IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: DECEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000480-MR

DAVID HOFF — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
NO. 08-CR-00067

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant David Hoff was convicted by a Christian County jury of three counts of first-degree rape of Angela Green. Appellant now challenges his convictions, alleging multiple errors. Finding no error, this Court affirms.

I. Background

Appellant began living with Marilyn Benedict in 1984. Benedict had one daughter from a previous relationship, Angela Green, who was twelve years old in 1984 but was an adult when the charged crimes occurred. Green is mildly mentally retarded with an I.Q. of 50. Green lived with Benedict and Appellant until late 2007.

Green testified that Appellant raped her many times during the years they lived in the same home. She could not give exact dates for the first time or last time Appellant raped her, but the evidence showed that the rapes began in 1994 (or perhaps before) and continued until late 2007. Green had three

children fathered by Appellant: B.H. (daughter born 1995), Ju.H. (son born 1998), and Je.H. (daughter born 2003). The children were told that Benedict was their mother rather than Green, although B.H. eventually found out that Green is her mother. The entire family lived together in West Virginia and then moved together to Kentucky in 1995.

In February 2008, Appellant was charged with three counts of forcible rape. All of the charged rapes occurred when Green was an adult. Originally, the dates of the counts corresponded with the approximate dates of conception for each of Green's children: July 1994, June 1997, and June 2002. The date of the first count was amended the morning of the trial to "on or between July 1994 and December 2007" because the family lived in West Virginia in 1994 before moving to Kentucky in 1995.

The one-day trial was on March 2, 2009. At trial, Green testified about the rapes. She said that Appellant would knock her to the floor, "whoop" her, pull her hair, and then "stick it in." She would ask him to stop or would try to get away from him, and he would hold her down and cover her mouth. Appellant told Green not to tell anyone about the rapes or else he would "whoop" her. Green was not sure about the number of times she was raped or when the rapes happened. She testified that it happened every time Benedict left the house, but she also testified that it happened "on and off."

B.H., the oldest child of Green and Appellant, testified that she witnessed Appellant rape Green on many occasions. B.H. said that Green would try to run away or tell Appellant to stop, but he would hold Green down or tie her to

the bed with a rope. B.H. said she saw Appellant put his penis between Green's legs or make her "suck it." Afterwards, Green would cry and lock herself in the bathroom. B.H. testified that this happened almost daily, and she saw it happen a week before she was removed from the home in December 2007. B.H. testified in the judge's chambers in the presence of the prosecutor and defense attorney. Appellant and the jury viewed her testimony via closed-circuit television.

Appellant also raped B.H. multiple times between 2000 and 2007. He was convicted on charges of rape and incest of B.H. in February 2010 at a separate trial. His appeal in that case is dealt with separately in 2010-SC-000167-MR. Appellant's crimes against B.H. were not mentioned during Appellant's trial for raping Green, but the fact that B.H. was also a victim of Appellant was relevant to the trial court's determination that B.H. could testify outside the presence of Appellant.

Appellant testified in his own defense. He did not deny that he had sex with Green or that he was the father of her children. He claimed that his sexual relationship with Green was consensual and that he had never forced sex on her.

The jury found Appellant guilty on all three counts of first-degree rape. He was sentenced to fifteen years' imprisonment for each count to be served consecutively, for a total of forty-five years' imprisonment. His appeal to this Court, therefore, is as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises the following arguments on appeal: (1) the trial court erred in allowing B.H., a child witness, to testify outside the presence of the defendant; (2) the trial court erred in admitting a psychological evaluation of Green without redacting a portion discussing Appellant forcing sex on Green; (3) the Commonwealth failed to give reasonable notice of its intention to introduce evidence of other crimes, wrongs, or acts under KRE 404(c); (4) the Commonwealth ignored the trial court's ruling about what KRE 404(b) evidence was admissible; and (5) the Commonwealth failed to prove venue.

A. Child Witness's Testimony Outside of Presence of Appellant

Appellant challenges the decision of the trial court to allow B.H. to testify outside the courtroom. KRS 421.350 allows the trial court to order that a child victim of illegal sexual activity or a child witness to such a crime testify outside of the courtroom. When the procedure in KRS 421.350 is used, the attorneys examine the witness outside of the courtroom, and the defendant and the jury watch the child's testimony in the courtroom. In this case, the jury and the defendant viewed B.H.'s testimony live via closed-circuit television.

Appellant argues that the trial court should not have allowed B.H. to testify outside of the courtroom because two of the requirements of KRS 421.350 were not met in this case. First, he argues that KRS 421.350 is only available when the child is twelve or younger at the time of trial, and B.H. was thirteen when she testified. Second, he argues that the trial court did not make

a thorough determination about whether there was compelling need for B.H. to testify outside of the presence of Appellant.

1. Preservation of the Issues for Review

Appellant argues that these two issues were preserved by defense counsel's objection during a pre-trial discussion in chambers. The following discussion took place:

Court:	All right, one other thing before I go orient the new jury. There is also a motion pending for the testimony of the child outside the presence of the defendant pursuant to KRS 421.350. Do you have any objection to that?
Defense counsel:	I have to object. I think by the terms of the statute she's thirteen.
Court:	How old is she now?
Commonwealth:	She's thirteen now.
Court:	How old was she at the time these alleged acts occurred?
Commonwealth:	Four to twelve.
Court:	Okay. There's a case that allowed for the testimony of a fifteen-year-old victim. And I think there is certainly some discretion on the part of the court. Based on the allegations of incest which will not be tried in this case, but I think still fit us squarely in the parameters of the statute, the court finds that there is compelling need for [B.H.] to be able to testify outside the physical presence of Mr. Hoff. My intention then would be to do that in here, and to let that testimony be presented live to the jury with Mr. Hoff in the courtroom.

From this discussion, it is clear that Appellant preserved the issue of whether B.H. was too old for the statute to apply. Appellant argues that

defense counsel's objection during this discussion also preserved the issue of whether the trial court had made an adequate finding of compelling need. The Commonwealth responds that defense counsel only objected to the age issue and not to the compelling need issue, and so only the age issue is preserved.

This Court has held that "[a] new theory of error cannot be raised for the first time on appeal." *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). This Court has also held that an error is "not properly preserved for appellate review" if the grounds for objection on appeal are "different from those asserted at the trial court." *Charles v. Commonwealth*, 634 S.W.2d 407, 409 (Ky. 1982); *see also Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky. 1972). In this case, Appellant did object in a timely manner on the age issue, but he never objected at trial to what he contends was the trial court's failure to seriously consider if there was compelling need for B.H. to testify outside of the presence of Appellant. The compelling need objection raised on appeal is a new and different objection from what was raised at trial, and so any error was unpreserved.

The Commonwealth further argues that because Appellant did not preserve the compelling need issue at trial and did not request palpable error review in his brief (because he assumed the issue was preserved), he has waived all review of this issue. In the reply brief, Appellant continues to assert that the compelling need issue was preserved by the objection at trial, but asks in the alternative for palpable error review. The Commonwealth argues that Appellant should not be allowed to strategically wait until the reply brief to ask

for palpable error review, an approach the Commonwealth believes to be unfair and unduly burdensome.

The recent case of *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009), is directly on point. In that case, the defendant believed that his objection at trial had preserved an issue for review and, in his brief, argued the issue as if it had been preserved. *Id.* at 670. In fact, the objection had not preserved the issue. The Commonwealth challenged preservation in its brief, and in his reply brief the defendant requested palpable error review if the error was deemed unpreserved. *Id.* As in the present case, in *Jones* the Commonwealth argued that the defendant's "belated" request for palpable error review was unfair and an improper use of the reply brief. *Id.* This Court disagreed:

> CR 76.12(1) and 76.12(4)(e) permit the appellant to file a reply brief "confined to points raised in the briefs to which they are addressed." Generally, an appellant is not obliged to anticipate that the Commonwealth will challenge preservation, and once it does he is free under the rule to reply to the Commonwealth's point by arguing that, even if unpreserved, the error is one that may be noticed as palpable. The Commonwealth, of course, may argue in its appellee's brief not only that the alleged error is unpreserved but also that it does not warrant palpable error relief. It is neither unfair to the Commonwealth nor unduly burdensome to expect it to use that opportunity to address as fully as it deems necessary an issue it has raised.

Id. The Commonwealth has not provided any convincing arguments for distinguishing the present case from *Jones* or for limiting the holding in *Jones*. And this Court will not assume that an appellant is engaging in underhanded briefing tactics simply because the appellant's initial brief makes an argument about preservation that is ultimately incorrect. Therefore, the compelling need issue will be reviewed for palpable error.

Thus it is appropriate to examine the merits of Appellant's challenges to the trial court's decision to allow B.H. to testify outside of the presence of Appellant.

2. Age of the Child Witness

KRS 421.350 applies "to the statements or testimony of [the child victim] or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection." Appellant argues that the statute should not apply in this case because B.H. was thirteen at the time of trial.

This Court acknowledged in *Danner v. Commonwealth*, 963 S.W.2d 632 (Ky. 1998), that the age requirement in the statute is somewhat ambiguous because it could be read to mean either that the child must have been twelve or younger when the crime was committed, or that the child must be twelve or younger when she testifies at trial. *Id.* at 634. In *Danner*, the child victim of rape and sodomy was between five and ten years old when the crimes occurred, but she was fifteen by the time the case went to trial. *Id.* at 633. This Court stated:

> The statute assumes the age will be the same, but in fact, it often will not. Despite the ambiguity as here applied, we believe legislative intent is to protect child victims twelve and under when the crimes were committed against them and who remain children at the time of trial. The statute does not preclude this interpretation and its language focuses on the age of the child when the crime was committed .... To hold otherwise would permit the untoward result of disallowing the protections of the statute to a child who was twelve when the sex crimes were committed, but who had turned thirteen before the trial of the accused. Such a result would be contrary to the broad protective purpose underlying the statute.

Id. at 634 (footnote omitted). Appellant asks for reversal of *Danner* because he believes it is in contravention of the plain language of the statute. This Court declined to reverse *Danner* in the recent unreported case *Vires v. Commonwealth,* No. 2006-SC-000072-MR, 2008 WL 4692362, at *10 (Ky. Oct. 23, 2008). And the present case does not demonstrate any need to disturb *Danner's* reading of the language and purpose of KRS 421.350(1). Therefore, the interpretation from *Danner* that the procedure in KRS 421.350 may be used if the child was twelve or younger when the crime was committed, even if by the time of trial the child is over the age of twelve, controls.

Here, B.H. was younger than twelve when she witnessed the crimes at issue in this case, and then turned thirteen before the trial. The trial court did not err in deciding this issue.

3. Compelling Need

As discussed above, Appellant's objection to the trial court's finding of compelling need will only be reviewed for palpable error: "A palpable error which affects the substantial rights of a party may be considered ... by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26.

Appellant argues that the trial court did not make a thorough determination that there was compelling need for B.H. to testify outside the presence of Appellant. KRS 421.350(2) requires the trial court to find "compelling need," defined as "the substantial probability that the child would

be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." KRS 421.350(5). The determination of compelling need is one that must be done seriously and cautiously because it implicates the defendant's rights under the federal and state constitutions to confront witnesses against him. *See Price v. Commonwealth*, 31 S.W.3d 885, 892–94 (Ky. 2000); Ky. Const. § 11; U.S. Const. amend. VI. In *Danner*, this Court outlined several factors to be considered by the trial court, including the child's age and demeanor, the nature of the offense, the likely impact on the child of testifying in court, and, when the child is older than twelve at the time of trial, the time that has elapsed since the crime. *Danner*, 963 S.W.2d at 634 (citing *Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986)). The inquiry should focus on the effect of testifying in the presence of the defendant on the child's ability to communicate. *Id.*

The trial court in this case did make an adequate finding that there was compelling need for B.H. to testify outside of the presence of Appellant, although it did not explicitly state that B.H. would be "unable to reasonably communicate" because of Appellant's presence. KRS 421.350(5). As is clear from the discussion in chambers about the Commonwealth's motion (transcribed above), the trial court considered B.H.'s current age and her age when the crimes occurred, and it considered the fact that she was the victim in the incest case against Appellant that was tried separately. The Commonwealth's motion to apply KRS 421.350 also included a letter from

B.H.'s counselor that explained how testifying in front of Appellant would affect her:

> It is my professional opinion that [B.H.] is not at a place in her treatment where she is able to successfully cope with the stress which testifying before her father would create. [B.H.] has a history of self harming behaviors primarily as a means of coping with the stressors she experiences and has expressed suicidal thinking while present at Hope Hill Children's Home. ... I do believe that [B.H.] is capable of and would benefit from telling her side of the events but believe that the setting for this disclosure should not be in the open court.

Based on this evidence, the trial court could reasonably conclude that B.H. would experience "serious emotional distress" if required to testify in the presence of the defendant, and that this emotional distress would affect her ability to testify. KRS 421.350(5).

Appellant argues that the trial court did not make a thorough determination because it did not interview B.H. and it spent "less than one minute" on the issue.[1] Appellant does not point to any evidence the trial court failed to consider. He merely argues that the trial court should not have given weight to the counselor's letter, that more weight should have been given to the fact that B.H. was testifying as a witness in this case rather than as a victim, and that more weight should have been given to the fact that B.H. was nearly fourteen years old at the time of trial.

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[1] Appellant is referring to the trial court's brief discussion before ruling on the Commonwealth's motion (transcribed above). This discussion lasted only a few moments. But the Commonwealth had previously submitted a motion detailing the law and the facts of this case, and the letter from B.H.'s counselor was attached to the motion. There is no reason to believe that the trial court did not consider the motion and attached material.

The evidence in the present case—B.H.'s young age and the fairly short time that had elapsed since the crimes, the fact that B.H. was also Appellant's victim, and the letter from the counselor—supports the trial court's finding of compelling need.

Ideally, the trial court would have been more explicit in finding that B.H.'s emotional distress would affect her ability to reasonably communicate. The plain language of KRS 421.350(5),[2] as well as this Court's cases on the issue, demonstrate that the "compelling need" inquiry is about the child witness's *ability to communicate,* not just the trauma the child will experience as a result of testifying. In *Price v. Commonwealth,* 31 S.W.3d 885, 893 (Ky. 2000), this Court held that the Commonwealth must "prove that the use of this procedure is *reasonably necessary* to obtain the testimony of the child," and we noted that mere stress caused by testifying was not enough. *Id.* (emphasis added).

In this case, the trial court made a finding of compelling need that was supported by the evidence. Although the trial court did not explicitly state on the record that testifying in the presence of Appellant would affect B.H.'s ability to reasonably communicate, the evidence supported such a finding. In particular, the counselor's letter explaining the very severe stress that B.H. would experience if required to testify in Appellant's presence supports the

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[2] "For the purpose of subsections (2) and (3) of this section, 'compelling need' is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence." KRS 421.350(5).

finding that B.H.'s ability to communicate would be affected. For these reasons, there was no palpable error in the trial court's determination of compelling need.

B. Mental Health Evaluation

Appellant argues that the trial court erred in admitting a psychological evaluation of Green by Dr. Robert B. Sivley, Jr., without redacting a portion of the background section that describes Appellant forcing sex on Green. Because this statement was a prior consistent statement admissible under KRE 801A(a)(2), there was no error.

The evaluation was conducted on April 2, 2007, about eight months before Appellant was arrested in December 2007. The evaluation was requested by the Department of Community Based Services, and the purpose was to determine Green's IQ. The relevant part of the background section is as follows:

> [Green] essentially described that she engages in sexual activity with her step-father when he conflicts with her mother, and her mother leaves the home temporarily. Although the patient's mother believed that her sexual activity with her step-father was consensual, Ms. Green described her step-father making unwanted advances toward her and forcing himself on her. She stated that she has told him to stop when he wanted to have sex with her but that he did not. She further indicated that this has occurred on a daily basis at times and that it has caused her to feel bad.

In addition to the background section, there was a reference to forced sex in the diagnostic impression portion of the evaluation. Dr. Sivley wrote that forced or coercive sexual activity with her stepfather was among the psychosocial stressors affecting Green.

The Commonwealth sought to introduce the evaluation during Detective Roberts's testimony. The Commonwealth's main purpose in introducing the evaluation was to show the diagnosis of mild mental retardation and an I.Q. of 50. When defense counsel made a hearsay objection to the two portions that referenced forced sex, the Commonwealth responded that the statements were made for the purposes of diagnosis[3] and that the defense was potentially going to introduce testimony to discredit Green's testimony that she did not consent to sex with Appellant. The trial court ruled that the line from the diagnostic impressions section would be redacted, but decided to reserve ruling on the background section until after the defense's case because that section could become admissible depending on what the defense did during cross-examination and its case in chief. The court admitted the evaluation into evidence but did not immediately publish it to the jury.

After the close of all the evidence, the trial court decided not to redact the background section. This decision was based on the trial court's understanding of the background section as a prior consistent statement under

[3] At trial, the prosecutor initially argued that the statement was admissible under KRE 803(4) as a statement made for the purpose of diagnosis. The trial court responded that it would not be admissible under this hearsay exception because Dr. Sivley's report was being offered to show Green's mental abilities rather than to prove that Appellant raped her. Instead, the trial court believed it was a prior consistent statement. The Commonwealth adopted the trial court's approach. Because the statement is admissible under KRE 801A(a)(2), this opinion does not address whether or not it is admissible under KRE 803(4).

KRE 801A(a)(2).[4] The trial court noted that it was not redacting the background section because "it's relevant in light of [Appellant's] denial."

The following requirements must be met before a prior consistent statement may be admitted into evidence under KRE 801A(a)(2):

> [T]he party offering the statement must establish four elements under [the rule]: (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.10[3], at 578 (4th ed. 2003) (internal quotation marks omitted) (quoting *United States v. Bao*, 189 F.3d 860, 864 (9th Cir. 1999)).

Here, all these requirements were met. First, Green testified at trial and was subject to cross-examination, and in fact Appellant did cross-examine Green about her statement to Dr. Sivley although the trial court had not yet decided whether to redact the statement. *See Colvard v. Commonwealth*, 309 S.W.3d 239, 248 (Ky. 2010) (requiring that the declarant be examined

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[4] The relevant portions of KRE 801A(a)(2) are as follows:

> 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:
>
> ...
>
> (2) 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 ... .

KRE 801A(a)(2).

concerning the statement). Second, there was an implicit charge of improper influence. On cross-examination, Appellant developed the argument that Detective Roberts told Green what to say at trial. Appellant noted that Green called Detective Roberts her "buddy" and asked whether Detective Roberts ever told her what to say. During re-cross, Appellant asked whether Green was nervous to testify because she was afraid she would say something wrong. This line of questioning implied that Green's testimony was the product of the improper influence of Detective Roberts. *Noel v. Commonwealth*, 76 S.W.3d 923, 928–29 (Ky. 2002) (holding that a similar line of questioning met the improper influence requirement). Third, the prior statement was fully consistent with Green's in-court testimony about Appellant forcing her to have sex. Finally, the prior statement to Dr. Sivley was made about eight months before Detective Roberts became involved in investigating the case, so it was made before the alleged improper influence arose. *See Slaven v. Commonwealth*, 962 S.W.2d 845, 858 (Ky. 1997) ("[A] prior consistent statement is admissible to rebut a charge of recent fabrication only if the statement was made before the alleged motive to fabricate came into existence."). For these reasons, the statement was properly admitted as a prior consistent statement under KRE 801A(a)(2).

Appellant argues that the trial court's decision not to redact the background section because "it's relevant in light of [Appellant's] denial" was an inappropriate application of KRE 801A(a)(2). Appellant is correct that if all that is required for KRE 801A(a)(2) to apply is a defendant's denial that he

committed the crime, virtually any prior consistent statement would be admissible. But the rule actually requires "an express or implied charge against the declarant of recent fabrication or improper influence or motive." KRE 801A(a)(2). Thus, the rule only applies when the party opposing the statement makes such a charge. Here, Appellant asked questions on cross-examination that implied that Detective Roberts improperly influenced Green in her testimony, so this requirement was met. It appears that the trial judge may have misspoken when discussing this issue, but he made the correct ruling. There was no error.

C. Notice of KRE 404(b) Evidence

Appellant argues that the Commonwealth gave late notice that it intended to introduce evidence of other crimes, wrongs, or acts under KRE 404(b), and the trial court erred by not excluding the evidence or granting a continuance to allow the defense more time to prepare to address the new evidence. This Court reviews a trial court's decision to admit evidence for abuse of discretion, *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005), and there was no such abuse here.

All the charges against Appellant (three counts of rape against Green, eight counts of rape against B.H., and eight counts of incest against B.H.) were set to be tried on March 2, 2009. Five days before trial, the trial court granted the defense's motion to sever the charges committed against B.H. from those committed against Green. Three days before trial, the prosecutor met with B.H. to tell her that her case would not be tried at that time. During this

conversation, B.H. revealed for the first time to the prosecutor that she had seen Appellant raping Green on many occasions. B.H. also said that she had seen Appellant use a gun, a baseball bat, and other objects to threaten Green and that Appellant forced Green to perform oral sex. B.H. said that Appellant forced her (B.H.) to use drugs. After the interview with B.H., the prosecutor called defense counsel to inform him of the information she had just learned. She also filed a notice of intent to introduce KRE 404(b) evidence as required by KRE 404(c) and attached a summary of her interview with B.H.

The Commonwealth's notice of intent to introduce KRE 404(b) evidence stated that the Commonwealth intended to introduce evidence that Appellant raped Green on multiple occasions other than the three rapes included in the indictment. This evidence would be offered through the testimony of Green and B.H. The Commonwealth argued that this evidence of other crimes was admissible under KRE 404(b) because the acts were so inextricably intertwined with the charged crimes that separation could not be accomplished without serious adverse effect on the Commonwealth's case.

On the day of trial, Appellant moved to exclude B.H.'s testimony or alternatively to grant a brief continuance because of the short notice. Defense counsel argued that he needed more time to review some letters B.H. had written describing what Appellant had done to her. Defense counsel believed that the letters did not mention that B.H. witnessed any acts committed against Green, and he thought they might be useful for cross-examination.

The notice requirement in KRE 404(c) states that the prosecution in a criminal case must give reasonable pretrial notice of 404(b) evidence, and "[u]pon failure of the prosecution to give such notice the court may exclude the evidence ... or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure."

The trial court ruled that the Commonwealth's notice was reasonable under the circumstances and that B.H. could testify about other sex acts against Green that she witnessed. The trial court said that B.H. could not testify about Appellant using a gun to threaten Green, Appellant forcing B.H. to use drugs, or Appellant forcing Green to perform oral sex (unless Green first testified about oral sex).

Appellant does not dispute that the evidence of other bad acts was admissible under KRE 404(b) because it was "inextricably intertwined" with evidence of the charged crimes. But he argues that under the notice requirement in KRE 404(c) the trial court should have excluded the evidence or granted a continuance or other remedy. The trial court found that the Commonwealth's notice was "reasonable under the circumstances," a finding that was supported by the evidence. The prosecutor notified the defense of the evidence in a telephone call immediately after she learned of it. She also faxed defense counsel a notice of intent to introduce KRE 404(b) evidence and a summary of B.H.'s statement by the end of that day. Thus, defense counsel

had notice three days before trial, almost immediately after the prosecution first learned of the evidence.

Since the trial court found that the Commonwealth had provided reasonable notice, there was no need to continue on to the second part of KRE 404(c), which states that if the prosecutor fails to give such notice, the trial court may exclude the evidence or "for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy *as is necessary to avoid unfair prejudice* caused by such failure." (Emphasis added.) Even assuming for the sake of argument that the prosecutor failed to give reasonable notice, there was no reason to believe that a continuance was necessary to avoid unfair prejudice. The purpose of the notice requirement in KRE 404(c) is "to provide an opportunity for the defendant to challenge admissibility of the evidence before trial and to have a fair chance of dealing with reliability and prejudice problems at trial." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.25[7], at 156 (4th ed. 2003). Here, Appellant was able to make a motion in limine to exclude the evidence, and the trial court did in fact limit what B.H. could testify about, excluding the evidence about the gun, forced drug use, and oral sex. Thus, Appellant was able to challenge the admissibility of the evidence before trial. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 31–32 (Ky. 1998) ("Obviously, no prejudice occurred, because Appellant had actual notice of this evidence and raised the KRE 404(b) issue ... in his own *in limine* motion ....").

Of course, it is not ideal that the defendant received notice three days before trial, but this Court has held that notice given shortly before trial is not necessarily prejudicial if the defendant has time to adequately challenge the admissibility of the evidence. *Dant v. Commonwealth*, 258 S.W.3d 12, 21–22 (Ky. 2008) (four days' notice); *Walker v. Commonwealth*, 52 S.W.3d 533, 538 (Ky. 2001) (six days' notice). Moreover, until five days before trial, the counts involving Green and those involving B.H. were set to be tried together, and B.H. was going to testify at that trial. Therefore defense counsel already had a strong incentive to carefully review all the evidence relating to B.H. because, until just a few days before trial, everyone involved with the case believed she would be testifying. Although defense counsel argued that he needed more time to review B.H.'s letters and prepare for cross-examination on the new evidence, the trial court did not believe this created unfair prejudice, and in so deciding, the trial court did not abuse its discretion.

D. B.H.'s Testimony about Sodomy

Appellant argues that the prosecutor ignored the trial court's KRE 404(b) ruling about the evidence concerning oral sodomy. As discussed above, the trial court held that B.H. could testify about witnessing Appellant rape Green, but that she could not testify about seeing him force Green to perform oral sex unless Green testified about such acts. (Green did not mention oral sex in her testimony.) The trial court presumably made this ruling because Appellant was not charged with sodomy, and the court believed the sodomy was not inextricably intertwined with the rapes. KRE 404(b).

During her testimony, B.H. made two mentions of forced oral sex. When the prosecutor asked what B.H. meant when she said that Appellant would "mess with" Green, B.H. responded that Appellant would make Green have sex with him or "suck his thing and stuff." Later, when the prosecutor asked what Appellant would do with his penis, B.H. said that he would "stick it in [Green's] private" or make Green "suck it."

Appellant argues that the error was preserved by his motion in limine to exclude the evidence, which was granted by the trial court. Appellant did not object to the testimony during the trial. He argues that this error requires a reversal.

The admission of this testimony did not create reversible error. The prosecutor's questions were not meant to solicit testimony about sodomy, and so B.H.'s answers were in part non-responsive to the questions. In *Phillips v. Commonwealth*, 679 S.W.2d 235, 237 (Ky. 1984), this Court held that "[w]here evidence of other crimes is introduced into evidence through the non-responsive answer of a witness, this court must look at all of the evidence and determine whether the defendant has been unduly prejudiced by that isolated statement." *Id.*; *see also Matthews*, 163 S.W.3d at 18. In light of all the evidence, it is very unlikely that the two fleeting references to sodomy had any effect on the jury's decision. The allegations of sodomy involved the same victim during the same time period as the charged crimes, so they did not introduce significantly new or different information about Appellant's actions. *Compare Funk v. Commonwealth*, 842 S.W.2d 476, 480–81 (Ky. 1992) (holding that it

was unduly prejudicial to admit extensive, detailed evidence about the defendant's previous crime against another victim). And the allegations of sodomy were no more shocking than the charged crimes of rape, so this is not a case where evidence of other bad acts inflamed the jury's passions. *See White v. Commonwealth*, 178 S.W.3d 470, 478 (Ky. 2005) (recognizing that evidence of some types of crimes would "almost inevitably inflame a jury's passion"); Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.10[4][b], at 88 (4th ed. 2003) (defining "undue prejudice" as evidence that creates a "risk of an emotional response that inflames passions, generates sympathy, or arouses hostility"). The two references to sodomy were very brief and the prosecutor did not pursue further details about the allegations. For these reasons, the defendant was not unduly prejudiced.

Further, "[t]his type of evidentiary error is easily cured by an admonition to the jury to disregard the testimony." *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky. 2000). In the present case, an admonition would have been the proper remedy, but the Appellant did not request an admonition. The trial court did not err by not granting a mistrial.

E. Venue

Appellant claims that there was insufficient evidence that the crimes occurred in Christian County, which is where the indictment was returned and the case tried. The Hoff family moved to Christian County from West Virginia in 1995. They apparently moved to Cadiz, in Trigg County, sometime in the early 2000s before moving back to Christian County. Appellant, Appellant's sister

Julie Hoff, Green, and B.H. all had differing recollections about when the family lived in Trigg County. Appellant testified that they lived in Trigg County until 2002, which would mean that they were in Trigg County in June 2002, the date for the third count of rape. Appellant does not dispute that all the charged crimes happened in Kentucky, but he argues that there was insufficient proof that the third count happened in Christian County. As a result, he claims, the Commonwealth failed to prove a necessary jurisdictional fact, failed to prove all the elements of the offense, and failed to prove venue as required by statute. Though these claims are functionally the same, because they are framed slightly differently, they shall be addressed in turn.

First, Appellant argues that the trial court did not have jurisdiction over the third count because the Commonwealth did not prove venue, which he believes is a necessary jurisdictional fact. Appellant cites a 1960 case, *Willis v. Commonwealth*, 339 S.W.2d 174 (Ky. 1960), to support his argument that venue is a jurisdictional fact that the Commonwealth must prove. Although our older cases viewed venue as a jurisdictional fact, *e.g.*, *Woosley v. Commonwealth*, 293 S.W.2d 625, 626 (Ky. 1956), this Court has recognized that the concept of venue has changed significantly over the last half-century, and venue is no longer a necessary jurisdictional fact. *See Derry v. Commonwealth*, 274 S.W.3d 439, 441–44 (Ky. 2008) (describing the historical development of Kentucky's law on venue). Any circuit court in the Commonwealth has *jurisdiction* to preside over this type of criminal

prosecution, although it may not be the proper venue for a particular case depending on where the crime was committed. *Id.* at 443.

Appellant also argues that the Commonwealth's alleged failure to prove venue resulted in a conviction based on insufficient evidence. In other words, Appellant argues that the Commonwealth failed to prove a required element of the crime. This Court recently addressed a defendant's claim that venue must be proved as an element of the crime:

> Neither crime at issue here, incest nor first-degree sexual abuse, contains any reference to venue in its respective statute .... Thus, the Commonwealth bore no burden to prove venue as an element of the offense. However, under the venue statutes, it does have that burden in all cases, but if it fails to offer such proof, the defendant is required to raise the failure with a motion to the trial court for a transfer to the proper venue in order to secure relief. If the defendant fails to do this, as Appellant did in this case, then he is deemed to have waived venue and cannot challenge his conviction on that ground.

Turner v. Commonwealth, 345 S.W.3d 844, 847 (Ky. 2011) (citation omitted). Venue is not an element of first-degree rape, the charged crime in this case. KRS 510.040.

Finally, Appellant's overall complaint that venue was not proved is answered by the fact that venue may be waived. Under KRS 452.650, "The venue of the prosecution may be waived by the defendant and the failure to make a timely motion to transfer the prosecution to the proper county shall be deemed a waiver of the venue of the prosecution." This Court applied KRS 452.650 in *Derry,* 274 S.W.3d at 444, to find venue waived where no motion to transfer was made. Likewise, in the present case Appellant did not make a motion to transfer, and so any problem with venue was waived.

In summary, venue is neither a jurisdictional fact that must be proved by the Commonwealth, *Derry*, 274 S.W.3d at 443, nor an element of the crime that must be proved by the Commonwealth, *Turner*, 345 S.W.3d at 847, and the defendant may waive venue by failing to make a motion for transfer, KRS 452.650. Here, Appellant did not make a motion for transfer, so he waived any issues relating to venue. There was no error.

III. CONCLUSION

Finding no error, Appellant's convictions are affirmed.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Schroder, J., concurs in result only, believing that Green's statements contained in the background section of Dr. Sivley's evaluation were not admissible under KRE 801A(a)(2), or any other hearsay exception, under the facts of this case.

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