IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 2-12-04 Ella Gray [illegible], D.C.

2002-SC-0043-MR

RICKY LAMMORIS HOLLIE — APPELLANT

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
INDICTMENT NO. 00-CR-00236

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Ricky Lammoris Hollie, was indicted for the first-degree rape of the victim, R. B. Upon conviction, he was sentenced to twenty (20) years and appeals to this Court as a matter of right.[1]

On the night of July 28, 2000, the victim went to a bar and had three or four drinks. Afterwards, she went to a friend's house and stayed there until 3:00 a.m. when she began to walk home in the rain. During her walk home, a male approached and spoke to her. The man said his name was Johnson and asked the victim if she had any drugs and she responded that she did not do drugs. The victim attempted to walk away but the man caught up with her. The victim later identified the man as Appellant.

[1] Ky. Const. §110(2)(b).

As the victim walked away, Appellant grabbed the victim by the throat and told her to walk with him. He took her to an alley behind a tractor-trailer as she begged him to stop. As Appellant grabbed her, the victim dropped a plastic grocery bag containing several personal items. The victim testified that Appellant told her to be quiet or he would kill her. Appellant then forced the victim to partially undress, lie down and take her boots off. As the victim followed his orders attempting to remove her boots, Appellant became frustrated because the victim was slow and ordered her to scoot three or four times further up under the trailer. The victim was then raped.

Appellant told the victim that she had been with him before and remarked, "You liked it before." The victim testified that she was crying and eventually nodded her head that she liked it so Appellant would stop choking her. Appellant told her not to leave because he would be "right back." During that time, the victim escaped to a gas station and called the authorities.

The victim was taken to a hospital by a police officer where medical personnel tested the victim's blood and clothing, and administered a rape kit. Medical personnel discovered marks on her neck showing where she had been choked. She also had scrapes on her back, hip and legs. On the morning of the crime, the victim went to the police station and identified Appellant as the rapist from photographs of nine individuals. The police also recorded the victim's statement of the events.

After Appellant's arrest, he gave three statements to the police. At the hospital where a sexual assault kit was administered, Appellant stated that he had been with several people during the night in question, including his cousin, and he claimed the only girl he had had sex with was over by the Budget Inn. Appellant also denied using any drugs or knowing what crack looked like. He then gave another statement at

the police station at which time he executed a written waiver, and repeated that he had had sex with a girl by the Budget Inn. After the second statement, Appellant advised the police officers that he wanted an attorney and questioning was terminated.

Before Appellant's third statement, he was taken to a security room to be held during the processing of paperwork. Detective Powell testified that it was there that Appellant confessed to raping the victim. Appellant made this statement after agreeing that he had read and understood his Miranda warnings. Detective Powell testified that Appellant was not coerced or threatened prior to or during his confession.

On his motion to suppress his confession, Appellant claimed that the police slammed the door of a cruiser on his leg, that he was kicked and that he sprained his wrist when cuffed behind his back. Appellant testified that Detective Powell threatened him by stating that he should "go ahead and blow [Appellant's] head off right now." Appellant testified that during this incident, Detective Powell put a gun too close to his head and "threatened the hell out of him." Appellant testified that he only made the statement because he feared for his life. In spite of Appellant's version of the events, the trial court found that the confession was intelligently, voluntarily and freely made. The trial court denied Appellant's motion to suppress on the grounds that it included a written waiver stating that he had not been coerced. Appellant's confession was presented to the jury at his trial.

At trial, the Commonwealth introduced other physical evidence implicating Appellant that was discovered by Officer Harper and Officer Roby under a semi-trailer. The officers discovered a plastic bag containing personal items of the victim, a sock and a wallet near the tires of trailer. In court, Officer Harper identified some of the items that were contained within the wallet, including a Veterans Universal Access ID with a

picture of Appellant, a check belonging to Appellant, a patient ticket from a doctor's office belonging to Appellant, and Appellant's social security card. Officer Harper also testified that it was apparent something had happened under the trailer because the grass was matted down.

Officer Harper testified that the sexual assault kits were sent off for lab testing at the Kentucky State Police Laboratory in Jefferson County and for DNA testing in Frankfort. Stacy Wernecke with the Kentucky State Police central lab in Frankfort testified that the vaginal swabs showed the presence of male DNA that matched that of Appellant. She testified that the DNA profile discovered could occur only one time in every eight quadrillion individuals.

Appellant presents various issues on appeal and further facts will be developed as necessary.

Appellant's defense to the charge of rape was that the sex act was consensual and was not by forcible compulsion. Appellant testified that he and the victim engaged in sexual intercourse in exchange for drugs because she had run out of money. Later that evening, he testified, that the victim returned and again wanted to exchange sex for drugs. Appellant reported that he rejected the offer, grabbed the victim by her throat and threw her in the mud. He testified that the victim obtained numerous abrasions and contusions as a result of the assault. Upon this evidence, Appellant claims entitlement to an instruction on fourth-degree assault.

The trial court has a duty to provide instructions on the "whole law of the case, including any lesser-included offenses which are supported by the evidence, [but]

. . . that duty does not require an instruction on a theory with no evidentiary foundation."[2] This Court has held:

> The general rule is that "the court is required to instruct on every state of the case reasonably deducible from the evidence." Ragland v. Commonwealth, Ky., 421 S.W.2d 79, 81 (1967). And, a "defendant is entitled to have his theory of the case submitted to the jury." Davis v. Commonwealth, Ky., 252 S.W.2d 9, 10 (1952).[3]

However, a special instruction is not required "if the instruction which submits the Commonwealth's theory is couched in such language that the ordinary layman who sits upon the jury can easily understand and its negative completely covers the defense of the accused."[4]

Appellant offers Sanborn v. Commonwealth,[5] where this court held that if evidence to support a theory of a lesser offense was introduced, the jury should be instructed accordingly, rather than being left with no alternative except to convict or acquit of the principal charges.[6] In Sanborn, a prosecution for murder, first-degree rape, first-degree sodomy, and kidnapping, the defendant's theory was that all of the offenses except murder were committed after the victim was already dead.[7] The defendant offered evidence to support his defense that the kidnapping and sex offenses were committed after the victim was already dead.[8]

This Court reversed and remanded Sanborn on other grounds, but provided that "[i]f at the next trial there is any substantial evidence to support this

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[2] Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 72 (2000)(*quoting* Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998)).
[3] Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 549 (1988).
[4] Blevins v. Commonwealth, Ky., 258 S.W.2d 501, 502-503 (1952).
[5] Supra, note 3.
[6] Id. at 549.
[7] Id.
[8] Id. at 550.

theory, the appellant will be entitled upon request to instructions accordingly, rather than the jury being left with no alternative except to convict or acquit of the principal charges."[9]

In this case, the jury could easily understand that the negative of the charge of forcible rape was consent. Appellant was not charged with assault, and even his version of the events separated the sexual contact and the assault by forty-five minutes or so. Appellant's defense was consent and an uncharged assault remote in time would not have been a lesser-included offense with the evidence in this state.

Appellant next claims that he should have been allowed to question the victim regarding any potential past substance abuse problems despite her denial of any drug use. Appellant contends that denial of his right to cross-examine the victim on past drug use violated his right of confrontation.

On cross-examination, Defense counsel asked the victim, "Do you have any substance abuse problems of any sort? Marijuana?" The prosecution immediately objected, approached the bench, and argued that the victim had already been asked about cocaine use. The defense argued that any substance abuse by the victim would make it more likely that the victim purchased drugs in exchange for sex from Appellant. The Commonwealth's objection was sustained.

Appellant contends that prior drug use was relevant to establish that the victim was not credible because her testimony that she was drug free was false. Appellant also intended to show motive for the victim's testimony, *i.e.*, to cover her own alleged drug activity. Limitations on cross-examination seeking to expose bias or prejudice implicate a fundamental constitutional right and should be cautiously

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[9] Id.

applied.[10] This Court has noted that, "[s]o long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries."[11] We said:

> [A] Connection must be established between the cross-examination proposed to be undertaken and the facts in evidence. A defendant is not at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence.[12]

The trial court did not violate Appellant's right of confrontation. He was allowed to inquire into the victim's possible use of cocaine. The victim denied ever taking cocaine, and denied taking any form of drugs the night and the morning of the rape. Appellant offered no evidence suggesting that the victim used drugs, and police officers and medical personnel also testified that although the victim was shaken up, she did not appear to be using drugs. It was well within the discretion of the trial court to disallow further questioning upon Appellant's unsupported theory that the victim was a drug abuser. Furthermore, Appellant sought no avowal.

Appellant next argues that the trial court committed error by allowing the victim to improperly bolster her claim of rape by the use of inadmissible hearsay evidence. First, during the Commonwealth's case-in-chief, a nurse who examined the victim on the night of the rape testified that the victim told her she was raped. Second, a doctor who examined the victim also testified that the victim told him she was raped and threatened. Third, medical records from the hospital where the victim was

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[10] Davis v. Alaska, 415 U.S. 308, 320, 94 S.Ct. 1105, 1112, 39 L.Ed.2d 347 (1974); Parsley v. Commonwealth, Ky., 306 S.W.2d 284, 285 (1957).
[11] Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 721 (1997) (*quoting* United States v. Boylan, 898 F.2d 230, 254 (1st Cir. 1990)).
[12] Maddox, 955 S.W.2d at 721.

examined had numerous references to the victim's statements claiming that she had been raped. Finally, Detective Powell testified that the victim told him she was raped and threatened by a black male. Appellant observed that the prosecutor had told the jury that the case boiled down to a battle of credibility between Appellant and the victim, and that the Commonwealth had urged the jury to consider all the victim's prior consistent statements.

Appellant did not preserve this issue at trial. He now asks this Court to review this claim of hearsay error under RCr 10.26 for palpable error resulting in manifest injustice. RCr 10.26 provides as follows:

> 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.

RCr 10.26 review requires a "manifest injustice" that prejudices the substantial rights of the defendant creating a substantial possibility that the results at trial would have been different.[13]

The victim's statements to the nurse and the doctor introduced through testimony and medical records were related to the medical treatment and diagnosis of the victim.[14] KRE 803(4) provides as follows:

> Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

The victim's statements informing the doctors and nurses that she had been raped were pertinent to her treatment insofar as to determine the applicable tests, *i.e.,* a rape

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[13] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

kit and blood tests. As these statements appear to be admissible and do not specifically identify Appellant, there was no manifest injustice.

As to detective Powell's testimony that the victim stated that a black male had raped her, we note that such a statement describing the characteristics of a defendant as opposed to an identification of him was inadmissible as hearsay.[15] The Commonwealth argues that these statements were valid explanations of why Detective Powell took the further actions he took in his investigation. The Commonwealth contends that these statements were not intended as evidence that what the victim said was true, or that they sought to bolster her testimony.

The Commonwealth's arguments have often been made and rejected.[16] Detective Powell's testimony was no more than inadmissible investigative hearsay and if an objection had been made, it would have been sustained. Nevertheless, in view of the limited nature of the officer's statement, we are not convinced that manifest injustice occurred.[17] Certainly, in view of the victim's testimony and her condition, and the fact that other witnesses properly testified that she said she had been raped, it is highly unlikely that a different result would occur upon retrial if the Powell testimony were excluded. Accordingly, we discern no palpable error.

Finally, Appellant argues that the prosecution violated due process by failing to provide notice of the intended introduction of a detective's testimony implying

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[14] Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001).
[15] Summitt v. Commonwealth, Ky., 550 S.W.2d 548 (1977).
[16] Young v. Commonwealth, Ky., 50 S.W.3d 148, 167 (2001); Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 859 (1997).
[17] Carter v. Commonwealth, Ky., 782 S.W.2d 597, 600 (1990) (holding admission of unspecific identification of accused harmless error), *rev'd on other grounds,* Norton v. Commonwealth, Ky., 37 S.W.3d 750 (2001).

that Appellant had committed other crimes. Appellant did not preserve this issue at trial, but asks this Court to review it under RCr 10.26 for palpable error.

Detective Powell, a veteran police officer whom Appellant claims coerced him into confessing, testified that the victim identified him from a photographic lineup. The prosecution then asked what he did to locate Appellant and Detective Powell stated that he had his address on file, although it was no longer correct. Appellant argues that this testimony could only have implied to the jury that Appellant had been involved in other criminal activity beyond the charge of rape. We reject this argument. It is not clear that this passing remark by Detective Powell implies prior criminal activity by Appellant, as it is not clear where the address information came from. In view of the evidence, this unpreserved comment was not manifest injustice.

Accordingly, the judgment of conviction is affirmed.

Lambert, C.J., and Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Keller, J., concurs in result only.

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