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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0037-MR

CECIL PATE — APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
01-CR-00105

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING IN PART

I. INTRODUCTION

Following a jury trial, Appellant was found guilty of First-Degree Rape and two (2) counts of First-Degree Sexual Abuse. The jury recommended a life sentence for the First-Degree Rape conviction and a five (5) year sentence for each First-Degree Sexual Abuse conviction. The jury also found Appellant to be a First-Degree Persistent Felony Offender (PFO), and recommended an enhanced sentence of life imprisonment in lieu of the previously-recommended sentences.[1] In accordance with the jury's recommendation, the trial court

---

[1] Rather than authorizing the jury to enhance the punishment for each offense, as it should have, see 1 WILLIAM S. COOPER, KENTUCKY INSTRUCTIONS TO JURIES § 12.35A, at 775 (4th ed. 1999); Wilhite v. Commonwealth, Ky., 574 S.W.2d 304, 307-08 (1978), the trial court's penalty phase jury instructions authorized the jury to recommend one (1) enhanced sentence for all three (3) convictions. Because this improper aggregate enhanced sentence was based, in

sentenced Appellant to "Life in Prison as a [F]irst-Degree Persistent Felony Offender."[2] Appellant appeals as a matter of right[3] and argues that his conviction for sexual abuse of EH must be reversed based on insufficiency of the evidence. Additionally, Appellant argues that he was denied a fair trial by an impartial jury when the trial court conducted EH's competency hearing in the presence of the jury.[4] We affirm Appellant's convictions for the First-Degree Rape and First-Degree Sexual Abuse of JMK and the jury's PFO determination, but we reverse his conviction for First-Degree Sexual Abuse of EH because Appellant was entitled to a directed verdict of not guilty on that offense.

II. BACKGROUND

In April 2000, Appellant Cecil Pate lived with his girlfriend, Christy Jean Kayse, and her three daughters, JMK, four (4) years old, EH, nine (9) years old, and Amanda, thirteen (13) years old. Also living in the residence were Kayse's aunt, Brenda Hall, and Kayse's nineteen (19) year old cousin, Jason. In March 2001, JMK's father and stepmother, who had limited visitation with the children, overheard a conversation between JMK and another sibling alerting them to the possibility of sexual abuse occurring at the children's full-time residence. They

---

part, upon a conviction that was unsupported by the evidence, the trial court's instructional error will necessitate a remand for a new sentencing hearing to fix PFO-enhanced sentences as to Appellant's convictions for the First-Degree Rape and First-Degree Sexual Abuse of JMK.

[2] A PFO determination authorizes an enhancement of the sentence for the underlying offense – or, as in this case, the sentences for each of the underlying offenses; it is not, itself, a separate criminal offense. Thus it is inaccurate to designate a sentence as being imposed for a PFO conviction. See Wellman v. Commonwealth, Ky., 694 S.W.2d 696 (1985).

[3] KY. CONST. § 110(2)(b).

[4] It is not clear from Appellant's brief, but we assume that he seeks reversal of all convictions because of this alleged error.

took JMK to the Jackson Purchase Medical Center where an examination of the child's genitalia was conducted. They later took both JMK and EH to Child Watch for interviews and further examinations by Dr. Wally Montgomery. Dr. Montgomery stated at trial that the examination of JMK revealed that her vaginal vault near her rectum had been disrupted, the child's hymen was not intact, and there was evidence that tissue in the vaginal area had been torn. Dr. Montgomery testified that these medical findings were consistent with the history JMK reported, a portion of which was read at trial:

> Dr. Montgomery: What has happened to you?
>
> JMK: Cecil hurt me.
>
> Dr. Montgomery: How?
>
> JMK: He put his pee-pee in me.
>
> Dr. Montgomery: Where?
>
> JMK: In my bottom (Dr. Montgomery indicates the child pointed toward the front part of her pelvic area).
>
> Dr. Montgomery: Did he pee in you...in your bottom?
>
> JMK: No.
>
> Dr. Montgomery: Did he put his pee-pee in your mouth?
>
> JMK: No.
>
> Dr. Montgomery: Who is Cecil?
>
> JMK: Cecil is my mother's boyfriend.
>
> Dr. Montgomery: Did you bleed from your bottom after you were hurt?
>
> JMK: Yes.

Dr. Montgomery: How many times did he hurt you?

JMK: I don't know.

But, Dr. Montgomery's examination of EH revealed no evidence of injury to the vaginal or perineum region. This finding was consistent with the history she provided to Dr. Montgomery, a portion of which was read as follows:

Dr. Montgomery: What is wrong?

EH: My mother's boyfriend has been hurting my sister.

Dr. Montgomery: What is his name?

EH: Cecil.

Dr. Montgomery: Have you seen him hurting your sister?

EH: No, he makes me leave the room.

Dr. Montgomery: Has your mother been at home when this happens?

EH: No, she is at work.

Dr. Montgomery: How many times has this happened?

EH: Almost every night.

Dr. Montgomery: Has anyone hurt you?

EH: No.

Dr. Montgomery: Has Cecil touched your bottom?

EH: No.

Dr. Montgomery: Has your older sister been hurt?

EH: I don't know.

Dr. Montgomery: How do you know [JMK] has been hurt?

EH: I saw blood in her panties and also in her jeans.

A critical factor in the Commonwealth's case against Appellant concerned the application of a hydrocortisone cream or ointment to the vaginal regions of both EH and JMK. Kayse, the children's mother, testified that JMK's father provided the cream because of a rash or redness on the child's genitalia. Kayse testified that she applied this medication to JMK after her bath in the evenings and began to apply it to EH when she noticed some redness in her vaginal area. EH testified that her mother was often at work in the evenings and on those occasions, Appellant would apply the medication to her and JMK. EH stated that Appellant made her leave the room when he applied the medicine to JMK and that she once saw him place his hand down the front of his pants while applying the medicine to JMK. EH testified that the only time Appellant touched her "private" was when he applied the medicine to her and that he did not touch himself while applying the medicine to her.

The grand jury indicted Appellant for First-Degree Rape, First-Degree Sodomy, and First-Degree Sexual Abuse of JMK, for First-Degree Sexual Abuse of EH, and for being a First-Degree PFO. The offenses were alleged to have occurred between May 1, 2000 and March 1, 2001. Upon motion of the Commonwealth's Attorney, the trial court dismissed the sodomy charge prior to commencement of Appellant's trial. The jury convicted Appellant of all charges and recommended a life sentence for the rape conviction and a five (5) year sentence for each sexual abuse conviction. The jury also found that Appellant was a First-Degree Persistent Felony Offender and then recommended an

enhanced sentence of life in lieu of the previous recommended sentences.[5] The trial court sentenced Appellant in accordance with the jury's recommendation.[6]

III. ANALYSIS

A. SUFFICENCY OF THE EVIDENCE AS TO SEXUAL ABUSE OF EH

Appellant's first claim of error is that the evidence was insufficient to warrant his conviction for First-Degree Sexual Abuse of EH, and therefore, he asserts that the trial court erred in overruling his motion for a directed verdict on that charge. In reviewing a claim that the trial court erred in denying a directed verdict of acquittal of a criminal charge based on the sufficiency of the evidence, this Court has steadfastly adhered to the rule that "[i]f the totality of the evidence [was] such that the judge [could have] conclude[d] that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence [was] sufficient, albeit circumstantial[,]"[7] and the defendant was not entitled to a directed verdict of acquittal. "If the evidence [did not] meet that test, it [was] insufficient[,]"[8] and the defendant would have been entitled to his requested directed verdict.

Appellant was charged with violating KRS 510.110, which reads in relevant part, as follows:

> A person is guilty of sexual abuse in the first degree when:
> (a) He subjects another person to sexual contact by forcible compulsion; or

---

[5] See supra note 1.

[6] See supra note 2.

[7] Hodges v. Commonwealth, Ky., 473 S.W.2d 811, 813-14 (1971). See also Norris v. Commonwealth, Ky., 89 S.W.3d 411 (2002); Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Sawhill v. Commonwealth, Ky., 660 S.W.2d 3 (1983).

[8] Hodges, 473 S.W.2d at 814.

(b) He subjects another person to sexual contact who is incapable of consent because he:
1. Is physically helpless;
2. Is less than twelve (12) years old; or
3. Is mentally incapacitated.

As it is undisputed that EH was only nine (9) years old at the time of the alleged offense, the Commonwealth was not required to prove forcible compulsion, but rather the Commonwealth was only required to prove that Appellant subjected EH to sexual contact. Sexual contact is defined in KRS 510.010(7) as follows:

> "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]

The 1974 Commentary to KRS 510.110 states:

> The three degrees of sexual abuse contained in KRS 510.110, 510.120, and 510.130 roughly parallel the structure for rape and sodomy. The offenses apply to both adults and children. Formerly the proscribed behavior when committed upon an adult was generally prosecuted under an assault provision. However, under the Code an actual physical injury must be inflicted to constitute an assault. Since the conduct dealt with in the offense of sexual abuse seldom results in physical injury a gap would exist if this conduct were not proscribed. Thus, these three sections constitute a special prohibition against sexual assault.[9]

As recognized in the Commentary, the conduct dealt with in this type of offense rarely results in physical injury. So, the fact that Dr. Montgomery's examination of EH did not reveal injuries consistent with sexual abuse is not dispositive as to the charge.

---

[9] KRS 510.110 cmt. (Banks/Baldwin 1974) (emphasis added).

The dispositive issue, however, is whether the evidence supported a finding by the jury that Appellant's undisputed touching of EH's vaginal area was for the purpose of sexual gratification. In deciding this issue, Appellant's intent "may be ascertained from the surrounding facts and the jury is allowed a reasonably wide range in which to infer intent from the circumstances."[10]

Here, the facts relied upon by the Commonwealth in support of its claim that Appellant touched EH's vaginal area for his sexual gratification are straight forward but limited. EH testified that when Appellant applied medicine to her vaginal area, he required that she lay naked on the bed in his bedroom. EH also testified that Appellant often requested that she massage his legs with either baby oil or lotion, and when asked how far up the leg Appellant would ask her to massage, she stood and indicated her upper thigh/lower hip region. In addition, EH stated that Appellant asked her to watch with him a movie depicting "naked people," and she testified that she once saw Appellant place his hand down the front of his pants while he was applying medicine to JMK's vaginal area. She did not testify that he did so when applying medicine to her. Although this evidence may give rise to a suspicion, even a strong suspicion that Appellant touched EH's vaginal area for his sexual gratification, "[s]uspicion alone is not enough."[11] We realize that "[i]t is, of course, often difficult to draw the line between a reasonable inference and speculation. But evidence that will support a reasonable inference

---

[10] Rayburn v. Commonwealth, Ky., 476 S.W.2d 187, 189 (1972). Accord Tungate v. Commonwealth, Ky., 901 S.W. 2d 41 (1995); Anastasi v. Commonwealth, Ky., 754 S.W.2d 860, 862 (1988).

[11] Hodges, 473 S.W.2d at 814.

must indicate the probable, as distinguished from a possible cause."[12] Even taking the evidence in the light most favorable to the Commonwealth, it was not sufficient to create a reasonable inference that Appellant touched EH's vaginal area for his sexual gratification. Thus, the trial court erred when it failed to direct a verdict of acquittal on the charge that Appellant sexually abused EH.

B. CONDUCTING EH'S COMPETENCY HEARING IN JURY'S PRESENCE

Appellant next claims that he was denied due process and a fair trial by an impartial jury because the trial court conducted a hearing to determine whether EH was competent to testify in the presence of the jury. Appellant also claims that in addition to the error of conducting the hearing in front of the jury, the judge also improperly bolstered the witness's credibility at the close of the hearing. At the outset we note that this issue is not properly preserved for review; however, Appellant urges this Court to consider this claim as palpable error. Under RCr 10.26, "[a] palpable error which affects the substantial rights of a party may be considered . . . 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."

Near the close of its case, the Commonwealth called ten (10) year old EH to the stand, and the trial court conducted a hearing in the jury's presence in order to determine her competency to testify as a witness.[13] The trial judge

---

[12] Briner v. General Motors Corp., Ky., 461 S.W.2d 99, 101 (1970).

[13] KRE 601 relates to competency of witnesses and it provides:

> (a) General. Every person is competent to be a witness except as otherwise provided in these rules or by statute.

asked EH several questions regarding her ability to discern between telling the truth and telling a lie; he emphasized the importance of telling the truth, particularly when she was on the witness stand. At the close of the hearing he stated, "All right, do you have any further qualifiers, either counsel? I think she's capable and qualifies under the statute, so you may proceed." Appellant maintains that the trial judge's statement was improper bolstering of the child witness. We disagree.

Appellant relies upon language from this Court's opinion in Humphrey v. Commonwealth[14] to support his contention that it was error for the trial court to conduct the competency hearing in the presence of the jury. In Humphrey, Appellant claimed ineffective assistance of counsel because his attorney did not object when the trial court held the competency hearing of a child witness in the presence of the jury,[15] and this Court stated:

> While it would have been better practice to have conducted the competency hearing in chambers, outside the presence and hearing of the jury, inasmuch as our law was not then settled on this point, counsel's failure to object did not amount to ineffective assistance. Moreover, the trial court said nothing which amounted to bolstering the credibility of

---

> (b) Minimal qualifications. 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.

[14] Ky., 962 S.W.2d 870 (1998).

[15] Id.

> K.H. and although appellant asserts that there was some type of error and that his trial counsel should have objected, at that time there was no authority that such a hearing was improper.[16]

Citing the Humphrey Court's language, Appellant states that it appears "there is now direct authority in Kentucky which provides that conducting a competency hearing of a child witness in the presence and hearing of the jury is prohibited." Appellant candidly admits, however, that he cannot find any such authority. We assume that the Humphrey Court was simply referring to its statement that the better practice is to conduct such hearings outside the presence and hearing of the jury. Regardless, the Kentucky Rules of Evidence now provide that "[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court,"[17] and shall be conducted out of the hearing of the jury "when the interests of justice require."[18] KRE 104 grants the trial court discretion in whether to conduct a preliminary hearing on admissibility of evidence with or without the presence of the jury.[19] Here, the trial court held the hearing in the jury's presence, and although we reaffirm that the better practice is to hold the hearing without the jury being present, we find no abuse of discretion by the trial court in so doing. Undoubtedly, the questions asked by the trial court

---

[16] Id. at 874 (emphasis added).

[17] KRE 104(a).

[18] KRE 104(c).

[19] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.12[7][a], at 65 (4th ed. 2003) ("It is clear that KRE 104(c) is designed to give the trial judge considerable discretion over the question of whether to conduct hearings on preliminary questions with or without the presence of the jury . . . ."). Accord Commentary to KRE 104, Evidence Rules Study Commission, Final Draft (1989) ("This provision assumes that in most instances the trial judge is in a superior position to determine the need for shielding the jury from hearing on preliminary matters pertinent to the admissibility of evidence.").

would have been asked by the Commonwealth's Attorney if the trial judge had not conducted the hearing in the jury's presence. Additionally, the trial judge's statements did not bolster EH's testimony. He merely stated that she was competent to testify, not that he believed EH to be truthful, as suggested by Appellant, or that she would be truthful in her testimony. The jury was free to determine EH's credibility. Accordingly, we find no error by the trial court in holding the hearing in the jury's presence or in his statement. In any event, no manifest injustice has resulted from this claim of error.

IV. CONCLUSION

For the above reasons, we affirm Appellant's convictions for the First-Degree Rape and First-Degree Sexual Abuse of JMK and the jury's First-Degree PFO determination but reverse Appellant's conviction for First-Degree Sexual Abuse of EH and remand the case to the trial court for the jury to fix enhanced sentences for Appellant's First-Degree Rape and First-Degree Sexual Abuse convictions.

Lambert, C.J.; Graves, Johnstone, Keller and Stumbo, JJ., concur. Cooper, J., concurs in part and dissents in part by separate opinion in which Wintersheimer, J., joins.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601-1133

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Elizabeth A. Heilman
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204

RENDERED: APRIL 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0037-MR

CECIL PATE — APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
01-CR-00105

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE COOPER

CONCURRING IN PART AND DISSENTING IN PART

The majority opinion vacates one of Appellant's convictions of sexual abuse in the first degree because of insufficient evidence that the "sexual contact" that occurred between Appellant and EH was "for the purpose of satisfying the sexual desire of either party." KRS 510.010(7); 510.110(1)(b). The opinion also reverses and remands for a new penalty phase of the trial because of improper jury instructions. Finally, the opinion holds that it is not an abuse of discretion to hold a child competency hearing in open court in the presence of the jury. I believe the evidence was sufficient to support Appellant's conviction of sexual abuse in the first degree; that error in the penalty phase instructions was not preserved and does not amount to palpable error; and that, while it

was error for the trial court to hold the competency hearing in open court and to declare EH competent within the hearing of the jury, that error was also unpreserved, and, thus, not reversible.

I. SEXUAL ABUSE IN THE FIRST DEGREE.

"A person is guilty of sexual abuse in the first degree when . . . [h]e subjects another person to sexual contact who is incapable of consent because he . . . [i]s less than twelve (12) years old . . . ." KRS 510.110(1)(b). "'Sexual contact' means 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).

EH was nine years old when the relevant events occurred. Appellant was her mother's boyfriend. The three lived in a mobile home with EH's sister, Amanda, age 14, her half-sister, JMK, age 4, her mother's adult sister, and, occasionally, a male cousin, age 19. However, they were not all at home at the same time. Appellant's mother and aunt were employed as dispatchers for the same company and worked opposite hours, alternating between day and night shifts. Pursuant to an agreement between EH's mother and JMK's father, JMK stayed with a babysitter while her mother worked, which meant that EH was often at home alone with Appellant.

Upon returning JMK from a scheduled visitation in January 2001, her father reported that he had taken JMK to a doctor for treatment of a vaginal rash. At the doctor's suggestion, he had purchased a tube of hydrocortisone cream and told JMK's mother that she should apply it to the rash on a daily basis. Because EH was also exhibiting redness in her vaginal area, the mother also treated her with the cream on at least two occasions. The mother testified that she then gave the tube of hydrocortisone to JMK's babysitter. According to EH, Appellant then assumed the task of rubbing the

cream onto her vagina. But since the hydrocortisone had been delivered to JMK's babysitter, the jury could have believed that Appellant was rubbing something else on EH's vagina as a pretext to obtain EH's consent to sexual contact.

EH testified that Appellant would wash her "privates" while giving her a bath – though EH's great-aunt testified that EH was capable of bathing herself and caring for her own hygiene. Appellant would then take EH into his bedroom and lay her naked on the bed with her legs spread apart while he applied the "cream" to her "privates." When defense counsel suggested on cross-examination that this was "no big deal," EH responded that she "didn't think it felt right." EH also claimed that she saw Appellant do the same thing to JMK while sticking his hand inside the front of his pants, and that when Appellant realized EH was present, he told her to leave the room. EH testified to other occasions when Appellant would strip to his shorts and have EH massage his calves and thighs up to his hips with lotion or baby oil even though "[t]here was nothing wrong with his legs."

In support of the decision to vacate Appellant's conviction of sexual abuse of EH, the majority opinion cites Hodges v. Commonwealth, Ky., 473 S.W.2d 811 (1971), for the proposition that "'suspicion alone is not enough,'" ante, at ___ (slip op. at 8). In Hodges, the defendant was found hiding under a log with a person who had been seen emerging from a burglarized building several hours before. Our predecessor court held this to be insufficient evidence to convict Hodges of participating in the break-in.

> There is nothing in the competent evidence which indicates that Hodges was at the crime scene, nor is there anything other than his being found with Moore five hours after the latter's flight from the store, tending to prove his complicity in the crime.

Id. at 814. The issue in Hodges was whether the evidence sufficed to prove the defendant's commission of the alleged criminal act, not his mens rea.

The majority opinion then cites Briner v. General Motors Corp., Ky., 461 S.W.2d 99 (1970), for the proposition that "evidence that will support a reasonable inference must indicate the probable, as distinguished from a possible cause," ante, at ___ (slip op. at 8-9). Briner was a personal injury action asserting strict manufacturer's liability and negligent repair. Our predecessor court noted that "[t]here was no direct proof of the existence of a defective mechanical condition existing at the time of the accident which could have caused it," id. at 101, and concluded that there was insufficient evidence of a mechanical defect attributable to either defendant to warrant submission of the case to a jury. Id. at 102-03. Again, the issue was the civil version of corpus delicti, not mens rea.

Here, however, there was direct, not inferential, testimony that Appellant committed the act of touching a "sexual or other intimate part" of EH's body. There was also direct evidence that he induced EH to touch an "intimate part" of his own body.

> The leg is an "intimate" part of the body, and a common sense interpretation of the language of the statute indicates that "intimate" is not a rephrasing of "sexual." By including the word "other," the statute provides a broader category of "intimate" parts.
>
> . . .
>
> Certainly a proper test to determine if the part of the body is "intimate" should revolve around an examination of three factors: 1) What area of the body is touched; 2) What is the manner of the touching, [sic] and 3) Under what circumstances did the touching occur.

Bills v. Commonwealth, Ky., 851 S.W.2d 466, 472 (1993) (internal quotes omitted).

The only remaining issue was whether the touching was "done for the purpose of gratifying the sexual desire of [Appellant]." KRS 510.010 (7). "Purpose" is a synonym of "intent." Webster's Third New International Dictionary of the English Language Unabridged 1847 (1993). We have consistently held that "intent may be inferred from the act itself or from the circumstances surrounding it." Talbott v. Commonwealth, Ky.,

968 S.W.2d 76, 86 (1998). See also Davis v. Commonwealth, Ky., 967 S.W.2d 574, 581 (1998); Tungate v. Commonwealth, Ky., 901 S.W.2d 41, 42 (1995); Anastasi v. Commonwealth, Ky., 754 S.W.2d 860, 862 (1988). I have no difficulty concluding that the evidence was sufficient to create an inference that Appellant's repeated touching of EH's vagina and his acts of inducing EH to massage his legs with lotion and baby oil were "for the purpose of gratifying [Appellant's] sexual desire."

II. PENALTY PHASE INSTRUCTIONS.

The penalty phase instructions were erroneous in permitting the jury to enhance the penalties for three separation convictions, i.e., life imprisonment for first-degree rape and five years each for two counts of first-degree sexual abuse to one life term for first-degree persistent felony offender. Of course, PFO is not an offense, but is a status that permits the enhancement of penalties for convictions of offenses such as rape and sexual abuse. Hardin v. Commonwealth, Ky., 573 S.W.2d 657, 661-62 (1978). However, the Commonwealth's Attorney tendered these jury instructions without objection from defense counsel. The error was actually favorable to Appellant, as he received only one sentence instead of three even though the result is the same as the two lesser sentences merge into the life sentence. Bedell v. Commonwealth, Ky., 870 S.W.2d 779, 783 (1993). Because the error was unpreserved, RCr 9.54(2), and resulted in no injustice to Appellant, RCr 10.26, I would affirm on this issue.

III. COMPETENCY HEARING.

Appellant correctly asserts that it was an abuse of discretion for the trial court to bolster the credibility of EH by establishing her competency in the presence of the jury and then declaring her "capable and qualified under the statute." The majority opinion

suggests that, "Undoubtedly, the questions asked by the trial court would have been asked by the Commonwealth's Attorney if the trial judge had not conducted the hearing in the jury's presence." Ante, at __ (slip op. at 11-12). Perhaps, but it is one thing for the proponent of the witness to bolster her credibility and quite another for the trial judge to do it and then declare her competency to the jury. We have held that a trial court should not inform the jury that a particular witness has been determined to be an expert because such information bolsters the credibility of the witness. Luttrell v. Commonwealth, Ky., 952 S.W.2d 216, 218 (1997). In Humphrey v. Commonwealth, Ky., 962 S.W.2d 870 (1998), we said that it would be "better practice" to conduct a child competency hearing outside the presence of the jury. Id. at 874. Apparently, that "softball" was not enough. I would specifically hold that hearings to determine the competency of a child witness should be held out of the hearing of the jury and that the jury should not be informed that the trial court has determined that the witness is competent to testify.

Again, however, there was no objection to the trial court's procedure in this case. Nor, after hearing EH's testimony, could there be any question of her competency. On several occasions, she asked counsel to explain or repeat a question and, on one occasion, corrected a misstatement made by counsel during cross-examination. Thus, no palpable error occurred.

Accordingly, I concur in the affirmance of Appellant's convictions of rape in the first degree and sexual abuse in the first degree perpetrated against JMK but dissent from the reversal of the sentence imposed therefore. I further dissent from the vacating of Appellant's conviction of sexual abuse in the first degree of EH, and would affirm the

judgment of conviction and sentence imposed by the McCracken Circuit Court in its entirety.

Wintersheimer, J., joins this opinion, concurring in part and dissenting in part.