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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000511-MR

CRAIG EDWARD BASSHAM — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
NOS. 05-CR-003593 & 06-CR-002159

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On April 1, 2008, Appellant, Craig Edward Bassham, was found guilty by a Jefferson Circuit Court jury of rape in the first degree, terroristic threatening in the third degree, and carrying a concealed deadly weapon. He later pled guilty to promoting contraband in the first degree, two (2) counts of illegal possession of a controlled substance (marijuana), possession of drugs not in original container, and being a persistent felony offender in the second degree. For these crimes, Appellant was sentenced to twenty-two (22) years imprisonment. Appellant now appeals his conviction as a matter of right. Ky. Const. § 110(2)(b).

I. Background

Appellant and R.S. engaged in sexual intercourse on October 18, 2005—a fact uncontested by either party. Appellant claims that he had

consensual sex with R.S., while R.S. claims that she was raped by Appellant. Due to their disparate claims, the facts presented at trial by each side differed dramatically.

On October 18, 2005, R.S. lived in Regency Mobile Home Park in Louisville. She testified that she was sitting alone in her trailer that night waiting on her roommate, John Foote, to return home from work. At some point between 10:00 and 11:30 that evening, an unknown man rushed into the trailer yelling for Leslie.[1] She told the man to leave and threatened to call the police. The man took a knife from her kitchen counter, walked up behind her, and put the knife to her throat. The unknown assailant then threatened R.S. with the knife, threw her onto the couch, and raped her. He threatened to kill her if she called the police, took her cell phone, and stated that he would come back to see whether the police had arrived. The attacker then left, taking the knife from R.S.'s kitchen counter with him.

Foote testified that as he approached the trailer when he returned home from work, sometime between 11:00 p.m. and midnight, he saw someone with dark pants and a dark, hooded shirt get on a bicycle and leave. When he went inside, R.S. was seated in a kitchen chair, rocking back and forth and crying. When Foote asked her what was wrong, she recounted her version of events regarding what had taken place that

[1] Leslie "Les" Bassham was R.S.'s boyfriend and Appellant's uncle.

night. Foote then convinced R.S. to call the police, though she was reluctant at first.

Appellant's contentions regarding the night of October 18, 2005 stand in stark contrast to R.S.'s. Appellant testified that he entered R.S.'s trailer looking for his uncle, Leslie Bassham, with whom he worked, and had picked up at the trailer on numerous occasions. When R.S. told him Leslie was not there, he stated that he wanted to smoke marijuana with Leslie. Appellant testified that R.S. indicated that she would like to smoke some marijuana with him and he obliged.[2]

Appellant testified that as they passed the marijuana joint, R.S. would brush his hand and he took this as an indication that she was "coming on to him." Appellant stated that he tried to get away from R.S. at some point, but that she pulled him back toward her. He stated that he never threatened R.S. and that the two of them engaged in consensual sexual intercourse, with R.S. stating that she hoped Leslie did not find out. Appellant then left the trailer, passing Foote on his way out.

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[2] Appellant's claims that he and R.S. smoked marijuana on the night in question were not substantiated by testimony at trial. Foote, Leslie Bassham, and Officer Streever all testified that they were familiar with the odor of marijuana smoke, but did not detect it in the trailer on the night of October 18, 2005. Officer Cambron also testified that he was familiar with the odor of marijuana smoke, but did not detect it on Appellant when he stopped him and that Appellant, while possessing individual baggies of marijuana, did not have rolling papers on his person. Additionally, Dr. Price and Riddick (an EMT who responded to the scene), both of whom examined R.S. that night, stated that she did not seem to be under the influence of drugs or alcohol. Finally, when the trial court allowed a juror to ask Detective Cohen whether there had been any physical evidence of marijuana being smoked at R.S.'s trailer, she responded that she was not aware of any such evidence.

At the conclusion of trial, the jury found Appellant not guilty of burglary in first degree, but did find him guilty of: rape in the first degree, terroristic threatening in the third degree, and carrying a concealed deadly weapon. The following day, Appellant entered into a plea agreement as to the penalty to be imposed for the jury's findings of guilt and also pled guilty to the following offenses which had been severed for trial: promoting contraband in the first degree, two counts of illegal possession of a controlled substance (marijuana), possession of drugs not in the original container, and to being a persistent felony offender in the second degree. For these crimes, the trial court imposed a total sentence of twenty-two (22) years.

On appeal, Appellant raises five principal allegations of error: (1) that the trial court failed to suppress certain statements that were the product of custodial interrogation; (2) that inadmissible hearsay statements were introduced that had not been made for the purpose of medical treatment or diagnosis; (3) that prior consistent statements were improperly introduced, which only served to bolster R.S.'s testimony; (4) that he was denied his right to effective cross-examination and confrontation when the trial court limited his ability to ask questions regarding R.S.'s mental health; and (5) that the evidence was insufficient for the jury to find him guilty of carrying a concealed deadly weapon. Finding no cause for reversal, we affirm Appellant's convictions.

II. Analysis

A. Though The Trial Court Erred In Admitting Appellant's Statement Made During Custodial Interrogation, Such Error Was Harmless Beyond A Reasonable Doubt.

Appellant claims that the trial court committed reversible error by failing to suppress statements he made to Officer Cambron prior to his arrest, arguing that they were the product of custodial interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966). While we agree with Appellant that the trial court erred in denying his suppression motion, we decline to reverse on these grounds because we conclude that the trial court's error was harmless beyond a reasonable doubt.

Tanya Owens was R.S.'s neighbor in October 2005. Owens testified that she knew Appellant, and had seen him at R.S.'s trailer twice that night. The first time Appellant approached the trailer, Owens stated that he knocked on the door and asked for "Les." The second time Appellant went to R.S.'s trailer, she heard Appellant knock and then saw him walk through the open door. After getting Appellant's name and physical description from Owens, Officer Streevers (who had responded to the scene on the night of October 18, 2005) relayed it over his police radio. Officers Cambron and Brown responded when the information about the rape suspect came out over their radios.

Prior to trial, Appellant made a motion to suppress certain statements he made to Officer Cambron before being advised of his Miranda rights concerning whether he had been at the Regency Trailer Park on the night of the crime. The day before trial, the court held a

suppression hearing at which Cambron testified that he saw Appellant riding on his bike by the road and noticed that he matched the description of the suspect. At this point, Cambron stated that he flashed his lights and tapped his siren, causing Appellant to pull over beside the road. Officer Matt Brown was following Cambron in his police cruiser and radioed Cambron as he approached Appellant, advising him that Appellant was carrying a knife in his back pocket. Cambron stated that he removed the partially concealed knife from Appellant's pocket and asked him why he was carrying it. According to Cambron, Appellant responded that he had the knife for personal protection.

After removing the knife, Cambron asked Appellant for his name, which Appellant truthfully provided. Cambron testified that the name provided by Appellant matched that of the suspect wanted for questioning in the rape investigation. Cambron then asked Appellant if he had any other weapons or drugs on him and Appellant admitted to possessing the latter, including bags of marijuana and Xanax pills. Cambron then proceeded to pat him down and confiscate the drugs from his person. Cambron stated that when he questioned Appellant as to why he was carrying bags of marijuana, Appellant indicated that he had to feed his kids.

Cambron next asked Appellant if he had been in Regency Trailer Park that night and Appellant responded, "No, where is that?" It is this statement Appellant sought to suppress at trial. Cambron then arrested Appellant, handcuffed him, and placed him in the back of his police

cruiser. It was not until he was later placed in a holding cell that Appellant was advised of his Miranda rights by Detective Sherrard.

At the conclusion of the suppression hearing, the Commonwealth argued that it was permissible for the police to determine whether Appellant was indeed the suspect wanted for questioning before advising him of his Miranda rights, that Appellant was not in custody until he was placed under arrest, and that there was no evidence that Appellant believed he was in custody until that time. Appellant countered, arguing that a person in his position would not have believed that he or she was free to leave after officers had confiscated drugs from his person, and that he was not, in fact, free to leave.

The trial court issued an oral ruling denying Appellant's motion to suppress, determined that Appellant was not in custody until he was placed under arrest, and held that the officers were under no duty to advise Appellant of his Miranda warnings until they arrested him. For these reasons, the trial court concluded that Appellant's statements regarding Regency Trailer Park were not obtained as a result of custodial interrogation and, therefore, were not subject to suppression.

Our review of the trial court's ruling denying Appellant's suppression motion is two-pronged. Under the first prong, we must determine whether the factual findings of the trial court were supported by substantial evidence on the issue of whether Appellant was in custody when Officer Cambron asked him if he had been at Regency Trailer Park. Beckham v. Commonwealth, 248 S.W.3d 547, 551 (Ky.2008) (citing

Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006)); see RCr 9.78 ("If supported by substantial evidence the factual findings of the trial court shall be conclusive."). Under the second prong, we conduct a *de novo* review to determine whether the trial court's decision was correct as a matter of law. Olden v. Commonwealth, 203 S.W.3d 672, 676 (Ky. 2006) (citing Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky. App. 2000)); see Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky.1998). We examine each in turn.

As to the first issue, we conclude that the trial court's factual findings were not supported by substantial evidence and thus were not conclusive. The trial court found that the order of events surrounding Appellant's statement was as follows: Cambron approached Appellant on foot, removed a knife from his back pocket, asked him if he had been at Regency Trailer Park that night, and, *lastly*, removed drugs from him. However, the record indicates that Cambron in fact confiscated the drugs from Appellant *before* asking him if he had been at Regency Trailer Park.

In conducting the second prong of our analysis, we examine the trial court's decision at the suppression hearing *de novo* to determine whether it was correct as a matter of law. Olden, 203 S.W.3d at 676. Under Miranda, statements given in response to custodial interrogation are only admissible if a Miranda warning was given beforehand. 384 U.S. at 478-479. In order for statements elicited during custodial interrogation to be admissible, the now well-recognized Miranda warnings required the officers to inform Appellant that:

> he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479. Here, the Commonwealth concedes that a Miranda warning was not given before Appellant made the statements that he contends were inadmissible. Thus, if Appellant's statements were a product of custodial interrogation, they should have been suppressed prior to trial. Id.

Miranda defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id at 444. The United States Supreme Court has explained that a formal arrest is not required for custodial interrogation: "the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983). While the specific circumstances of each situation often determine whether an individual is in custody for purposes of Miranda, the standard is objective: "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

In order to determine whether a particular set of circumstances constitutes custodial interrogation for purposes of Miranda, a reviewing

Court must conduct a two-part inquiry: "[f]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995).

We must first examine the totality of events before, during, and after the interrogation. Id. The record shows that, upon seeing Appellant, who matched the suspect's description, Cambron turned on his blue lights and tapped the siren and Appellant pulled over on the bicycle he was riding. Cambron then walked up to Appellant, removed a partially-concealed knife from Appellant's back pocket, and asked for his name. Next, Cambron placed Appellant in front of the police car while he and Officer Brown stood next to him. Cambron asked Appellant if he had any drugs or other weapons on him and Appellant told him that he had marijuana in his pockets and Xanax pills in his cigarette box. Cambron then confiscated the drugs from Appellant's person. After doing so, Cambron asked Appellant if he had been to the Regency Trailer Park that night.

We must determine how a reasonable person placed in Appellant's position would have perceived the situation. Id. In Lucas, we explained that: "[c]ustody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave." 195

S.W.3d at 405. We went on to articulate several factors that may help determine whether an individual had been taken into custody, such as: "the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police." Id.

Here, the circumstances indicate that Appellant was in custody at the time Cambron asked him if he had been to the trailer park and that Appellant's answer to this question should have been suppressed by the trial court. At the time of the questioning, Appellant was standing between two officers in front of a police car. Cambron had just removed marijuana and Xanax pills from Appellant's pocket. [3] Thus, at least two of the Lucas factors seem to be present here: Appellant was surrounded by two police officers at the scene and Cambron had previously touched Appellant on at least two occasions—once to remove the knife and another in order to confiscate the drugs. We must conclude that a reasonable person in Appellant's situation would not have believed that he or she was free to terminate the interrogation and leave.

The Commonwealth contends that even if Appellant was in custody, Cambron's question was not interrogative in nature, but rather represented an attempt to identify Appellant. This Court, indeed, has

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[3] At the suppression hearing, Cambron acknowledged that once he confiscated the drugs, it was his intention to arrest Appellant and would not have allowed him to leave the scene. However, the inquiry we must make is not whether Appellant was, in fact, free to leave the scene, but rather how a reasonable person in Appellant's position would have interpreted the situation.

held that merely asking an individual for identification does not amount to custodial interrogation. Port v. Commonwealth, 906 S.W.2d 327, 331 (Ky. 1995). However, the actions taken by Officer Cambron exceeded merely asking Appellant for identification and fell within the bounds of interrogation:

> [i]nterrogation has been defined to include "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect . . . focus[ing] primarily upon the perceptions of the suspect, rather than the intent of the police.

Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

Here, Cambron had already identified Appellant when he asked whether he had been to Regency Trailer Park that night: Cambron had observed Appellant riding his bike and noticed that he matched the physical description of the suspect and, additionally, the first question Cambron asked Appellant was his name, which matched that of the suspect. Therefore, Cambron knew Appellant's identity when he asked if Appellant had been to the trailer park. This question was surely meant to elicit an incriminating response, as an affirmative answer would put Appellant at the scene of the crime. Accordingly, the Commonwealth's argument that Cambron's question was not tantamount to interrogation (but merely an effort to identify the suspect) is simply not convincing.

Having concluded that the trial court's failure to suppress Cambron's testimony ran afoul of the dictates of Miranda, we must now consider whether this error is substantial enough to warrant reversal. The Commonwealth contends that even if Appellant's statement was the product of custodial interrogation, the trial court's error was harmless. This Court has stated that, "[a]n error is harmless where, considering the entire case, the substantial rights of the defendant are not affected or there appears to be no likely possibility that the result would have been different had the error not occurred." Greene v. Commonwealth, 197 S.W.3d 76, 84 (Ky. 2006) (citations omitted). Here, however, because the trial court's error infringed upon a constitutional right, the standard is heightened and the error must be "harmless beyond a reasonable doubt" to avoid reversal. Chapman v. California, 386 U.S. 18, 24 (1967); see Talbott v. Commonwealth, 968 S.W.2d 76 (Ky. 1998).

Appellant argues that the admission of his statement made to Cambron, in which he denied having been to Regency Trailer Park that night, was highly prejudicial to him. The record shows that Appellant was read his Miranda warnings only after he was arrested, driven to the police station, and placed in a holding cell—after he had already made his first denial of being at the Regency Trailer Park that night. However, after he was Mirandized, he again denied having been at Regency Trailer Park that evening: stating that he only rode by the trailer park on his bicycle. Appellant's previous denial, therefore, appears to be nothing

more than cumulative evidence, and the error in failing to suppress it harmless beyond a reasonable doubt.

Nevertheless, Appellant contends that after being Mirandized, he contradicted part of his previous statement. He argues that since he did not deny knowing the location of the trailer park after receiving his Miranda warnings, but rather, just denied having been in the trailer park that night, this was not cumulative evidence. In particular, Appellant makes the strained argument that because he later admitted to riding by the trailer park, he thus knew its location, contradicting his previous statement that he did not know the location of Regency Trailer Park.

Appellant's contention is without merit. Cambron did not ask him if he knew the location of the trailer park, but rather if he had been there. Appellant's answer to this question did not change after he was given his Miranda warnings. Appellant still denied having been to the trailer park, though he did admit to riding by it. Even if these statements were marginally inconsistent with one another, any discrepancy was not significant.[4] Accordingly, though the trial court erred in admitting Cambron's statement at trial, we conclude that the effect of the error was harmless beyond a reasonable doubt.

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[4] Appellant's alleged denial of knowing the location of the trailer park was negligible when compared to the other evidence presented against him. The record demonstrates that there was substantial evidence against Appellant, including DNA and medical evidence. Appellant's DNA matched the semen found in R.S.'s vaginal swab. The doctor that examined R.S. at the hospital noted diffuse bruising on R.S.'s chest, scratches and bruising on R.S.'s upper chest and arms, and swelling and bruising on her lower back.

B. The Trial Court Did Not Err In Admitting Medical Records And Statements Made For the Purpose Of Medical Diagnosis And Treatment.

Appellant next argues that it was reversible error for the trial court to permit Dr. Sarah Price to testify as to statements made by R.S. and to allow the introduction of R.S.'s medical records because they were inadmissible hearsay.[5] We disagree and hold that the trial court did not err in admitting this evidence, as it was admissible pursuant to KRE 803(4).

Appellant challenges two items of evidence introduced at trial. Appellant first contends that the medical history R.S. gave to a nurse in the emergency room should not have been admitted as evidence. Second, he contests the admission of certain statements that R.S. made to Dr. Price in the emergency room. In particular, R.S. told Dr. Price that she had been sexually assaulted by an unknown assailant and that the perpetrator had held her at knifepoint, thrown her to the ground, vaginally penetrated her, and hit her in the face and chest. The parties concede that both R.S.'s medical history and her statements to Dr. Price were hearsay.

In Kentucky, even if the declarant is available as a witness, KRE 803(4) permits the admission of certain statements that would normally

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[5] The Commonwealth's contention that Appellant failed to preserve this issue for our review is without merit. Appellant objected at trial on the basis that the statements were inadmissible hearsay. The Commonwealth contends that this objection was insufficient because Appellant was additionally required to object to the relevancy of the statements in order to properly preserve this issue. Appellant's hearsay objection at trial adequately preserved this issue for our review.

constitute inadmissible hearsay: "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis."[6] Additionally, any statement that qualifies under this exception must also be subjected to KRE 403's balancing test, which seeks to determine whether its "probative value is substantially outweighed by the danger of undue prejudice." Garrett 48 S.W.3d at 14.

Here, Appellant primarily takes issue with the portions of R.S.'s medical history and Dr. Price's testimony which indicated that the assailant held R.S. at knifepoint, threw her to the ground, and hit her in the face and chest. Appellant claims that these statements failed to aid in R.S.'s medical treatment and diagnosis and that the evidence was unduly prejudicial because it was used to improperly bolster R.S.'s credibility. Appellant argues that R.S.'s claim that she was held at knifepoint does not fit under this exception because she was not treated for any knife-related physical injuries. We conclude that Dr. Price's knowledge that R.S. was held at knifepoint may have been beneficial to her diagnosis or treatment. It might have indicated that R.S. was

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[6] In Garrett v. Commonwealth, 48 S.W.3d 6, 14 (Ky. 2001), we held that there is no distinction between treating and nontreating physicians in applying the KRE 803(4) exception. Therefore, both the medical history R.S. gave in the emergency room and the statements she made to Dr. Price fit under the exception so long as they were made for the purposes of her treatment or diagnosis.

suffering from shock, or the general severity of the physical and emotional trauma she endured during the rape. Moreover, the probative value of these statements outweighs any danger of prejudicing Appellant. The record shows that R.S. stated the facts surrounding her attack but did not place blame on any identifiable individual. In addition, in order for R.S. to receive proper treatment for and diagnosis of her injuries, medical personnel needed to know she had been thrown to the ground and hit in the face and chest during the attack. These facts describing the "inception or general character of the cause or external source" of her injuries were clearly "reasonably pertinent to [her] treatment or diagnosis." KRE 803(4).

R.S.'s medical history fits within the KRE 803(4) exception and is relevant. Dr. Price testified that, in order to know which tests to perform for the rape kit, she needed to know as much as she could about R.S.'s past. The probative value of R.S.'s medical history and statements to Dr. Price was substantial and there was no indication that Appellant was unduly prejudiced by the admission of this evidence. As above, neither the medical history nor the statements identified Appellant or provided any extraneous details. If the statements did enhance R.S.'s credibility, it was not so prejudicial as to overcome the heightened standard announced in Garrett: "its probative value is *substantially outweighed* by the danger of *undue* prejudice." Garrett, 783 S.W.3d at 14.

C. The Trial Court Erred By Allowing The Introduction Of Certain Prior Consistent Statements, But The Error Was Harmless.

Appellant also argues that the trial court erroneously permitted the Commonwealth to introduce prior consistent statements made by R.S. in police interviews. Both parties agree that prior to the introduction of R.S.'s statements, Appellant attempted to impeach her credibility by questioning her about discrepancies between statements she made in the police interviews and her subsequent testimony at trial. However, "[m]erely challenging the truthfulness of a witness's testimony does not open the door to a parade of witnesses who repeat the witness's story as told to them." Bussey v. Commonwealth, 797 S.W.2d 483, 485 (Ky. 1990).

The Commonwealth argues these prior consistent statements were used to rebut Appellant's express or implied charges of recent fabrication and improper motive pursuant to KRE 801A(a)(2).[7] Appellant counters that he made no such charges regarding a recent fabrication or improper motive and that even if he had, the statements were inadmissible

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[7] KRE 801A(a)(2) reads:

> Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is: . . . Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

because R.S.'s motive existed before she made the prior consistent statements. We agree with Appellant and conclude that the trial court erred by admitting the statements, but decline to reverse on this basis, as the error was harmless.

In order for prior consistent statements to be properly admitted, there must first be an express or implied allegation of recent fabrication or improper influence or motive. KRE 801(A)(a)(2). Secondly, if such recent fabrication or improper influence or motive is alleged, the prior consistent statement must have been made before the alleged fabrication or improper influence or motive arose. Tome v. United States, 513 U.S. 150 (1995); Slaven v. Commonwealth, 962 S.W.2d 845 (Ky. 1997); see also Noel v. Commonwealth, 76 S.W.3d 923 (Ky. 2002).

In the case at bar, the Commonwealth argued that the prior consistent statements were admissible to rebut Appellant's allegation of recent fabrication or improper motive. However, Appellant denied making any such allegation and argued that the Commonwealth could not introduce R.S.'s prior consistent statements based solely on the fact that Appellant impeached her. The trial court permitted the Commonwealth to introduce statements made by R.S. during interviews with Detective Cohen which were consistent with her testimony at trial. The Commonwealth questioned both R.S. and Detective Cohen regarding the prior consistent statements contained in these interviews.

The Commonwealth asserts that Appellant implied that R.S.'s motive to lie was that she wanted sympathy from others and that she did

not want her boyfriend to know she had engaged in consensual sexual intercourse with his nephew. Even if Appellant did imply that these were R.S.'s motives to fabricate, they existed from the time R.S. made her first statement. The prior consistent statements introduced at trial were not made at a time before these motives came into existence pursuant to Tome.

As the prior consistent statements did not fall into any exception to the general prohibition against hearsay, the trial court erred by admitting them. However, such error was harmless. "A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." Winstead v. Commonwealth, 283 S.W.3d 678, 688-689 (Ky. 2009) (citing Kotteakos v. United States, 328 U.S. 750 (1946)). In Winstead, we provided a further clarification of the standard to be used: "[t]he inquiry is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" 283 S.W.3d at 689 (quoting Kotteakos, 328 U.S. at 765).

There is no substantial possibility that the verdict in the case at bar was swayed by the improper admission of R.S.'s prior consistent statements; therefore, the error was harmless. Appellant claims that he and R.S. engaged in consensual sexual intercourse after smoking

marijuana together. However, none of the many individuals who were present in R.S.'s trailer that night, all of whom were familiar with the odor of marijuana, detected any evidence of such. Appellant also claims that he never held a knife to R.S.'s throat and the knife police found on his person when they apprehended him was alternatively either for personal protection or for use in his job as a painter. The knife carried by Appellant was not a knife one would associate with either personal protection or painting—but rather, it was a kitchen knife, such as the one R.S. claimed Appellant removed from her kitchen and used to threaten her while he raped her. The bruises on R.S.'s body were consistent with the series of events she described to both police and medical professionals: that she had been pushed down and physically restrained by Appellant during the course of the sexual assault.[8] In short, there is no substantial possibility, given all the other evidence in the case at bar, that the verdict was swayed due to the improper admission of a limited number of R.S.'s prior consistent statements. Winstead, 283 S.W.3d at 689.

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[8] R.S. was transported to the University of Louisville Hospital where she was examined by Dr. Price. Price testified that R.S. had diffuse bruising on her chest, scratches and bruising on her upper chest and arms and swelling and bruising on her lower back. Price observed no bruising or bleeding during R.S.'s pelvic exam, but testified at trial that in her experiences with sexual assaults of middle-aged women who had five children, such as R.S., she would not expect to see trauma unless the assault had been especially brutal. Dr. Price also testified as to the medications R.S. was taking and noted that she was alert and responsive to questions and did not appear to be under the influence of drugs or alcohol.

D. Appellant Was Not Denied His Right Of Confrontation.

Appellant contends that his right of confrontation was violated when the trial court refused to allow him to ask Dr. Price about the uses for one of the drugs R.S. was prescribed—which included schizophrenia and bi-polar disorder. The trial court conducted an *in camera* review of R.S.'s mental health records to determine whether they contained exculpatory evidence. The court issued a written order with the names and dosages of the drugs prescribed to R.S. on the night of the rape and stated Appellant would be allowed to ask R.S. "if she was taking these medications on October 18, 2005 and whether her sense of perception was affected."

Appellant, as a criminal defendant, had a right under the Confrontation Clause of the Sixth Amendment of the United States Constitution to cross-examine adverse witnesses. This right, however, is not without bounds. Holt v. Commonwealth, 250 S.W.3d 647, 653 (Ky. 2008) (The Confrontation Clause does not guarantee that the defense be able to conduct cross examination in whatever manner and extent they desire.). Rather, "the trial court retains the discretion to set limitations on the scope and subject" of cross-examination. Davenport v. Commonwealth, 177 S.W.3d 763, 767-68 (Ky. 2005). Reasonable limits may be imposed by the trial court "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

At trial, Appellant questioned Dr. Price regarding the uses for Seroquel, one of the medications R.S. took for depression and anxiety. Dr. Price testified that she was familiar with the Physician's Desk Reference (which the trial court determined to fall under the learned treatises exception to the hearsay rule found in KRE 803(18)) and, agreeing with the text, testified that Seroquel was used to treat schizophrenia and bi-polar disorder. Because the trial court found no evidence that R.S. suffered from either of these conditions in its *in camera* review of her mental health records, it admonished the jury to disregard these statements. The trial court did not abuse its discretion in disallowing this testimony, as the jury could have easily been misled by testimony regarding schizophrenia and bi-polar disorder when R.S. had been diagnosed with neither.

Appellant also contends that the trial court violated his right of confrontation when it refused to let him refer to R.S.'s depression and anxiety as mental illnesses or to allow him to question R.S. and Dr. Price about the symptoms and effects of these conditions on R.S.'s ability to observe, recollect, and narrate. While "[i]nformation regarding the credibility of a prosecution witness has been recognized as . . . exculpatory evidence which is subject to disclosure[,]" the reasonable limitations on cross-examination put in place by the trial court did not prevent such disclosure. Eldred v. Commonwealth, 906 S.W.2d 694, 701-702 (Ky. 1995) (abrogated on other grounds by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003)).

Further information from R.S.'s mental health records was not required to establish the fact that R.S. suffered from depression and anxiety, as evidence was available from a less intrusive source—namely, the fact that both R.S. and Dr. Price testified that R.S. had been diagnosed with these conditions. Barroso, 122 S.W.3d at 564. Appellant complains that he was not allowed to explore the symptoms and effects of these conditions. However, the fact is that he never attempted to ask either R.S. or Dr. Price questions to that end.

Furthermore, the trial court did not abuse its discretion by not allowing these conditions to be referred to as "mental illnesses." The trial court did not disallow any testimony as to R.S.'s conditions, but rather, insisted they be referred to as "mental health issues." This was within the discretion of the trial court and did not deprive Appellant of effective cross-examination.

E. The Trial Court Did Not Err In Failing To Grant Appellant's Motion For A Directed Verdict Because There Was Sufficient Evidence That Appellant's Knife Was Concealed.

Appellant's final contention is that the trial court erred in denying his motion for a directed verdict, as the evidence was insufficient for the jury to find him guilty of carrying a concealed deadly weapon. We decline to reverse on this ground, as the trial court did not err in denying Appellant's motion.

We restated the long-held standards under which we review a motion for a directed verdict in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

(citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983); Trowel v. Commonwealth, 550 S.W.2d 530 (Ky. 1977)). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal." Benham, 816 S.W.2d at 187 (citing Sawhill, 660 S.W.2d 3).

The dispositive question is whether there was any evidence presented that the knife in Appellant's back pocket was not "open to the ordinary observation of persons who may come in contact with the person carrying it in the usual and ordinary associations of life." Avery v. Commonwealth, 223 Ky. 248, 3 S.W.2d 624, 626 (1928). [9] We find

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[9] KRS 527.020 states that "[a] person is guilty of carrying a concealed weapon when he or she carries concealed a firearm or other deadly weapon on or about his or her person." However, the statute does not define the term concealed, nor have the courts since its adoption. In Avery, a case which defined "concealed" under a previous Kentucky statute, we held:

> "Concealed" does not mean that it must be so hidden that it can only be discovered by a person making a special investigation to ascertain whether the person has such a weapon. It is sufficient if it is so concealed that it would not be observed by persons making ordinary contact with him in associations such as are common in the everyday walks of life.

3 S.W.2d at 626.

that there was, and, therefore, the question as to whether the knife was concealed was a question of fact to be determined by the jury. Prince v. Commonwealth, 277 S.W.2d 470, 472 (Ky. 1955).

It is undisputed that Appellant was carrying a knife in his back pocket. The two police officers who apprehended him testified that some portion of the knife was visible when Appellant was leaned over and riding his bicycle. However, evidence was also presented that Appellant was wearing a shirt long enough to cover the knife and we believe this sufficient for "a reasonable juror to believe beyond a reasonable doubt" that the knife was concealed. Benham, 816 S.W.2d at 187. The trial court did not abuse its discretion in denying Appellant's motion for a directed verdict.

III. CONCLUSION

Therefore, for the aforementioned reasons, we hereby affirm Appellant's conviction.

All sitting. Minton, C.J.; Abramson, Cunningham, Schroder, Scott and Venters, JJ., concur. Noble, J., concurs except as to footnote 4, as it implies that harmless error can be determined based on a sufficiency of the evidence test.

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