going to ask that you attempt to do so. That's just part of my duty to do that, alright? So, return to the jury room and deliberate with the effort to reach a verdict.

V.R. 5/11/17; 2:44:52-2:45:04. This statement in no way forced the jury to return a verdict. The statement did not even discuss the desirability of reaching a verdict; it merely requested that the jury attempt to do so. We cannot find that the trial court's statement was coercive.

### **III. CONCLUSION**

In conclusion, the judgment and sentence of the Ohio Circuit Court is  
**AFFIRMED.**

**ALL CONCUR.**

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