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Supreme Court of Kentucky

FINAL

2007-SC-000580-MR

DATE 4/23/09 Kelly Klatt D.C.

WILLIAM R. BURDINE

APPELLANT

V. ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
NO. 04-CR-00141

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury found William Burdine guilty of one count of first-degree sexual abuse, one count of first-degree sodomy, and one count of first-degree rape and recommended a total sentence of forty-five years' imprisonment. The trial court sentenced Burdine in accordance with the jury's recommendation, after which Burdine filed this appeal as a matter of right.¹

Burdine's appeal raises four issues, all related to the trial of his case. Burdine argues that the trial court erred by (1) allowing the introduction of what he characterizes as evidence of prior bad acts, (2) refusing to grant a continuance after he allegedly suffered a sudden and unexplained loss of

¹ Ky. Const. § 110(2)(b).

consciousness during trial, (3) permitting allegedly improper bolstering of L.J.'s testimony, and (4) refusing to instruct the jury on third-degree sexual abuse. Because we find no reversible error on any of these issues, we affirm.

I. FACTS AND PROCEDURAL HISTORY.

L.J., the victim, stated that she stopped at a roadside rest area in Whitley County, Kentucky, where she fell asleep. She was awakened by a tapping on her car window and a man exclaiming that something was leaking from her car. When L.J. emerged from her car, the man grabbed her breast and asked her if she wanted to make a quick fifty dollars. When L.J. declined, the man forced her back into her car and told her he would slit her throat if she screamed. The man entered the car with L.J. and ordered her to remove her pants and underwear. When L.J. resisted, the man again threatened to slit her throat if she did not cooperate. The man then began to touch L.J.'s vaginal area with his fingers. He then drove L.J.'s car to a different location in the rest area, parked it behind a truck, repeated his threat to cut L.J.'s throat if she did not cooperate, and then revealed his penis and attempted to put his mouth near L.J.'s vagina. When L.J. resisted, the man forced L.J. to perform fellatio upon him, after which he removed L.J.'s shirt and bra. The man then mounted L.J., pinning her down, bit her neck, and had sexual intercourse with her.

Afterwards, the man rummaged through L.J.'s purse until he found some lotion. He squirted lotion onto his penis, and forced L.J. to masturbate him until he ejaculated onto her hands. The man then found a bottle of hair conditioner in L.J.'s purse and forced her to insert the bottle into her vagina.

The man also found a disposable camera in L.J.'s purse and took photos of her in the nude. The man also discovered L.J.'s address from her driver's license and told her that he knew where she lived, which would enable him to find her to kill her if she told anyone what he had done. The man then asked L.J. if he could keep her underwear, and did so, even though L.J. refused to give her consent. The man then took a cigarette from a pack lying in the car and departed. According to L.J., this ordeal lasted about an hour.

After the man left, L.J. drove herself to a gas station at the next exit where police were called. She was taken to a hospital where physical examination revealed bite marks on her neck and a labial abrasion. The exam also revealed semen on L.J.'s hand and a foreign fiber on her clothing. When investigators examined L.J.'s car, they collected a hair and fingerprints from a cigarette pack. Testing of the hair conditioner bottle revealed the presence of vaginal fluid.

Investigators created a composite sketch of the assailant based upon L.J.'s description. When that sketch was disseminated throughout the state, the authorities in Campbell County, Kentucky, notified the investigators that they were holding an inmate who matched the assailant's description. That inmate was Burdine, who had been arrested in an unrelated traffic accident. L.J. identified Burdine as her rapist from a photographic lineup.

Burdine's version of events in Whitley County was different. Although Burdine initially claimed not to have been in Whitley County at the time of L.J.'s rape, he later changed his story when he testified at trial to relate that he

had been with L.J. in Whitley County on the day in question. Burdine claimed that he met L.J. at a gas station, and they struck up a conversation. Burdine claimed that L.J. accepted his invitation to accompany him to a nearby adult book store, but that that store was closed.

Afterwards, Burdine claimed that he and L.J. smoked marijuana together and that to impress L. J., he had fabricated a story about being a bank robber. Burdine claims that he masturbated in L.J.'s car and that L.J. cleaned up his semen with an unknown object. Burdine claimed that he and L.J. made plans to meet the following weekend but that when further conversation with L.J. revealed that her boyfriend was African-American, Burdine was so upset that he called L.J. a racially inflammatory name, left her abruptly, and headed for the Cincinnati area. When he later heard news reports of a rape at the rest area in Whitley County, he regretted the harsh words he had spoken to L.J., so he went to call her to apologize. Unfortunately, Burdine had been drinking and smoking marijuana. En route, he ran a red light and crashed his vehicle, injuring six others. This led to his arrest.

A search of Burdine's car produced a disposable camera, dark blue running shorts, and a bag containing a pair of women's underpants. For the encounter with L.J., the Whitley County Grand Jury indicted Burdine charging one count of first-degree sexual abuse, one count of first-degree sodomy, one count of first-degree rape, one count of first-degree unlawful imprisonment, and one count of third-degree terroristic threatening. After several continuances, a jury trial on these charges commenced.

At trial, L.J. identified Burdine as the man who raped her. The Commonwealth introduced evidence that Burdine's fingerprints matched those on the cigarette pack in L.J.'s car. And the DNA analysis of the semen found on L.J.'s hands contained a mixture of L.J.'s and Burdine's DNA to a certainty of one in one thousand. Also, a hair found in L.J.'s car was found to be consistent with Burdine's mitochondrial DNA to a probability greater than 99.9%. The disposable camera and the women's underpants found in Burdine's car were not L.J.'s. But those items were, nevertheless, introduced into evidence. Also, the dark blue running shorts found in Burdine's car were introduced into evidence; and they were found to match the fiber collected from L.J.'s clothing after the rape.

The trial court granted the Commonwealth's motion to dismiss the unlawful imprisonment and terroristic threatening charges. At the close of the evidence, the jury found Burdine guilty of the sexual abuse, rape, and sodomy charges. The jury recommended maximum sentences of five years' imprisonment on the sexual abuse charge and twenty years' imprisonment each on the rape and sodomy charges, all of which the jury recommended be served consecutively. The trial court entered a judgment sentencing Burdine to forty-five years' imprisonment in accordance with the jury's verdict, after which Burdine filed this appeal.

II. ANALYSIS.

A. The Trial Court Erred in Admitting the Underpants and the Camera, But Those Errors Were Harmless.

Burdine's first argument is that the trial court committed two evidentiary errors. First, he contends that the trial court erred by admitting into evidence the underpants found in his car because those underpants were not L.J.'s. Second, he contends that the trial court erred in admitting the disposable camera found in his car because that camera was not L.J.'s. Burdine admits that the issue regarding the admissibility of the camera is not properly preserved for our review.² We agree with Burdine that the trial court erred by allowing these items to be introduced into evidence, but we conclude that those errors were harmless.

Burdine contends that the admission of the underpants and camera violate the prohibition in KRE 404(b) of the admission of evidence of "other crimes, wrongs, or acts. . . ." But we do not agree that evidence of Burdine's possession of women's underpants and an ordinary disposable camera constitutes evidence of a crime, wrong, or bad act because there is nothing inherently criminal about those items. And since the underpants and camera were never linked through evidence at trial to L.J., Burdine's possession of

² The Commonwealth also contends that the issue regarding the underwear is not fully preserved because Burdine only objected in the trial court on relevancy grounds, whereas he now complains that on Kentucky Rule of Evidence (KRE) 404(b) grounds. Although the Commonwealth's argument appears to be correct, Robey v. Commonwealth, 943 S.W.2d 616, 618 (Ky. 1997), we need not definitively determine whether the issue is properly preserved because, even giving Burdine the benefit of the doubt regarding preservation, admitting the underwear into evidence was a harmless error.

those items was not inherently criminal. So we cannot agree with Burdine's assumption that those items should be analyzed as prior-bad-acts evidence under the rubric of KRE 404(b), especially since Burdine was able to establish through cross-examination at trial that neither the underpants nor the camera could be linked to L.J. Rather, we believe that admissibility of those items must be analyzed under KRE 401 for their relevance and under the familiar weighing of their probative value against their prejudicial effect under KRE 403.

KRE 401 says that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." And KRE 403 says that relevant evidence may be excluded if, among other things, "its probative value is substantially outweighed by the danger of undue prejudice" We review a trial court's decision to admit evidence under the abuse of discretion standard.³ Since Burdine admits that the issue involving the camera is unpreserved, our review of that item is predicated upon the palpable error provision of Kentucky Rules of Criminal Procedure (RCr) 10.26, under which we must "plumb the depths of the proceeding . . . to determine

³ See, e.g., Clark v. Commonwealth, 223 S.W.3d 90, 95 (Ky. 2007) ("Since the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence, we may reverse a trial court's decision to admit evidence only if that decision represents an abuse of discretion.").

whether the defect in the proceeding was shocking or jurisprudentially intolerable.”⁴

Possessing women’s underpants and a disposable camera was not an element of any of the crimes charged against Burdine. And although evidence of Burdine’s possession of those items may well have been admissible if they had been linked in some way to L.J., the Commonwealth failed to make that evidentiary link. We also reject the Commonwealth’s argument that the evidence in question falls under the modus operandi exception to KRE 404(b). First, we have already explained that we do not believe that KRE 404(b) is implicated by this evidence. Second, even if it were linked, there was insufficient evidence to show that the crimes against L.J. were signature crimes. In other words, the evidence here fell short of distinctive evidence necessary to be modus operandi evidence as we have set forth in cases such as Clark.⁵ We are left, then, with determining whether the evidence of the underpants and camera had any probative value and, if so, whether that probative value was outweighed by its prejudicial effect.

⁴ Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006).

⁵ 223 S.W.3d at 97 (“We have attempted to clarify and refine our analysis of the modus operandi exception in recent reported decisions of this Court. Toward that end, we held that it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi. So, as a prerequisite to the admissibility of prior bad acts evidence, we now require the proponent of the evidence to demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual. Thus, [a]lthough it is not required that the facts be identical in all respects, evidence of other acts of sexual deviance . . . must be so similar to the crime on trial as to constitute a so-called signature crime.”) (footnotes and quotation marks omitted).

We question whether this evidence had any probative value because neither the camera nor the underpants bore any direct connection to L.J. At most, the evidence had very slight probative value as a weak bolstering of L.J.'s contention that her assailant kept her underpants and her disposable camera. But even if we accept Burdine's argument that the underpants and camera should not have been admitted for lack of any probative value, we must conclude that their admission was, at most, a harmless error.

The evidence against Burdine was strong. The Commonwealth presented not only L.J.'s damning eyewitness testimony, but also presented scientific evidence that buttressed L.J.'s version of the events.⁶ Also, Burdine admitted to having attempted to view pornography, having smoked marijuana, having been intoxicated while driving, and having directed a racially oriented remark at L.J. So, faced with this list of uncharged bad acts to which Burdine himself admitted, L.J.'s strong eyewitness testimony, and the scientific evidence supporting L.J.'s version of events, we are convinced that there is not a reasonable possibility that the strange and erroneous admission into evidence of unidentified women's underpants and a disposable camera did not

⁶ Although some of that scientific evidence could also support Burdine's version of events, Burdine's story would not appear to explain things such as why L.J. had a labial abrasion or why there was vaginal fluid on the hair conditioner bottle.

reasonably contribute to the jury's verdict.⁷ The errors in admitting the underpants and camera into evidence were each harmless.⁸

B. The Trial Court Did Not Abuse Its Discretion by Refusing to Grant a Continuance.

During the second day of trial, defense counsel informed the court that Burdine had begun to tremble and had turned pale. Shortly after that, Burdine slumped over, and his head struck a chair. This event apparently occurred outside the jury's presence. Two nurses, who were on the premises as witnesses to be called at trial on behalf of the Commonwealth, and an EMT examined Burdine. Each reported that, essentially, Burdine's condition was not life threatening. One of the nurses told the trial court that she had performed a couple of basic tests on Burdine and that those tests indicated that he was having a "pseudo-seizure," not a real seizure. The other nurse said that Burdine's pulse was normal. The EMT stated that Burdine's vital signs, such as blood pressure and pulse rate, were fine. The EMT stated that he roused Burdine with ammonia inhalers and that Burdine was able to speak and was responsive to commands. The EMT stated that he found no evidence that Burdine's condition was life threatening. The Commonwealth then told the court that Burdine had a history of "pseudo-seizures." The jury was not

⁷ RCr 9.24; Anderson v. Commonwealth, 231 S.W.3d 117, 122 (Ky. 2007) ("An error is reversible if the erroneously admitted evidence has a reasonable possibility of contributing to the conviction; it is harmless if there is no reasonable possibility that it contributed to the conviction.").

⁸ And the erroneous admission into evidence of the camera certainly was not so shocking and intolerable as to rise to the level of a palpable error. Martin, 207 S.W.3d at 4.

present while the trial court and counsel questioned the medical personnel, but the video record reflects that Burdine was slumped over in his chair at counsel table next to his counsel.

Defense counsel moved for a mistrial or a continuance so that Burdine could see a doctor, but the trial court denied that request. The trial court stated that it was unable to do anything about Burdine's apparent torpor and that it did not know if Burdine was faking, but that he "might as wells [sic] to shape up because we are going to finish this [the trial]. That's all I know to do." The jury was then allowed to return to the courtroom, and the trial resumed.

The Commonwealth called several witnesses over the course of the next hour or so. These witnesses included some state troopers and the artist who drew the composite sketch of the suspect. Throughout this span of trial time, Burdine remained slumped over in the chair at counsel table next to his lawyer. The jury was told nothing about Burdine's condition. At one point during the testimony of a witness who was testifying about a thread found on L.J.'s clothing that matched the dark blue running shorts found in Burdine's car, defense counsel interrupted the Commonwealth's direct examination to inform the trial court that he could not take notes while holding Burdine to prevent him from falling out of his chair. Again, the trial court responded, "What do you want me to do?" Burdine's attorney again asked for a continuance, which the trial court denied by saying that it was going to finish the trial and had done everything it knew to do. At one point near the end of

the Commonwealth's case, the video record shows Burdine slumped so far forward in his chair that his head is resting on the table.

After the Commonwealth's last witness, defense counsel renewed his motion for a mistrial. Counsel again informed the trial court that Burdine was non-responsive and unable to assist in his defense. The Commonwealth repeated its assertion that Burdine was feigning illness. A discussion between defense counsel and the trial court ensued, during which the trial court stated that Burdine had a history of faking seizures. When defense counsel expressed concern about Burdine being able to testify, the trial court directed counsel to ask Burdine if he could testify. Counsel attempted to do so; but Burdine, whose head was resting on counsel table, did not respond. Defense counsel again requested a continuance, stating that the court could hold Burdine in contempt if it believed Burdine were faking. The trial court again denied the request for a continuance, stating that it resented defense counsel calling the trial court "mean."⁹ The trial court also stated that Burdine had been examined by three "medical people" who agreed that Burdine was not having a seizure. By the time trial resumed, approximately thirty-five minutes later, Burdine had regained consciousness but stated in an avowal that he was dizzy and that he could not think. After Burdine's brother testified for slightly less than two minutes, Burdine then testified in his own behalf, although he told the jury that he felt woozy.

⁹ As defense counsel noted, the record does not support the trial court's assertion that defense counsel had called the trial court "mean" or any similar pejorative term.

On appeal, Burdine claims that the trial court erred by not at least granting a continuance because his condition caused him to be slumped in his chair with his shirt soaked in perspiration during about an hour of the trial. This episode caused him to be unable to assist his attorney while the Commonwealth called four witnesses. Obviously, we believe that the judges across the Commonwealth have an obligation to ensure that critical stages of the criminal process, including trial, do not proceed in medical emergencies that render a defendant so incapacitated as to be unable to participate meaningfully in the defense of the case. And it may be safer practice to err on the side of caution when facing these types of situations. But under the particular facts of this case, we do not believe the trial court abused its discretion by refusing to grant a continuance.

As we have stated many times, a trial court has broad discretion in determining whether to grant a continuance; and we may reverse a trial court's decision to deny a continuance only if that decision represents an abuse of discretion.¹⁰ Although the decision regarding whether to grant a continuance obviously depends on the facts and circumstances of each individual case, in making the determination as to whether to grant a continuance, courts should focus on factors such as "the length of the delay, previous continuances, inconvenience to the parties and the court, purpose of the delay, availability of

¹⁰ See, e.g., Woodall v. Commonwealth, 63 S.W.3d 104, 128 (Ky. 2001).

other competent counsel, complexity of the case, and whether undue prejudice will result if the continuance is not granted.”¹¹

In the case at hand, the length of the delay is uncertain; but it is reasonable to assume that the delay would have been of relatively short duration because Burdine seems to contend that he only wanted to delay the proceedings long enough to see a doctor. Next, the record reflects that there had been several postponements of the trial in the case. More specifically, Burdine was granted the following continuances: a continuance in January 2005 because Burdine’s attorney had not had sufficient time to prepare for trial; another continuance in July 2005 because the results of Burdine’s mental competency evaluation had not been completed; another continuance in May 2006 because a report had not been issued regarding Burdine’s competency; and a fourth continuance in November 2006 because Burdine had been hospitalized. So it appears as if the trial court had already granted numerous continuances to Burdine, although most of the continuances seem to revolve around Burdine’s mental or physical health, so that the charges against Burdine had been pending for nearly three years by the time the trial actually commenced.

As to prejudice, it is inarguable that any continuance will necessarily cause the court, counsel, and the opposing party some degree of prejudice.¹² That inconvenience is heightened when the trial has already begun and the

¹¹ Fredline v. Commonwealth, 241 S.W.3d 793, 796 (Ky. 2007).

¹² Eldred v. Commonwealth, 906 S.W.2d 694, 700 (Ky. 1994), *overruled on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 554, 563-64 (Ky. 2003).

jury has been impaneled and witnesses brought to court. Because the continuance sought in this case would, according to Burdine, have been relatively brief, we cannot say that the continuance would have caused severe or undue prejudice to the Commonwealth or the court.¹³

The purported purpose of the delay was to enable Burdine to seek medical attention from a physician. Although we recognize the Commonwealth's assertion that Burdine was feigning illness, the record before us is insufficient for us to conclude that Burdine was seeking a delay for an improper purpose.

Since the availability of other counsel is not a factor in this case, we next turn our attention to the complexity of the case. Although Burdine contends that the case was complex, we disagree. There was some scientific evidence and the charges were serious, but the gist of the whole trial was a credibility contest between Burdine and L.J.¹⁴ Since this case did not involve a host of witnesses or complex legal and factual concepts, we decline to find that its complexity required a continuance.

We now turn to the heart of the continuance issue: whether Burdine suffered any undue prejudice from the trial court's denial of his request for a continuance. Burdine claims that he did suffer undue prejudice by virtue of

¹³ Eldred, 906 S.W.2d at 700 (“Of course, any change in trial date is going to cause some inconvenience. Thus, in order to become a factor for consideration there must be some significant or substantial inconvenience, which should be demonstrated on the record.”).

¹⁴ Burdine's own brief asserts that “[t]his case was essentially a swearing contest— [L.J.] maintained she was raped and sodomized while Mr. Burdine maintained that any sexual contact between them was consensual.”

his having essentially missed the testimony of four witnesses for the Commonwealth. Burdine also states that he was “forced to testify in his own defense after possibly just having a seizure” and that he “felt dizzy and his mind was not clear.” Burdine also questions whether the two nurses who examined him were truly free from bias because each had been called as witnesses for the Commonwealth in his case.

The Commonwealth disputes Burdine’s allegations of undue prejudice. The Commonwealth points out that the witnesses whose testimony Burdine allegedly missed testified very briefly and that their testimony concerned things that had already been discussed in the trial, with the exception of a forensic analyst who testified that a fiber collected from L.J.’s clothing matched the dark blue running shorts found in Burdine’s car. The Commonwealth contends that Burdine’s counsel was able to cross-examine the forensic analyst. Furthermore, the Commonwealth asserts that Burdine offers sheer speculation to insinuate that the nurses who examined him would have abandoned their medical ethics simply because they had been called as witnesses by the Commonwealth. And, finally, the Commonwealth points out that the testimony of the EMT who examined Burdine, and who bore no other relationship to the case, was consistent with that of the nurses.

A defendant has a constitutional right to confront and cross-examine witnesses called by the prosecution.¹⁵ Regrettably, the Commonwealth does

¹⁵ See, e.g., Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (“The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due

not address Burdine's due process argument. But, our thorough review of this record has brought us to the conclusion that Burdine did not suffer such undue prejudice as to lead to a decision that the trial court abused its discretion by denying Burdine's request for a continuance.

Although a defendant's right to be present during the critical stages of the proceedings against him is highly important, that right is not absolute. For example, an unruly defendant may properly be removed from the courtroom during a trial.¹⁶ And recognizing that each case is factually distinguishable, the general rule appears to be that "courts have been reluctant to grant a continuance based on claimed ill-health or disability where it appeared that [the] accused was malingering or that the condition complained of had been voluntarily incurred."¹⁷ Although he did not make a precise finding that Burdine was faking, a review of the record leads to the inescapable conclusion that the trial court believed Burdine was at least feigning illness or greatly exaggerating the severity of his condition. We cannot know for certain what, if any, physical ailment Burdine suffered on the second day of trial; but we do know that the trial court's implicit conclusion of malingering was supported by

process."). See also RCr 8.28 (concerning defendant's right to be present during critical stages of trial).

¹⁶ See, e.g., *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) ("we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.").

¹⁷ W.E. Shipley, Annotation, *Continuance of Criminal Case Because of Illness of Accused*, 66 A.L.R.2d 232 § 10 (1959).

the findings of the two nurses and the EMT. And the trial court saw the entire situation first-hand. We must agree with the Commonwealth that we find it uncanny that Burdine was able to regain control of himself to testify coherently as he did just minutes after the alleged seizure.

Obviously, serious medical issues in the courtroom must be dealt with humanely and fairly. The trial court here did not remain idle—Burdine was examined by three different medical personnel who then reported to the court and responded to counsel. That the two examining nurses had been witnesses for the Commonwealth does not mean that they were unreliable to examine and, if necessary, to recommend the need for immediate medical attention for Burdine. Burdine would have us hold that medical personnel called as witnesses by the Commonwealth would disregard medical ethics when called upon to examine a criminal defendant. We refuse to engage in such speculation.

We also refuse to declare that a trial court abused its discretion by failing to have an apparently ill criminal defendant examined by a physician. We refuse to find that the trial court abused its discretion in this case by utilizing and relying upon the services and statements of three medical personnel. Furthermore, Burdine has not shown any specific prejudice he suffered from the lack of a continuance (*i.e.*, he has not shown anything specific his counsel was unable to ask of any witness presented by the Commonwealth during the period Burdine claims he was allegedly incoherent). So we find that Burdine did not suffer undue prejudice stemming from the lack of a continuance.

Having examined all of the appropriate factors, we conclude that the trial court did not abuse its discretion by denying Burdine's request for a continuance.¹⁸

C. Burdine Has Not Properly Preserved the Issue of Improper Bolstering of L.J.'s Credibility and, Regardless, Any Improper Bolstering was, at Most, a Harmless Error.

Burdine contends that Dr. Roberts, who examined L.J. in the emergency room, was impermissibly permitted to bolster L.J.'s credibility. When the Commonwealth asked Dr. Roberts if he observed anything about L.J. that would suggest that she was not being truthful, Burdine's counsel objected based upon speculation. When the trial court overruled that objection, Dr. Roberts stated that there was nothing about L.J. that caused him to believe she was lying and that L.J. "appeared to be one of the true innocent victims that I rarely get to see."

Burdine contends that Dr. Roberts bolstered L.J.'s credibility before it was impeached. Of course, Burdine is correct that the character of a witness should not be bolstered before it is impeached.¹⁹ But the Commonwealth is also correct that this issue likely is not properly preserved because Burdine raised a different ground for objection in the trial court than he does on

¹⁸ Likewise, we conclude that the trial court did not abuse its discretion by refusing to declare a mistrial. *See, e.g., Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005) (holding that decision of whether to grant mistrial rests within discretion of trial court and that appellate review of that decision is based upon abuse of discretion standard).

¹⁹ *Fairrow v. Commonwealth*, 175 S.W.3d 601, 606 (Ky. 2005) ("KRE 608(a)(2) requires credibility to be attacked before it is supported.").

appeal.²⁰ Nevertheless, even if we assumed for argument's purposes that the issue was preserved, Burdine's argument would fail.

When Burdine testified in his own behalf later in the trial, he directly attacked L.J.'s credibility and truthfulness. We have previously held in these types of situations that any error in permitting a premature bolstering of a witnesses' credibility before it had been attacked was harmless if the witnesses' credibility was later impeached.²¹ Thus, any error in Dr. Roberts's testimony in this regard was, at most, harmless.

D. The Trial Court Did Not Err By Refusing to Instruct the Jury on Sexual Abuse in the Third Degree.

Burdine contends that the trial court erred by refusing to instruct the jury on third-degree sexual abuse as a lesser-included offense of first-degree sexual abuse. We disagree.

As it pertains to this case, KRS 510.110(1)(a) provides that a person is guilty of sexual abuse in the first degree if "[h]e or she subjects another person to sexual contact by forcible compulsion" ²² KRS 510.130(1)(a), by contrast, provides that a person is guilty of sexual abuse in the third degree if "[h]e subjects another person to sexual contact without the latter's consent."

²⁰ Robey, 943 S.W.2d at 618 ("The objection raised at trial was that the friend's testimony would bolster the testimony of the other witnesses. However, this issue was not preserved. Robey did not argue that the evidence was inadmissible on the grounds that the friend calmed her down before speaking with her. This court will not review an alleged error where the ground raised in the trial court differs from the issue raised on appeal.").

²¹ Farrow, 175 S.W.3d at 606.

²² The 2008 amendments to KRS 510.110 and KRS 510.130 are not germane to this case.

Burdine contends that the jury could have believed his version of the events but somehow could have simultaneously believed that the sexual contact occurred without L.J.'s consent.

According to Burdine's testimony, the only sexually-oriented contact he had with L.J. was L.J. wiping up his semen after he masturbated in her car. Even if we assumed for the sake of argument that L.J.'s wiping up Burdine's semen constitutes sexual contact as that term is defined in KRS 510.010(7),²³ Burdine points to no specific testimony showing that L.J. did not consent to that sexual contact. In fact, Burdine's own brief states that "Mr. Burdine maintained that any sexual contact between them [he and L.J.] was consensual."

A trial court has a duty to instruct on the whole law of the case,²⁴ but a trial court need not instruct on a theory lacking an evidentiary foundation.²⁵ Or, in other words, conjecture and speculation do not entitle a defendant to a lesser-included offense jury instruction. In this case, the trial court did not err by failing to give an instruction on third-degree sexual abuse when the evidence did not support such an instruction.

²³ KRS 510.010(7) defines *sexual contact* as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party" The Commonwealth correctly contends that Burdine does not point to any specific testimony tending to show that wiping up Burdine's semen after he ejaculated was done to gratify either his or L.J.'s sexual desire.

²⁴ Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1995).

²⁵ Thompkins v. Commonwealth, 54 S.W.3d 147, 151 (Ky. 2001).

III. CONCLUSION.

For the foregoing reasons, William Burdine's convictions and sentence are affirmed.

All sitting. Minton, C.J.; Abramson, Cunningham, and Scott, JJ., concur.

Noble and Venters, JJ., concur in result only but would hold that the women's underpants and the camera were properly admitted because they were relevant and probative of a signature crime or modus operandi; thus, a harmless error analysis was not necessary because there was no error.

Schroder, J., concurs in result only and would hold that Dr. Roberts' testimony that he believed L.J. and that she "appeared to be one of the true innocent victims" improperly vouched for L.J.'s credibility, Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky. 1997), and is not the character evidence permitted by KRE 608(a). However, he believes the error was harmless.

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Supreme Court of Kentucky

2007-SC-000580-MR

WILLIAM R. BURDINE

APPELLANT

V. ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
NO. 04-CR-00141

COMMONWEALTH OF KENTUCKY

APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

Pursuant to CR 76.32(1)(c), this Court hereby orders that its Opinion in Burdine v. Commonwealth, 2007-SC-000580-MR, rendered October 23, 2008 be modified by substituting pages 1 and 23 as attached hereto, in lieu of pages 1 and 23 of the opinion as originally rendered, so as to reflect the correct spelling of the name of the Commonwealth's attorney in this case, James Chesnut Maxson. Said modification does not affect the holding of the case.

All sitting. All concur.

ENTERED: April 23, 2009.


CHIEF JUSTICE