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# NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: NOVEMBER 25, 2009
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2008-SC-000177-MR

FINAL
DATE 12/16/09 Kelly Klaber D.C.

RODNEY WATKINS APPELLANT

V.

ON APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIMBERLEY CHILDERS, JUDGE
NO. 07-CR-00029

COMMONWEALTH OF KENTUCKY APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Rodney Watkins appeals as a matter of right from a February 12, 2008 Judgment of the Magoffin Circuit Court convicting him, in accord with a jury's verdict, of first-degree sodomy and sentencing him, in accord with the jury's recommendation, to twenty years in prison. The Commonwealth charged, and the jury found, that during the summer of 2006, Watkins orally sodomized M.P., his step-granddaughter, who was nine years old at the time. Watkins raises four issues on appeal, one preserved and three unpreserved. The preserved issue concerns testimony by the pediatrician, Dr. Aaronda Wells, who examined M.P. in November after the alleged incident. Watkins contends that the trial court erred when it permitted Dr. Wells to testify that at the

outset of the exam M.P. stated that Watkins had "raped" her. Watkins also contends, although he failed to object on these grounds at trial, that A.P., M.P.'s mother, was also improperly allowed to give hearsay testimony; that the Commonwealth's Attorney abused closing argument; and that the Commonwealth failed to prove venue in accord with KRS 452.510. Because Dr. Wells's testimony was properly admitted and because none of the other alleged errors justifies palpable error relief, we affirm.

## RELEVANT FACTS

The Commonwealth's case rested primarily on the testimonies of M.P. and her mother, A.P. M.P., who was ten years old at the time of trial, testified that during her 2006 summer vacation, probably in July, she spent several days in the care of her maternal grandmother at the residence her grandmother shared with Watkins. On four or five of those days, she testified, she was awakened from naps on her grandmother's bed by Watkins kissing her and touching her in a sexual manner. According to M.P., the touching escalated from day to day, beginning on the first day when Watkins kissed her on the cheeks and touched her breasts through her clothes, and culminating on the fourth or fifth day when Watkins removed her clothing, kissed her body in several places, sodomized her orally, and subjected her to intercourse.[1] M.P. claimed that Watkins threatened to kill M.P.'s brother or her grandmother if

[1] Watkins was indicted for incest but that charge was subsequently dismissed because Watkins was M.P.'s step-grandfather, a relationship not included in the incest statute.

she told anyone what had happened. She did not tell anyone, therefore, until she returned home to her mother, whom she told of Watkins's abuse.

A.P. testified that she reported the allegations to authorities, that she and M.P. were interviewed by a social worker and a Kentucky State Police investigator, and that she eventually took M.P. to be examined by Dr. Wells. A.P. also testified that she had received a letter—in Watkins's handwriting, according to A.P., and signed, "Rodney"—apologizing and seeking forgiveness because "all this has happen[ed]." The letter and the envelope in which it was delivered were introduced as Commonwealth exhibits.[2]

The Commonwealth also offered testimony by Dr. Wells, a pediatrician with specialized training in exams of abuse victims, who was employed at the Children's Medical Clinic of the Big Sandy Area Child Advocacy Center. Dr. Wells, who did not see M.P. until November 2006, testified that M.P.'s physical exam was normal, with the possible exception of a small flap of tissue on M.P.'s hymen. The flap was likely normal, Dr. Wells testified, but could have been the

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[2] The redacted letter states:

> Aug. 20.
>
> Hi A.P.
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> Hope everything going good for you. I writeing to let you know how sorry i am that all this happen. I know that saying i'm sorry do'sent mean much, but i don't know what else to say. I ask that you and [M.P.] can find it in your heart some day to forgive me. I wanted to ask you in person but i may never get the chance to.
>
> * * * * *
>
> I'm not asking you to do anything, you do what you feel in your heart you need to and i will understand. I really just wanted to say i'm sorry and forgive me if you can.
>
> Rodney

result of trauma. Even if the exam was normal, however, M.P. could still have been abused, Dr. Wells testified, because abuse results in an abnormal physical exam in only about ten percent of cases. Over Watkins's objection, Dr. Wells was also permitted to testify that at the outset of M.P.'s exam she had asked M.P. if she understood why she was there and that M.P. had responded that she was there because her "Papaw Rodney raped" her. Watkins's first contention on appeal is that Dr. Wells's repetition of that remark violated the hearsay rule and rendered his trial unfair. We disagree.

## ANALYSIS

### I. The Trial Court Did Not Err By Admitting Hearsay Testimony Accusing Watkins Of Abusing M.P.

As Watkins correctly notes, under KRE 802, the hearsay rule, out-of-court statements, such as M.P.'s statement to Dr. Wells, offered in evidence to prove the truth of the matter asserted, are generally inadmissible at trial. There are numerous exceptions to the rule against hearsay, however, and the trial court ruled that one of them, the so-called business records exception provided for by KRE 803(6), permitted Dr. Wells to repeat M.P.'s remark, as Dr. Wells had included the remark in her record of M.P.'s visit. As we explained in Alexander v. Commonwealth, 862 S.W.2d 856 (Ky. 1993), however, the business records exception does not render hearsay statements within a record indirectly admissible if the maker of the record would not be permitted to testify to the hearsay directly. *See also* Prater v. Cabinet for Human Resources, 954 S.W.2d 954, 958 (Ky. 1997) ("KRE 803(6) . . . only satisfy[ies] the hearsay aspects of the business . . . record, itself. If a particular entry in the record

would be inadmissible for another reason, it does not become admissible just because it is included in a business . . . record."). Notwithstanding the fact that Dr. Wells included M.P.'s remark in her records, therefore, the hearsay remark would remain inadmissible unless some other rule permitted Dr. Wells to introduce it. The Commonwealth concedes this point and argues that in this case there are two such rules: KRE 803(4), which allows the introduction of out-of-court statements made for the purpose of medical treatment or diagnosis, and KRE 801A(a)(2), which removes from the hearsay rule a witness's prior consistent statement if "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Because we agree with this second contention, we need not address the KRE 803(4) question.

As the Commonwealth correctly notes, KRE 801A(a)(2) excludes from the hearsay rule prior statements consistent with the declarant's testimony, if the prior statement "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." This rule applies here because it was Watkins's defense, developed entirely through cross-examination of the Commonwealth's witnesses and counsel's argument, that M.P. had exaggerated the charges against him after she was examined by Dr. Wells through the influence of the social worker assigned to M.P.'s case. In his cross-examination of M.P., Watkins confronted her with the fact that in her examination by Dr. Wells, she had told the doctor that on three different days Watkins had touched her breasts and kissed her, and on one of the days had

unbuttoned her pants, but she had not told the doctor of any other sexual contact and in particular had not described the oral sodomy she testified to at trial. Watkins also asked M.P. how many times she had discussed the matter with the social worker, clearly implying, as counsel later argued during his closing, that the more serious allegations had been suggested to M.P. after her interview with Dr. Wells. In response to this "recent fabrication" defense, KRE 801A(a)(2) permitted the Commonwealth to introduce M.P's "Rodney raped me" statement to Dr. Wells as one consistent with her trial testimony.

Generally, of course, KRE 801A(a)(2) applies only to prior statements made before the motive to fabricate or the allegedly improper influence has arisen, and this aspect of the rule might appear to be implicated by the fact that M.P.'s examination by Dr. Wells followed her initial meeting with the social worker. As noted, however, aside from the "rape" remark, M.P. did not describe for Dr. Wells the more serious allegations of abuse and thus there is no basis for suspecting that those remarks were the product of the social worker's undue suggestions. Indeed, Watkins argues that M.P.'s remarks to Dr. Wells were untainted by any undue influence and that the more serious allegations were suggested to M.P. only during subsequent sessions with the social worker after Dr. Wells's examination. That examination was truly prior, therefore, to the alleged improper influence, and KRE 801A(a)(2) applies to it in the ordinary way, notwithstanding M.P.'s earlier contact with the social worker.

As we explained in Noel v. Commonwealth, 76 S.W.3d 923 (Ky. 2002), moreover, a prior consistent statement made after some alleged motive to

fabricate or improper influence may still be admissible under the rule provided that "the statement had 'some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" *Id.* at 929 (quoting from United States v. Ellis, 121 F.3d 908 (4th Cir. 1997), *cert. denied,* 522 U.S. 1068 (1998)). In Noel, another sex-abuse case, a post-motive prior consistent statement was deemed admissible because its thrust was not so much substantive, as proof of the statement's content, but more rehabilitative, the statement and the circumstances in which it was made tending to rebut, beyond the mere fact of a prior statement, the defense suggestion that the abuse allegations were the product of an adult's undue influence.

Here, too, in conjunction with M.P.'s redirect-examination, her statement to Dr. Wells's has significant rehabilitative force. During redirect, M.P. testified that she had not told Dr. Wells everything that Watkins had done to her because the examination was being video recorded and the recording equipment made her nervous. The apparent discrepancy between M.P.'s initial "Rodney raped me" statement and her subsequent much milder description of what happened lends credence to that explanation by suggesting that during the course of the pediatrician's examination M.P.'s confidence waned. The statement and its circumstances thus tend to counter Watkins's suggestion that M.P. exaggerated her account of the abuse after the Wells examination and do so with a rebutting force greater than the mere fact that M.P. had previously made a statement consistent with her trial testimony. The statement was

admissible, therefore, even were it not clear that the statement was made before M.P. had been first exposed to the social worker's allegedly improper influence. In sum, Dr. Wells's testimony repeating M.P.'s "Rodney raped me" statement was admissible, although for reasons different than the one the trial court relied upon. That testimony thus does not entitle Watkins to relief. Noel, 76 S.W.3d at 929 (upholding trial court's evidentiary admission which was correct "even though for the wrong reason.").

## II. Watkins's Trial Was Not Marred By Palpable Error.

Watkins also raises three unpreserved errors, which he contends were palpable and so subject to relief under RCr 10.26. Under that rule, as we recently explained in Commonwealth v. Jones, 283 S.W.3d 665 (Ky. 2009),

> an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." An error is "palpable," we have explained, only if it is clear or plain under current law, . . . and in general a palpable error "affects the substantial rights of a party" only if "it is more likely than ordinary error to have affected the judgment." . . . An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable."

*Id.* at 668 (citations omitted). None of the unpreserved errors Watkins alleges satisfies this standard.

### A. Hearsay Testimony By M.P.'s Mother Was Admissible Under KRE 801A(a)(2).

Watkins first complains that like Dr. Wells, A.P., M.P's mother, repeated during her testimony hearsay statements attributed to M.P. describing the acts, including the oral sodomy, to which Watkins subjected M.P. Counsel did not object to that testimony, and it does not warrant palpable error review because admission of that testimony was not "palpably" erroneous. Like her statement to Dr. Wells, M.P.'s statements to her mother were prior statements consistent with her trial testimony admissible under KRE 801A(a)(2) in response to Watkins's "recent fabrication" defense. Indeed, if anything, A.P.'s testimony was even more securely admissible under that rule than the pediatrician's testimony because M.P. made the statements to her mother before seeing the social worker and thus clearly before the social worker's allegedly improper influence.

**B. The Prosecutor Did Not Engage In Improper Closing Argument.**

Watkins, who did not testify at trial, next contends that during her closing argument the Commonwealth's attorney improperly vouched for M.P.'s credibility, attempted to shift the burden of proof to the defense, and invited the jury to infer guilt from Watkins's decision not to testify. These contentions stem from the prosecutor's following remarks, which came immediately after she had described, and asked the jury to recall, M.P.'s demeanor during her testimony:

> She told you the truth about what happened to her. No one has testified to anything today, there's been no evidence presented to you all today that the version that she told you about what happened to her was not true. It's true. Again, the evidence is clear, [M.P.] told you what happened. Doctor Wells testified that the

> condition of [M.P.'s] body was consistent with the things that [she] said happened to her. She said they were consistent with the things that her step-grandfather did to her. The defendant wrote the victim's mother an apology letter. And no one has presented any evidence to the contrary.

Watkins did not object to these remarks at trial, but complains now that the prosecutor improperly vouched for M.P.'s credibility when she stated that M.P. "told you the truth," and improperly shifted the burden of proof and commented on Watkins's choice not to testify by saying "no one has testified to anything today," "there's been no evidence presented to you," and "no one has presented any evidence to the contrary."

As Watkins correctly notes, the prosecutor may not vouch for his or her witnesses. "Improper vouching occurs when the prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the [prosecutor's] office . . . behind the witness." United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999). As the Sixth Circuit explained in Francis, improper vouching generally involves such blunt comments as "I think the witness was candid," or "I think he is honest," or comments that suggest that the prosecutor has knowledge of facts not presented to the jury which bear on the witness's credibility. *See* Mack v. Commonwealth, 860 S.W.2d 275 (Ky. 1993) (reversible error for prosecutor to tell jury that it had not heard the "full story"). On the other hand, the prosecutor is allowed great leeway in closing argument to comment on the evidence, Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987), and in this case the prosecutor was careful to base her assertion that M.P. had told the

truth not on her own opinion or on her awareness of facts outside the evidence, but on the evidence of M.P.'s demeanor. Although the prosecutor certainly strayed onto thin ice by commenting on M.P.'s truthfulness, a practice we strongly caution against, given the emphasis the prosecutor placed on the comment's evidentiary basis, *i.e.*, M.P.'s demeanor on the witness stand, we cannot say that the comment amounted to a palpable error rendering Watkins's trial manifestly unjust.

Even less problematic were the prosecutor's remarks that no one had testified for Watkins and that he had presented no evidence. Although Watkins is correct that the Commonwealth bears the burden of proof on every element of the alleged offense, Kirk v. Commonwealth, 6 S.W.3d 823 (Ky. 1999), a prosecutor is free to comment on the evidence, or the lack thereof, and "d[oes] not 'shift the burden of proof' by arguing during the guilt phase that the defendant failed to rebut the Commonwealth's evidence." Tamme v. Commonwealth, 973 S.W.2d 13, 38 (Ky. 1998).

Watkins is also correct that the Fifth Amendment to the United States Constitution prohibits prosecutors from inviting jurors to draw adverse inferences from a defendant's decision not to testify. Ragland v. Commonwealth, 191 S.W.3d 569 (Ky. 2006). Such an invitation is improper whether made by direct comment on the defendant's silence or indirectly, but in either case "a comment violates a defendant's constitutional privilege against compulsory self-incrimination only when it was manifestly intended to be, or was of such a character that the jury would necessarily take it to be, a

comment upon the defendant's failure to testify." *Id.* at 589. Comments that the Commonwealth's evidence is unrebutted "are improper only if the defendant was the only person who could have rebutted the evidence." United States v. Snook, 366 F.3d 439, 444 (7th Cir. 2004). Otherwise, "[a] prosecutor may properly comment on the defendant's failure to introduce witnesses on a defensive matter." Weaver v. Commonwealth, 955 S.W.2d 722, 728 (Ky. 1997) (citation and internal quotation marks omitted).

Here, the prosecutor's comments that the Commonwealth's case was unrebutted clearly referred to Watkins's case as a whole and not to his decision not to testify. In summarizing the Commonwealth's proof, the prosecutor underscored the fact that Watkins's case did not include any evidence—medical, forensic, or otherwise—to rebut not only M.P.'s testimony but that of Dr. Wells and A.P. as well. Because the prosecutor's remarks were neither manifestly intended nor necessarily understood to be a comment on Watkins's silence, they did not constitute an error, much less a palpable one.

**C. The Commonwealth's Failure To Prove Venue Does Not Justify Palpable Error Relief.**

Finally, Watkins contends that he is entitled to have his conviction reversed because the Commonwealth failed to prove the venue of his offense. In this context, "venue" has two interrelated senses. It means both the "locality where a crime is committed or a cause of action occurs," and the "locality or political division from which a jury is called and in which a trial is held." *The American Heritage Dictionary of the English Language, Fourth Edition* (2006).

Under Section 11 of our Constitution,[3] venue in the second sense, the place of jury selection and trial, must ordinarily correspond to venue in the first sense, the place or places where the crime occurred. Accordingly, KRS 452.510 provides as follows: "Unless otherwise provided by law, the venue of criminal prosecutions and penal actions is in the county or city in which the offense was committed."

As we recently explained in Derry v. Commonwealth, 274 S.W.3d 439 (Ky. 2008),

> "[v]enue" then is merely a *statutory prescription* that the prosecution be in the county in which the offense has been committed and that the prosecution is in a court which has "jurisdiction" to preside over the case, i.e., the circuit court of that county.

*Id.* at 443 (citing Commonwealth v. Cheeks, 698 S.W.2d 832 (Ky. 1985); internal quotation marks omitted).

As such, assuming that there is no suggestion that the crime may have been committed outside Kentucky, venue is not a jurisdictional fact which must be proven to establish the trial court's jurisdiction, nor is it an element of any offense, which must be proven to establish a defendant's guilt. *Id.* The statutory prescription, rather, creates a right in the accused to be tried in the

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[3] Section 11 of the Kentucky Constitution provides in relevant part:

> [In] prosecutions by indictment or information, [the accused] shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

county of the offense, and creates a duty in the prosecutor to offer proof "that the offense did in fact occur in the county in which the case is being prosecuted." *Id.* at 443 (citing Commonwealth v. Cheeks, supra; internal quotation marks omitted). The defendant's right to object to an improper venue may be waived and will be deemed waived unless the objection is raised prior to trial. *Id.* The prosecutor's duty is satisfied by even slight evidence from which venue can be inferred. Bedell v. Commonwealth, 870 S.W.2d 779 (Ky. 1993); Commonwealth v. Cheeks, supra. In Jackson v. Commonwealth, 670 S.W.2d 828 (Ky. 1984), furthermore, we indicated that "the question of whether the evidence was sufficient could only be raised as to this aspect of the case [i.e., venue] by an objection to the giving of an instruction which authorized the jury to find that the offense was committed in [the county of prosecution]." *Id.* at 831-32. Absent such a timely objection, even a complete failure of proof of venue does not entitle the defendant to relief under the palpable error standard, because, as noted above, venue is not an element of the offense and thus has no bearing on the jury's determination of guilt. Moreover, it is not manifestly unjust to try the defendant in a county where venue is in fact proper, although unproven, or in a county where by his silence the defendant has agreed to be tried.

Here, we agree with Watkins that the Commonwealth failed to introduce even slight evidence from which venue could be inferred. M.P. testified as to her and her mother's address on Dry Bread Road in Salyersville, in Magoffin County, but neither she nor any other witness testified as to the location of her

grandmother's house, where the offense occurred. Watkins failed to object to the jury instructions on this ground, however, and because, as explained above, the failure of proof did not amount to a manifest injustice, it does not entitle Watkins to palpable error relief.

## CONCLUSION

In sum, Dr. Wells's testimony repeating M.P.'s identification of Watkins as her abuser was admissible under KRE 801A(a)(2) as a prior consistent statement tending to rebut Watkins's "recent fabrication" defense. The trial court, therefore, did not err by admitting that testimony. Moreover, Watkins's trial was not marred by palpable error. A.P.'s hearsay testimony also repeated prior consistent statements admissible under KRE 801A(a)(2); the Commonwealth did not exceed the bounds of proper closing argument; and although the Commonwealth did, with regrettable carelessness, fail to prove that venue was proper in Magoffin County, that failure, to which there was no objection, did not render Watkins's trial manifestly unjust. Accordingly, we affirm the February 12, 2008 Judgment of the Magoffin Circuit Court.

Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Schroder, J., concurs in result only by separate opinion.

SCHRODER, J., CONCURRING IN RESULT ONLY: Mere cross-examination does not open the door to any and all hearsay which tends to corroborate a witness's story. Bussey v. Commonwealth, 797 S.W.2d 483, 484-85 (Ky. 1990). Despite the majority's attempt to rationalize as such, the facts of this case do not support the admission of M.P.'s statement to Dr. Wells

under KRE 801A(a)(2). The majority's reliance on Noel is a stretch. Further, Dr. Wells' identification of the perpetrator was inadmissible under KRE 803(4). Garrett v. Commonwealth, 48 S.W.3d 6, 12 (Ky. 2001). Accordingly, the admission of the statement was error. Nevertheless, I would deem the error harmless in this case, particularly because of the Appellant's admissions in the letter. While I believe the hearsay repeated by the mother was inadmissible as well, I would deem this unpreserved error non-palpable for the same reason.

COUNSEL FOR APPELLANT:

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

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204