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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000379- MR

BILLY R. CLARK, JR. — APPELLANT

V.

ON APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
NOS. 03-CR-00100 AND 05-CR-00054

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Billy Clark appeals as a matter of right from an April 20, 2006 Butler County Judgment convicting him of three counts of rape in the first degree, one count of sodomy in the first degree, and one count of sexual abuse in the first degree. The victim of the alleged rape and sexual abuse in this case was Clark's minor daughter, L.C. Following the guilty verdict, the trial court sentenced Clark to a total of twenty years in prison. On appeal, Clark contends that the trial court erred by (1) permitting the Commonwealth to introduce evidence of Clark's prior acts of sexual abuse against L.C. that occurred in Ohio County, Kentucky; (2) failing to instruct the jury on the charge of sexual abuse in the second-degree as a lesser-included offense; (3) allowing the Commonwealth to play the audio recording of Clark's interview with the police following his arrest, which included statements from Police Officer Todd Combs indicating that he believed L.C. was telling the truth when she accused Clark of sexual abuse; (4)

permitting L.C.'s mother, who was also to be called as a witness, to remain in the courtroom during L.C.'s testimony; and (5) refusing to grant a continuance so that Clark could undergo a second mental competency evaluation. Although we do not agree with all of Clark's claims of error, we do agree that the trial court committed reversible error when it allowed Officer Combs's statements regarding L.C.'s truthfulness to be introduced and when it failed to give a second-degree sexual abuse instruction. Thus, Clark's April 20, 2006 Conviction and Sentence are reversed and his case remanded for a new trial. Because several of Clark's other claims of error may arise on retrial, we will address them in this opinion. However, Clark's fifth argument that the trial court should have granted a continuance is now moot and will not be discussed.

RELEVANT FACTS

L.C. testified at trial that her father, Billy Clark, first began sexually abusing her in 1998, when she was nine years old. At that time, L.C.'s parents were separated and Clark lived in Ohio County, Kentucky. L.C. testified that the abuse occurred during her weekend visits to her father's house in Ohio County. The next year, when L.C. was approximately ten years old, Clark moved to Butler County and resided in a camper on L.C.'s grandfather's property. L.C. stated that the abuse continued after Clark's move, revealing that Clark had sex with her both in his camper and in a motel room at the Green River Lodge. Subsequently, in June 2002, L.C.'s mother brought L.C. to the Kentucky Department of Protection and Permanency (KDPP) after L.C. revealed the sexual abuse to her. Amy Casey, an investigative worker at KDPP, testified at trial that after interviewing L.C., she contacted Kentucky State Police Officer Todd Combs in order to initiate a joint investigation into L.C.'s allegations.

As a result of the investigation, the Butler County grand jury returned an indictment on August 15, 2003, charging Clark with sexual abuse in the first degree. In response to the indictment, Officer Combs arrested Clark and interviewed him regarding the charges. In this interview, a tape of which was played during Clark's trial, Clark denied the allegations of abuse, but acknowledged that he checked L.C.'s "privates" once because she complained that she was hurting. Clark also revealed that on one occasion when he was having sex with his girlfriend, he believed he could have been having sex with L.C. by mistake, even though his girlfriend reassured him that this was not the case. Despite Clark's claim that the charges were false, Officer Combs told Clark that he could tell who was telling the truth and that he believed L.C. when she accused Clark of sexual abuse.

According to Officer Combs's trial testimony, two years after his initial interview with L.C. and Clark, L.C. contacted him again because she wanted to talk about some things involving Clark that she had not told Officer Combs before and that she thought he needed to know. On February 25, 2005, L.C. met with Officer Combs and told him about several other instances when Clark had raped and sexually abused her in Butler County. Due to this new information, on March 9, 2005, Clark was charged in a separate indictment with four counts of first-degree rape, one count of first-degree sodomy, and five counts of incest. Although the incest charges were eventually dismissed, the sexual abuse, rape, and sodomy indictments were consolidated in April 2005, and later tried in Butler Circuit Court in January 2006. The jury ultimately found Clark guilty of three counts of rape in the first degree, sodomy in the first degree, and sexual abuse in the first degree. Pursuant to the jury's recommendation, the trial court

sentenced Clark on April 18, 2006, to fifteen years on each rape and sodomy count, which were to run concurrently, and to five years on the sexual abuse count, which was to run consecutively, for a total of twenty years in prison. This appeal followed.

ANALYSIS

I. The Trial Court Did Not Err When It Allowed The Commonwealth To Introduce Evidence of Clark's Prior Abuse of L.C. That Occurred In Ohio County.

At trial, L.C. testified that she was visiting her father in Ohio County when he first sexually abused her. She stated that during one of these visits, she woke up and he was on top of her, touching her "private" with his hand and his "private." The only other time L.C. mentioned Ohio County in her direct-examination was when she began describing what happened after her father moved to Butler County. L.C. testified that the first time the abuse occurred in Butler County, she was staying with her father in his camper. L.C. stated that her father came over to her, took off her pants, and then "did the same thing he did in Ohio County." L.C. then went on to describe what occurred without any reference to Ohio County. Although L.C. made three more brief references to the fact that the abuse began in Ohio County, these were in direct response to the questions asked by Clark's counsel on cross-examination. Clark's counsel requested L.C. to describe where Clark lived in Ohio County and if anyone lived with him. Clark's counsel then asked L.C. if her Ohio County visit was "the first time when something bad happened," to which L.C. replied, "yes." The only other reference made to the abuse in Ohio County came when Clark's counsel asked L.C. if she had told her mother about what happened in Ohio County. L.C. responded that she did not initially tell her mother because she did not want her father to get into trouble.

Clark objected in a pre-trial motion and at trial to any mention of the alleged

abuse that occurred in Ohio County, arguing that such references were irrelevant to the allegations of abuse in Butler County, were highly prejudicial to Clark and would impair his ability to testify only in the Butler County trial. The trial court ruled that the Commonwealth could mention the abuse in Ohio County, but only briefly and only to show where Clark's abuse of L.C. began. On appeal, Clark now argues that the trial court erred by admitting evidence of sexual abuse in Ohio County because it was irrelevant to his current charges and violated the prohibition against prior bad act evidence as set forth in KRE 404(b). Even though we are reversing Clark's case on other grounds, we nonetheless will address the merits of this argument because it may arise on retrial.

Although evidence of a defendant's prior bad acts is inadmissible to prove that the defendant acted in conformity with his bad character, such evidence can be introduced if it is "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ." and if its probative value outweighs its prejudicial effect on the defendant. KRE 404(b); KRE 403. A trial court's decision to admit this evidence is reviewed on appeal according to the abuse of discretion standard, which means the trial court's ruling will not be disturbed unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

In Noel v. Commonwealth, 76 S.W.3d 923, 931 (Ky. 2002), this Court held that the victim's testimony that she had been sexually abused by the defendant on more than one occasion was properly admitted "to prove intent, plan, or absence of mistake or accident." Furthermore, we stated that "evidence of similar acts perpetrated against

the same victim are almost always admissible for those reasons." Id. In this case, the evidence of Clark's sexual abuse of L.C. in Ohio County was minimal and introduced for the limited purpose of establishing when and where the abuse began. As in Noel, supra, it was relevant to show Clark's opportunity, intent, preparation and plan to rape and sexually assault L.C. Clark's assertion that this evidence dominated the trial and amounted to "overkill" is simply untrue. As noted above, L.C. briefly made reference to the abuse in Ohio County twice during the direct examination and three times during the cross-examination. It was not the focus of her testimony and its probative value outweighed any prejudice suffered by Clark. Thus, it was not arbitrary or unreasonable for the trial court to allow L.C. to testify that the sexual abuse began in Ohio County.

II. The Trial Court Erred In Failing To Instruct The Jury On Second-Degree Sexual Abuse.

At the conclusion of Clark's trial, Clark requested that the jury be instructed on sexual abuse in the second-degree. The trial court, however, denied this motion and included an instruction only for sexual abuse in the first degree. Clark now claims on appeal that the trial court erred in failing to give the second-degree instruction because L.C. was thirteen-years-old at the time of the sexual abuse and because little or no evidence was introduced to prove that forcible compulsion was used in the rape and sexual assault of L.C. In fact, Clark was entitled to a second-degree sexual abuse instruction and the trial court's failure to include one amounted to reversible error.

According to KRS 510.110(1),

> (1) A person is guilty of sexual abuse in the first degree when:
> (a) He or she subjects another person to sexual contact by forcible compulsion; or
> (b) He or she subjects another person to sexual contact who is incapable of consent because he or

she:

1. Is physically helpless;
2. Is less than twelve (12) years old; or
3. Is mentally incapacitated.

The instruction given in Clark's case was based only on KRS 510.110(1)(a) and required a finding by the jury "that in this county in May 2002 . . . [Clark] subjected [L.C.] to sexual contact; and that he did so by forcible compulsion." Whereas forcible compulsion is a required element under KRS 510.110(1)(a), KRS 510.120(1)(b) states that a person is guilty of sexual abuse in the second degree if "[h]e or she subjects another person who is less than fourteen (14) years old to sexual contact . . . ."

A defendant is entitled to an instruction on a lesser included offense if "a reasonable juror could entertain a reasonable doubt as to the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." Taylor v. Commonwealth, 995 S.W.2d 355, 362 (Ky. 1999). In this case, the only direct evidence presented that the sexual abuse occurred by forcible compulsion was L.C.'s testimony that on one occasion when her father tried to touch her inappropriately, she pushed him away and told him to stop, at which point he did. When asked if she ever told anyone about this abuse when it started happening, L.C. replied that she did not tell anyone because she did not want her father to get in trouble.

Based on the lack of evidence presented on this issue, a reasonable juror could have believed that this particular event occurred without forcible compulsion, and thus, could have believed beyond a reasonable doubt that Clark was guilty of sexual abuse in the second degree. Because the evidence presented in this case supported an instruction on the lesser included offense of second-degree sexual abuse, the trial

court's failure to include such an instruction constitutes reversible error. Clark v. Commonwealth, 223 S.W.3d 90, 95 (Ky. 2007); Webb v. Commonwealth, 904 S.W.2d 226, 229 (Ky. 1995). Clark is entitled to a new trial on this basis.

III. The Trial Court Erred In Allowing the Commonwealth To Play An Audio Tape of Clark's Police Interview In Which Officer Combs Vouched For the Credibility of The Victim, L.C., and Stated That He Believed She Was Telling The Truth.

Following the August 2003 Butler County Indictment charging Clark with sexual abuse in the first degree, Officer Combs arrested Clark and interviewed him about the pending charges. During Clark's trial, the Commonwealth played an audio tape of this interview for the jury. In listening to this tape, the jury not only heard Clark's responses to Officer Combs's questions, but also heard Officer Combs's interrogation technique, which involved disclosing his opinion to Clark about the truthfulness of L.C.'s allegations. During the interview, Officer Combs stated that he believed "[L.C.] was telling the truth when she accused [Clark] of sexually abusing her and that he had never doubted what [L.C.] had told him had happened—what had indeed occurred—and that he could tell who was telling the truth." Clark objected to the admission of these statements at trial. The trial court overruled Clark's objection, agreeing with the Commonwealth that these statements were admissible because they reflected the context from which Clark answered Officer Combs's questions. On appeal, Clark argues that the introduction of Officer Combs's statements constituted reversible error because Officer Combs was permitted to vouch for the truthfulness of L.C., another witness at trial. We agree.

In Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005), the challenged interrogation technique involved an officer essentially accusing the defendant of "lying"

and of "not telling the truth." Recognizing that the admissibility of such statements in the context of a recorded interrogation was an issue of first impression, this Court surveyed state and federal cases before concluding that accusing the defendant of lying was an appropriate interrogation technique:

> . . . . Almost all of the courts that have considered the issue recognize that this form of questioning is a legitimate, effective interrogation tool. And because such comments are such an integral part of the interrogation, several courts have noted that they provide a necessary context for the defendant's responses. We agree that such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes. We also agree that retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.

Lanham, 171 S.W.3d at 27. However, the Lanham Court concluded with a cautionary note that its holding "is limited to the types of comments in this case, *i.e.*, accusations by an officer that a defendant is not telling the truth." Id. at 29. The Court specifically noted that it was not addressing more aggressive types of questioning including, for example, where an officer "directly or indirectly, [claimed] that he was an expert in lie detection." Id. This is precisely the circumstance present in Clark's case. Officer Combs did not simply accuse Clark of lying, but rather, professed to know who was telling the truth and stated that the truthful person was L.C., whose allegations he had never doubted. Thus, Officer Combs's statements go significantly further than those at issue in Lanham, and their admission cannot be justified based on the holding in that

case.[1]

This Court has long condemned the practice of allowing one witness to vouch for the credibility of another witness. Bussey v. Commonwealth, 797 S.W.2d 483, 484-485 (Ky. 1990); Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997) (stating that "[a] witness's opinion about the truth of the testimony of another witness is not permitted."); Dickerson v. Commonwealth, 174 S.W.3d 451, 472 (Ky. 2005). As noted previously, in expressly stating that he knew who was telling the truth, that he believed L.C.'s accusations were true, and that he never doubted what L.C. had told him, Officer Combs vouched for the credibility of L.C., who also testified at trial. Thus, the trial court erred by admitting the audio recording of Clark's interview without first redacting Officer Combs's statements regarding his belief in L.C.'s veracity and his ability to tell who is and who is not telling the truth. Furthermore, this error cannot be deemed harmless in Clark's case because the Commonwealth relied heavily on L.C.'s testimony to prove that Clark was guilty of rape, sodomy, and sexual abuse. The fact that Officer Combs was permitted to improperly vouch for L.C.'s credibility likely affected the result of this proceeding and constitutes grounds for reversal.

IV. Although the Trial Court Did Not Make the Requisite Findings Under KRE 615 Justifying Its Decision to Allow L.C.'s Mother to Remain in the Courtroom During L.C.'s Testimony, If L.C.'s Mother Is Found to Fit Into One of the KRE 615 Exceptions on Retrial, She Should Be Allowed to Stay In the Courtroom During L.C.'s Testimony.

In a pre-trial motion, Clark invoked the separation of witnesses rule pursuant to

[1] Furthermore, this Court's unpublished opinion in Kelly v. Commonwealth, 2006 WL 3386636 (Ky. 2006), does not extend the Lanham holding because the officer in Kelly simply predicated his questions on the victim's allegations. There is no indication in Kelly that the officer was vouching for the credibility of the victim and was claiming to know who was telling the truth.

KRE 615, which requires the trial court to exclude witnesses from the court room so they cannot hear the testimony of other witnesses. When L.C. initially began to testify in Clark's trial, her mother, Laura Clark, was sitting next to her in the witness box holding her hand. Clark objected to Laura being in the courtroom during L.C.'s testimony because Clark planned to call Laura as a witness. The trial court overruled Clark's motion and permitted Laura to remain in the courtroom, but directed Laura to move away from the witness stand and sit at the Commonwealth's counsel table. Clark now argues on appeal that the trial court violated KRE 615 by allowing Laura to remain in the court room during L.C.'s testimony and such error constituted grounds for a reversal. Because this issue may arise on retrial, we will address it in this opinion.

KRE 615 states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
> (1) A party who is a natural person;
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

Unless one of the three enumerated exceptions applies, KRE 615 requires trial judges to exclude witnesses if a party makes such a request. Mills v. Commonwealth, 95 S.W.3d 838, 841 (Ky. 2003). In this case, however, the Commonwealth did not argue to the trial court that Laura fit into one of the KRE 615 exceptions and the trial court did not base its ruling on any of the exceptions. Furthermore, the Commonwealth does not argue in its brief that any of the exceptions listed in KRE 615 apply to Laura; it simply argues that because Clark does not allege that Laura's testimony was false or that she

had a motivation to lie, her presence in the courtroom during L.C.'s testimony was not error. Nonetheless, because KRE 615 makes exclusion mandatory unless an exception applies, the trial court should have made a finding under KRE 615 before allowing L.C.'s mother to remain in the courtroom during her testimony. Despite the trial court's failure to make these findings, we recognize that L.C. was severely distraught and fearful in testifying against her father during trial and that her mother's presence in the courtroom during her testimony may have been essential to the Commonwealth's presentation of its case. Thus, if on re-trial the trial court finds that L.C.'s mother fits into one of the KRE 615 exceptions, it would be proper for L.C.'s mother to stay in the courtroom during L.C.'s testimony.

CONCLUSION

The trial court committed reversible error during Clark's trial by failing to instruct the jury on second-degree sexual abuse and by allowing the Commonwealth to introduce evidence that Officer Combs had vouched for the truthfulness of L.C.'s allegations. Based on the evidence presented at trial, the jury could have entertained a reasonable doubt that Clark committed sexual abuse by forcible compulsion, and could have believed beyond a reasonable doubt that the abuse occurred without forcible compulsion. Thus, the trial court should have instructed the jury on both first and second-degree sexual abuse. Furthermore, before playing the audio recording of Clark's police interview, the trial court should have redacted Officer Combs's statements that he believed L.C.'s allegations of abuse, knew L.C. was telling the truth, and never doubted that the abuse had occurred. The admission of these statements resulted in Officer Combs improperly vouching for L.C.'s credibility and constitutes

reversible error. Therefore, Clark's April 20, 2006 Conviction and Sentence are reversed and his case remanded for a new trial.

Minton, C.J.; Abramson, Noble, Schroder, and Venters, JJ., concur. Scott, J. concurs in part and dissents in part by separate opinion in which Cunningham, J., joins.

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COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE SCOTT CONCURRING IN PART AND DISSENTING IN PART

Although I concur with the majority opinion on issue I., I must dissent on issues II. (the Second-Degree Sexual Abuse instruction), III. (the playing of Appellant's interrogation by Officer Combs) and IV. (L.C.'s mother's presence in the courtroom during L.C.'s testimony), for which the majority reverses Appellant's convictions.

I. The error in failing to give the Second-Degree Sexual Abuse instruction was harmless.

As L.C. was thirteen years of age in May of 2002, the only dispute occurring in the evidence was the question of forcible compulsion. In her testimony concerning forcible compulsion, L.C. testified in regards to one event — that she didn't tell as she didn't want to get her dad in trouble — yet in relation to this specific event of sexual abuse, she testified to having pushed him away and telling him to stop, which he did. Thus, I concur that it was error not to instruct on sexual abuse in the second-degree under KRS 510.120(1)(b), in the

event the jury could have believed that this particular event occurred without forcible compulsion.

"Nevertheless, a judgment will not be reversed for errors in instructions unless upon the whole record it appears that the substantial rights of the defendant were prejudiced." Taylor v. Commonwealth, 995 S.W.2d 355, 361 (Ky. 1998). RCr 9.24, the harmless error rule commands this. "The test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different." Taylor, 995 S.W.2d at 361.

Here, the jury found Appellant guilty of three instances of rape in the first-degree "by forcible compulsion," KRS 510.040(1)(a), and one instance of sodomy in the first-degree "by forcible compulsion," KRS 510.070(1)(a). And in each instance, *contrary to the instructions*, the jury also rendered verdicts on the three lesser-includeds of "not guilty" for rape in the second-degree (without forcible compulsion), KRS 510.050, and sodomy in the second-degree (without forcible compulsion), KRS 510.080, all of which were consistent with their finding of guilt on this charge of sexual abuse in the first-degree "by forcible compulsion."

In fact, the only *primary* charge on which they found Appellant "not guilty" was the first charge of rape in the first-degree, alleged to have occurred between October 1, 1999, and October 3, 2000, *and predicated only* upon the finding that L.C. was "less than twelve years of age." Thus, given the dispute between Appellant and L.C. as to their occurrence (it did not happen or it did happen), along with the jury's finding of "forcible compulsion" in each and every instance, where it was alleged, I am satisfied that no reasonable possibility exists that absent this error, the verdict would have been different. Accordingly, the failure

to instruct the jury on the charge of second-degree sexual abuse was harmless error — not reversible error.

II. The playing of Appellant's interrogation by Officer Combs.

During Officer Combs' interview of Appellant, he interrogated Appellant using a common police interrogation technique where upon he asserted that he believed "[L.C.] was telling the truth when she accused Appellant of sexually abusing her and that he had never doubted what [L.C.] had told him had happened, had indeed occurred, and that he could tell who was telling the truth." This technique was used to prompt responses from Appellant. Appellant now alleges the technique improperly bolstered L.C.'s testimony.

"Generally, a witness may not vouch for the truthfulness of another witness." Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky. 1997). This is because such testimony "remove[s] the jury from its historic function of assessing credibility." Newkirk v. Commonwealth, 937 S.W.2d 690, 696 (Ky. 1996). As it is improper for a witness to vouch for the credibility of, the out-of-court statements of another, so it is improper to vouch for another witness' testimony at trial, Hall v. Commonwealth, 862 S.W.2d 321, 323 (Ky. 1993), and vouching for the truth of such statements, even by an expert, is impermissible. Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1992).

Yet, with regards to such questions during an interrogation of a defendant,

> [s]uch comments are not an attempt to describe to the jury the defendant's personality; nor are the statements aimed at impeaching a *witness,* especially when it is unknown whether a criminal defendant will take the stand. By making such comments, the officer is not trying to convince anyone-not the defendant (who knows whether he or she is telling the truth), other officers, a prosecutor, or the jury-that the defendant was lying. Rather, such comments are part of an interrogation technique aimed at showing

> the defendant that the officer recognizes the holes and contradictions in the defendant's story, thus urging him or her to tell the truth.

Lanham v. Commonwealth, 171 S.W.3d 14, 27 (Ky. 2005).

In Lanham, we found "the better remedy to any possible adverse inference by the jury is a limiting admonition given by the court before the playing of the recording." Id. at 28. "The admonition should be phrased so as to inform the jury that the officer's comments or statements are 'offered solely to provide context to the defendant's relevant responses.'" Id. (quoting State v. Demery, 144 Wash.2d 753, 30 P.3d 1278, 1283 (2001)). We have also noted, "that where an admonishment is sufficient to cure an error and the defendant fails to ask for the admonishment, we will not review the error." Id. (citing Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000).).

Lanham, however, dealt with questions in an interrogation where the officer stated to the defendant, that he "'better start telling the truth,' that 'the only way out is to tell the truth,' that Appellant was 'not telling the truth,' that the jury would not believe Appellant, and that Appellant was 'lying.'" Lanham, 171 S.W.3d at 19. Of course, the statements in Lanham, when played in a trial, where the defendant denies the allegations and the victim testifies otherwise, could be viewed in the same manner as asserted here, i.e., as bolstering the testimony of the victim or attacking the credibility of the defendant. Thus, we imposed the requirement of an admonition.

We followed the dictates of Lanham in a later unpublished decision dealing with an interviewing detective's comments to a defendant, to the effect that, "'I don't believe you,' 'what you're telling me does not match the evidence,'

and 'you know how many times people tell me the non-truth because they don't want to get caught.'" Hensley v. Commonwealth, No. 2003-SC-000470-TG, 2005 WL 2674974, at *1 (Ky. Oct. 20, 2005). Being concerned about the effect of "redacting" on the meaning of the defendant's statements, we noted:

> Redacting the tape would fragment the recording and would do little to mitigate the risk of prejudice. This Court held that the best remedy against possible prejudice would be a limiting admonition that informed the jury that the officer's comments are "offered solely to provide context to the defendant's relevant responses."

Id. at *1, (quoting Lanham, 171 S.W.3d at 24.).

In a subsequent unpublished decision, we extended the holding of Lanham to an officer's statement in an interrogation of a defendant specifically alleged to have improperly bolstered the testimony of the victim at trial. Kelly v. Commonwealth, No. 2004-SC-000786-MR, 2006 WL 3386636, (Ky. Nov. 22, 2006). "Appellant has noted several questions within the interrogation transcript in which the officer predicates his question on an accusation or statement made by [the victim]. Appellant asserts that all such statements are improper . . . because they would tend to bolster the testimony of the victim at trial." Id. at *5. We held in Kelly, that "the officer's statements concerning [the victim's] allegations were necessary to provide context for Appellant's answers. Moreover, the officer's statements were not offered to prove the truth of the matter asserted; rather they were a common interrogation technique designed to elicit a response from Appellant." Id.

In light of the foregoing, the comments of Officer Combs in the taped interview were properly admitted. The questioning process involved a common interrogation technique. The tape of the interrogation was introduced through

Officer Combs' testimony, thus he was subject to cross-examination. Officer Combs' comments on the tape were not introduced for the truth of the matter stated, nor for improper vouching for, or bolstering of, the victim's credibility. They are used along with an admonition, to *protect* the context of Appellant's responses. "By making such comments, the officer is not trying to convince anyone — not the defendant (who knows whether he or she is telling the truth), other officers, a prosecutor, or the jury-that the defendant was lying." Lanham, 171 S.W.3d at 27.

Thus given our prior holdings in Lanham, Hensley and Kelly, I cannot find error in this instance. I do fear, however, that the redaction of the interrogation to delete the officer's statement will make the Appellant's aggressive assertions of truthfulness seem more culpable, or evasive, since his answers are then deprived of their context. A point considered in Lanham, Hensley and Kelly.

III. L.C.'s mother's presence in the courtroom during L.C.'s testimony.

When L.C. first took the stand, she was anxiously holding her mother's hand, with her mother seated right next to her, beside the witness box. Appellant's counsel objected to her presence on grounds that L.C.'s mother would be a witness and thus should be excluded from the courtroom per KRE 615. In fact, she was only called as a witness by *Appellant*.

The trial court, noting that L.C. was a minor and obviously distraught, overruled Appellant's objection and approved her mother's continued presence in the courtroom during L.C.'s testimony. The court did, however, direct that L.C.'s mother was to sit at counsel table with the Commonwealth. L.C. testified thereafter, *taking as much as forty (40) seconds at a time*, to respond to

questions asked of her during her testimony. Even from the trial tape, her distress is so obvious as to lead one to seriously wonder whether or not she could have, or would have, testified absent the continued presence of her mother.

In fact, when advised of the court's ruling that her mother would have to move to counsel's table, L.C., in a very distraught response concerning her testimony, stated "I can't do it." Thus, a real possibility presented itself that the Commonwealth's primary witness could (or would) not testify absent the presence of her mother. The Commonwealth then asked for, and was granted, a recess to discuss the ruling with L.C. in private.

Upon the resumption of her testimony, she remained very distraught while responding to questions asked by both the Commonwealth and defense. During this testimony, her mother sat at counsel table facing L.C., while both the Commonwealth's Attorney, and Appellant's counsel, stood behind her mother, while asking their questions. Watching her overwhelming difficulty in answering the questions leaves one with an expectancy that she would bolt from the courtroom at any minute. And it surely leaves one with the question as to whether she would be able to testify at a re-trial without her mother's presence.

In this regard, KRE 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> (1) A party who is a natural person;
>
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

(3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

"The reason for the . . . rule is to prevent the witnesses excluded from hearing the testimony of other witnesses with the possible result that the testimony of the others might lead the witness to answer in such manner as to conform with other testimony, even though, as is often the case, the witness . . . is not conscious of this subtle influence." Speshiots v. Coclanes, 311 Ky. 547, 552, 224 S.W.2d 653, 656 (1949).

The rule, however, does not authorize exclusion of a "person whose presence is shown by a party to be essential to the presentation of the party's cause." KRE 615(3). This "third exception operates to codify the discretionary authority of a trial judge under previous case law." Hatfield v. Commonwealth, 250 S.W.3d 590, 594 (Ky. 2008) (citing Robert G. Lawson, The Kentucky Evidence Law Handbook § 11.30(3)(4th ed. 2003)). "Clearly, the impetus of KRE 615(3) is to validate the long standing and fundamental practice of separation of the witnesses while upholding the authority of a trial judge to tailor that obligation" to situations that are merited. Hatfield, 250 S.W.3d at 594. Thus, "whether a person is essential is and [should] remain, under the discretion of Kentucky's trial judges." Id.

In fact, numerous cases are reported where the rulings of trial courts permitting the parent of an infant victim to remain in the courtroom while the minor is testifying — have been upheld. See Druin v. Commonwealth, 124 S.W. 856, 858 (Ky. 1910) ("We do not think the trial judge committed an error in permitting the father of the prosecutrix to remain in the courtroom to assist in the prosecution. On the contrary, we are of the opinion that it was proper he should

have been permitted to remain and assist in the prosecution of the man who had ruined his daughter."); McGuff v. State, 7 So. 35, 37 (Ala. 1889) ("The refusal of the court to put the witness Bishop, the father of the injured girl, under the rule, by compelling his withdrawal from the court-room during the child's examination, was a matter within the sound discretion of the trial court."); Chambers v. State, 270 S.W. 528, 529 (Ark. 1925) ("It is true the court put the witnesses under the rule at the request of the state, but it is in the court's discretion to excuse special witnesses from the rule. We know of no good reason why the court abused this discretion in permitting the mother, who was a witness, from sitting with her daughter . . . who was the prosecutrix in the case."); State v. Smith, 193 N.W. 181, 184 (Iowa 1920) ("The question here is whether it was beyond the discretion of the court to permit the father of this young prosecutrix to remain in the room, say, as an aid to counsel while this witness was being examined. We hold no abuse of discretion is made to appear."); State v. Billsie, 131 P.3d 239, 242 (Utah 2006) ("Specifically, the trial court expressed concern with the victim's discomfort and sensitivities due to her young age and felt that her mother should be allowed to remain with her."); Huddleston v. Commonwealth, 61 S.E.2d 276, 279 (Va. 1950) ("In the case before us there is no showing of abuse of discretion by the trial court, or of prejudice against the accused by the presence of Miss Light in the courtroom.").

Here, "[a]ppellant offers nothing to show that [L.C.'s mother's] testimony was false, fabricated, or factually inaccurate or that [she] had a motive to alter [her] testimony." Justice v. Commonwealth, 987 S.W.2d 306, 315 (Ky. 1998). In fact, Appellant called her as his witness! Thus, given the witness's age, her

distraught condition, and her obvious reluctance to testify absent the presence of her mother, I can find no abuse of discretion on behalf of the trial court in this instance.

IV. Conclusion

Based upon the forgoing, I must disagree and dissent from the majority's opinion reversing Appellant's convictions.

Cunningham, J., joins this opinion.