

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

NO. 2018-CA-001744-MR

JEFF BURNS

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT  
HONORABLE DAVID L. WILLIAMS, JUDGE  
ACTION NO. 18-CR-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART,  
AND REMANDING

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BEFORE: KRAMER, LAMBERT, AND TAYLOR, JUDGES.

KRAMER, JUDGE: A jury convicted Jeff Burns of one count of sodomy, second degree, and one count of incest.<sup>1</sup> He was sentenced to a total of ten years'

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<sup>1</sup> Burns was charged in Cumberland County; however, on the date of the trial in Cumberland County, the trial court was unable to seat a jury. The trial court entered an order on July 27, 2018, changing the venue to Monroe County, and a trial was held on August 14 and 15, 2018.

incarceration.<sup>2</sup> He now appeals his conviction. After careful review of the record, we affirm in part, reverse in part, and remand for proceedings not inconsistent with this opinion.

In 2001, Burns lived in Cumberland County with his wife and two stepchildren. His stepdaughter, B.M., testified that, on or about September 11, 2001, Burns came to her room at night. He took her to the basement of the family home, held her down on a couch, and sodomized her. B.M. was twelve years old at the time. On September 26, 2001, B.M. became scared because she missed her period. At that point B.M. told her mother about Burns' actions; her mother took her to a local medical facility to undergo a pregnancy test, which was negative. The incident was not reported to the police, and B.M. continued to live at home until she graduated from high school. B.M. testified that her mother repeatedly told her she had to forgive Burns. B.M. returned home for a brief period of time after she graduated from college. She moved out of the family home permanently in 2012, when she started attending nursing school in Bowling Green, Kentucky.

In 2017, B.M. reported Burns' actions to Kentucky State Police Trooper Jordan Carter. Trooper Carter began investigating the allegations and

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<sup>2</sup> Burns received a sentence of five years' incarceration for sodomy, second degree, and ten years' incarceration for the incest conviction, to run concurrently for a total of ten years' incarceration.

went to Burns' home at least twice to interview him. During the first interview, Burns said he recalled "kissing" B.M. and stated that he wished he could go back and do things differently. He acknowledged an "inappropriate relationship." During the second interview, Burns stated he did not recall oral sex with B.M. ever happening, but he also did not deny the allegations.

Burns was eventually indicted on one count of first-degree sodomy, two counts of first-degree sexual abuse, and one count of incest. The jury convicted Burns of incest and second-degree sodomy, but acquitted Burns on one count of first-degree sexual abuse.<sup>3</sup> This appeal followed.

Burns makes numerous arguments on appeal: (1) the jury verdict violated the unanimity requirement; (2) the trial court erred in admitting an audio recording of a family conversation regarding the allegations; (3) the trial court improperly allowed victim impact evidence in the guilt phase of the trial; (4) the trial was unfair due to prosecutorial misconduct; (5) the Commonwealth engaged in improper bolstering; (6) Burns was improperly sentenced on the sodomy conviction as a Class B felony because the offense was a Class C felony in 2001, when committed; (7) Burns was improperly sentenced to a five-year period of

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<sup>3</sup> The trial court granted Burns' motion for a directed verdict on the other count of sexual abuse.

post-incarceration supervision; and (8) Burns was improperly ordered to pay court costs.

Turning to Burns' first argument, he points out that the jury instructions for both the sodomy and incest charges required the jury to believe that the charges against him occurred "in Cumberland County on or about the 11<sup>th</sup> day of September 2001 and before the finding of the indictment herein . . . ." Burns argues that "there was a lack of unanimity for each of the sodomy and incest charges. Some jurors could have believed [Burns] performed oral sex on B.M. sometime between September 11, 2001, and September 26, 2001.<sup>[4]</sup> Meanwhile, other jurors could have believed the oral sex occurred on a different day[.]"<sup>5</sup> We disagree.

Burns cites to *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015) in support of his argument; however, *Ruiz* is distinguishable. In that instance, the defendant was charged with multiple counts of both sexual abuse and sodomy. The jury instructions listed the dates of each offense as only a range between July 1, 2012, and November 25, 2012, and our highest Court pointed out that "the Commonwealth did not have [the victim] isolate and identify any individual

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<sup>4</sup> B.M. did not testify that Burns sodomized her on September 26, 2001. She testified that she informed her mother of his actions on that date and was taken to a local medical facility for a pregnancy test. Burns' actions stopped thereafter.

<sup>5</sup> See page 11 of Appellant's brief.

episode of sexual abuse or sodomy that would relate the specific crime to the instructions to be given to the jury.” *Id.* at 679. The instant action is distinguishable in three critical aspects. First, although B.M. did testify that Burns took her to the basement “more times than she could count,” she focused primarily on the date of September 11, 2001, which stuck out in her mind because of the infamous terrorist attacks on the same date. Second, Burns was charged with only one count of incest and one count of sodomy (*i.e.*, the jury was not asked to differentiate between individual episodes of each offense as in *Ruiz*). Third, in this instance, the same incident could give rise to findings of both incest and sodomy by the jury.

KRS<sup>6</sup> 510.080(1) states, in relevant part, that a person is guilty of sodomy in the second degree when “[b]eing eighteen (18) years old or more, he or she engages in deviate sexual intercourse with another person less than fourteen (14) years old[.]” KRS 530.020(1), which defines and criminalizes incest, states,

A person is guilty of incest when he or she has sexual intercourse or deviate sexual intercourse, as defined in KRS 510.010, with a person whom he or she knows to be an ancestor, descendant, uncle, aunt, brother, or sister. The relationships referred to herein include blood relationships of either the whole or half blood without regard to legitimacy, relationship of parent and child by adoption, relationship of stepparent and stepchild, and

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<sup>6</sup> Kentucky Revised Statute.

relationship of step-grandparent and step-grandchild.

Because the jury believed the evidence showed beyond a reasonable doubt that Burns committed sodomy on or about September 11, 2001,<sup>7</sup> the same instance gave rise to, and the same evidence supported, a conviction of incest as it was undisputed that Burns was B.M.'s stepfather. The jury instructions also sufficiently distinguished sodomy from incest, and there was no need to differentiate between various episodes of each because Burns was charged with only one count of both offenses. *See Harp v. Commonwealth*, 266 S.W.3d 813, 817 (Ky. 2008). Accordingly, we discern no error.

Burns' next argument pertains to admission of evidence; specifically, he contends that the trial court erred by allowing admission of a recorded conversation between Burns and other family members discussing the allegations shortly after Trooper Carter had interviewed Burns for the second time at his home. The standard of review for admission of evidence is whether the trial court abused its discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

The test for abuse of discretion is whether the trial court's "decision was arbitrary,

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<sup>7</sup> Burns argues that the "on or about" language in the jury instruction means that "a particular date is not critical, and therefore, the evidence will conform to the charging document if it establishes that the offense was committed on a date reasonably close to the one alleged." He states that B.M. never testified that something occurred on September 11, 2001. Again, we disagree, but even if there was perceived ambiguity regarding whether Burns' actions occurred precisely on September 11, 2001, or near September 11, 2001, *Ruiz* indicates that "near a notable date" is acceptable language in a jury instruction to distinguish uniquely identifiable events. *See Ruiz*, 471 S.W.3d at 678.

unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). We affirm the lower court’s decision unless there is a showing of some “flagrant miscarriage of justice[.]” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The trial court initially ruled that it would not allow the recorded conversation into evidence. However, after Burns testified on his own behalf, the trial court reversed its ruling. During his testimony at trial, Burns was adamant that he did not commit the acts for which he was accused. However, during the recorded conversation with family members, Burns repeatedly stated that he could not “recall” sodomizing B.M. The controversy regarding whether to admit the conversation into evidence centered on statements made by Burns’ father-in-law, Jimmy Scott, in the recording. Scott made repeated comments that a person simply would not forget doing the acts of which Burns was accused. However, after Burns testified, the trial court ruled that the audio was relevant and that its probative value outweighed any danger of undue prejudice against Burns. *See* KRE<sup>8</sup> 403.

We first note that CR<sup>9</sup> 76.12(4)(c)(v) requires, in relevant part, “citations of authority pertinent to each issue of law[.]” Burns provides no legal

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<sup>8</sup> Kentucky Rule of Evidence.

<sup>9</sup> Kentucky Rule of Civil Procedure.

basis whatsoever for his second argument. He fails to cite to any legal authority, including the Kentucky Rules of Evidence or the Kentucky Rules of Civil Procedure. This Court merely deduced that his argument lies in KRE 403 because he contends, without citation, that “[t]he trial court was correct initially that the prejudice outweighed any probative value.” However, we agree with the Commonwealth that the recording was permissible as evidence under KRE 801A(a)(1) as a prior inconsistent statement by Burns.

In Kentucky, a prior inconsistent statement is used not only to attack the credibility of the declarant, but also constitutes substantive evidence with respect to the matter asserted. KRE 801A(a)(1); *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969). A statement is inconsistent for purposes of KRE 801A(a)(1) whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it. *Wise v. Commonwealth*, Ky. App., 600 S.W.2d 470, 472 (1978).

*Brock v. Commonwealth*, 947 S.W.2d 24, 27 (Ky. 1997).

The recorded family conversation was inconsistent with Burns’ testimony that he did not commit the acts for which he was on trial. Burns takes issue with statements made by Jimmy Scott in the recording, to the effect that a person does not forget whether they had engaged in the type of behavior of which Burns was accused. However, Burns echoed the exact sentiment in his testimony at trial, which factored into the trial court’s decision to admit the recording into evidence:



**Prosecutor:** I'm asking you, sir, on all the acts you're charged with here, how could you not remember?

**Burns:** Exactly. You would think I would remember if that happened.

Burns' recorded statements were wholly inconsistent with his testimony at trial. Despite Jimmy Scott's repeated insistence that a person cannot forget something like that in the recording, Burns continued to assert that he did not recall performing the acts of which he was accused. The recorded conversation was not unduly prejudicial to Burns.

Burns' third argument is unpreserved and Burns requests review under RCr<sup>10</sup> 10.26 which states,

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Accordingly, unpreserved error may be noticed on appeal only if it is "palpable" and "affects the substantial rights of a party." This Court may only grant relief if it determines "that manifest injustice has resulted from the error." "[W]hat a palpable error analysis 'boils down to' is whether the reviewing court believes there is a 'substantial possibility' that the result in the case would have

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<sup>10</sup> Kentucky Rule of Criminal Procedure.

been different without the error.” *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citation omitted).

Burns argues that the trial court improperly allowed victim impact testimony during the guilt phase of the trial. B.M. testified that she started taking antidepressant medication in high school and that she started having panic attacks and nightmares. B.M. also testified that she started counseling in 2013. After careful review, we agree with the Commonwealth that this testimony was relevant to show that a traumatic event happened to B.M., consistent with her allegations against Burns.<sup>11</sup> Moreover, B.M.’s testimony provided a timeline that gave context regarding why she contacted authorities in 2017, when the alleged events took place in 2001. Burns is again making an evidentiary argument. He makes no assertion that the result would have been different absent this perceived error (*i.e.*, he does not argue that manifest injustice occurred). We cannot conclude that admission of this portion of B.M.’s testimony caused a different result than if it had not been admitted. *See, e.g., Miller v. Commonwealth*, 391 S.W.3d 857, 861 (Ky. 2013). Accordingly, we discern no error.

Burns next alleges prosecutorial misconduct and again requests review under RCr 10.26. Burns asserts that the prosecutor engaged in misconduct by

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<sup>11</sup> *See Dickerson v. Commonwealth*, 174 S.W.3d 451, 472 (Ky. 2005), which held that the fact that the victim sought treatment at a rape crisis center was relevant to prove whether she was sexually assaulted.

referring to Jimmy Scott's statements from the recorded conversation in his closing argument. This argument is simply a repackaging of Burns' assertion that the trial court committed error by allowing the full recorded conversation into evidence. It is well-settled law in Kentucky "that opening and closing arguments are not evidence and prosecutors are given considerable leeway during both." *Mayse v. Commonwealth*, 422 S.W.3d 223, 227 (Ky. 2013) (citations omitted). Had the trial court not allowed the conversation into evidence, the Commonwealth would not have referred to Mr. Scott's statements in closing arguments.

It should be noted that all but one of Appellant's claims of prosecutorial misconduct (discussed below) are better classified as claims that the trial court committed evidentiary error by admitting irrelevant and unduly prejudicial evidence. While Appellant correctly cites *Duncan v. Commonwealth*, 322 S.W.3d 81 (Ky. 2010), for the proposition that "prosecutorial misconduct can assume many forms, including improper questioning and improper closing argument," *id.* at 87, that case dealt with a witness being forced to characterize another witness specifically as "lying" and to testify as to the truth or falsity of DNA evidence. Appellant's claims on appeal do not focus on whether the Commonwealth's conduct was inappropriate, but rather on whether the trial court erred by admitting certain evidence at trial.

*Miller*, 391 S.W.3d at 861.

The same is true in the instant action. Notably, Burns once again does not argue that manifest injustice occurred (*i.e.*, that the result would have been different had the prosecutor not drawn attention to Mr. Scott's statements in

closing arguments). Because we have ruled that the recorded conversation was properly admitted into evidence, we decline to address the issue further.

Burns next argues that the Commonwealth engaged in improper bolstering and requests review under RCr 10.26. We must again note that Burns does not argue manifest injustice occurred. Indeed, much of his argument centers around testimony regarding an alleged incident in Burns' pickup truck. This incident resulted in a charge of sexual abuse in the first degree, for which the jury acquitted Burns. He cannot now seriously argue that manifest injustice occurred in this instance and we decline to address it further. Burns also argues that testimony by Brian Miller, B.M.'s husband, bolstered B.M.'s testimony. We disagree.

With regard to improper bolstering, it is well settled that "one witness is not permitted, and should not be asked, to comment upon the truthfulness of another witness's testimony." *Brown v. Commonwealth*, 313 S.W.3d 577, 628 (Ky. 2010) (citation omitted). Brian Miller testified that he believed Burns to be a "nasty, dirty, and sick man" which, at most, indirectly implied that he believed B.M.'s accusations against Burns. However, any indirect bolstering of B.M.'s testimony was "not so fundamental and intolerable as to have threatened the integrity of the trial. In short, the fact that a jury may have been able to infer that a witness was, at most, indirectly vouching for the credibility of another witness is

simply not the stuff from which palpable errors are made.” *Harp*, 266 S.W.3d at 824. The same is true in the instant action. We again discern no error.

Turning to Burns’ next argument, the Commonwealth is in agreement that Burns was improperly sentenced in this matter and that the case should be remanded for sentencing only. We also agree. When Burns committed the crime of incest in 2001, it was a Class C felony, punishable by a maximum incarceration period of “not less than five (5) years nor more than ten (10) years[.]” KRS 532.060(2)(c). However, the legislature amended the incest statute (KRS 530.020) in 2006 to make incest a Class B felony if the victim is less than eighteen years of age.<sup>12</sup> The jury found elements of the offense of incest took place before the statute was amended in 2006 and was therefore sufficient to sustain the conviction. However, the jury was then improperly instructed that incest was a Class B felony, and it recommended the minimum sentence of ten years’ incarceration, which the trial court later imposed. We again turn to *Miller* as instructive in this instance because “[t]here is a reasonable probability that the result, *on sentencing*, would have been different if the jury had been properly instructed because [the jury] convicted [Burns] only of an offense that pre-dated the amendment.” *Miller*, 391 S.W.3d at 866 (emphasis added). Accordingly, we reverse Burns’ sentence for the

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<sup>12</sup> A Class B felony is punishable by a maximum period of imprisonment of “not less than ten (10) years nor more than twenty (20) years[.]” KRS 532.060(2)(b).

incest conviction only and remand for sentencing not inconsistent with this Opinion.

Similarly, at the time Burns committed the offense, KRS 532.043(2) required a three-year period of conditional discharge for a person convicted of incest under KRS 530.020. The trial court sentenced Burns to a five-year period of conditional discharge pursuant to the version of KRS 532.043(2) in effect at the time of sentencing rather than at the time he committed the act. We likewise reverse and remand the imposition of the period of conditional discharge for proceedings not inconsistent with this Opinion.

Finally, Burns argues that the imposition of court costs by the trial court violates KRS 23A.205(3) which states,

If the court finds that the defendant does not meet the standard articulated in subsection (2) of this section and that the defendant is nonetheless unable to pay the full amount of the court costs, fees, or fines at the time of sentencing, then the court may establish an installment payment plan in accordance with KRS 534.020.

Notably, Burns' only argument on appeal is that he will be unable to pay the court costs within a year pursuant to KRS 534.020(2)(b) which states, in relevant part,

If the court establishes an installment payment plan for a defendant to pay the full amount of court costs, fees, or fines . . . [e]xcept as provided in subsection (3) of this section, all court costs, fees, and fines shall be paid within one (1) year of the date of sentencing[.]

Burns argues that, due to his incarceration, he will be unable to pay the court costs within one year of the date of sentencing. He cites to *Buster v. Commonwealth*, 381 S.W.3d 294 (Ky. 2012); however, *Buster* is distinguishable from the instant action, and Burns’ argument misses the mark. In *Buster*, the trial court incorrectly delayed ruling on whether the defendant could pay court costs and fees until after his release from imprisonment. In this regard, *Buster* held only that “the decision to impose or waive court costs is to be made by the trial court by or at the time of sentencing.” *Id.* at 305. In the instant action, the trial court imposed court costs at Burns’ sentencing; therefore, there was no error as defined in *Buster*. Rather, Burns argues that court costs should not have been imposed because he cannot pay within one year because he will likely still be incarcerated at that time. We are not persuaded.

The trial court ordered Burns to begin paying an installment plan of \$30.00 per week towards his court costs “beginning within 30 days of release [from incarceration].” In interpreting any statute—in this case KRS 534.020(2)(b)— “[w]e should not add or subtract from the statute, nor should we interpret the statute to provide an absurd result.” *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004). Burns encourages this Court to interpret KRS 534.020(2)(b) in a way that would provide an absurd result. Specifically, Burns argues for an interpretation that would mean anyone who is convicted of a crime and

incarcerated for a period of longer than one year will never be subject to the payment of court costs. We decline to do so. The trial court ordered Burns to pay court costs pursuant to a payment plan once released from imprisonment. There was no error.

### **CONCLUSION**

For the foregoing reasons, we affirm the Cumberland Circuit Court in part, reverse in part, and remand for sentencing proceedings not inconsistent with this Opinion.

ALL CONCUR.

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