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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2010-SC-000052-MR

JAMES RANDALL MAY

APPELLANT

V. ON APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN PECKLER, JUDGE
NO. 09-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted James May of two counts of first-degree unlawful transaction with a minor and one count of third-degree sodomy. The trial court sentenced him to twenty-four years' imprisonment and ordered the sentence to run concurrent with a life sentence, for which May was paroled

May now appeals his conviction as a matter of right.¹ He contends the judgment must be reversed because the trial court erred by (1) ruling that May could not present evidence of his reporting to school authorities the sexual abuse of another child without opening the door to evidence of his own prior convictions; (2) allowing testimony of the victim's treating physician identifying May as the perpetrator; (3) bolstering the victim's credibility by permitting inadmissible prior consistent statements, by finding in the jury's presence the victim competent to testify, and by allowing improper argument from the

¹ Ky. Const. § 110(2)(b).

prosecutor; (4) failing to admonish the jury after a witness revealed May had been in jail; (5) qualifying the victim's physician as an expert in the presence of the jury; and (6) denying his motion for a new trial without conducting an evidentiary hearing.

May also contends that this Court should (1) reconsider its holding in *Young v. Commonwealth*² and (2) find the Kentucky Violent Offender Statute unconstitutional.

We find no reversible error on any issue relating to the trial of this case, and we decline to reconsider *Young* or declare the violent offender statute unconstitutional. Accordingly, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY.

The father heard that his 14 year-old daughter, C.M., was sexually involved with the 47 year-old May. When confronted, C.M. told her parents that May persuaded her to have sex with him. The police initiated an investigation, and C.M. underwent a physical examination at the Children's Advocacy Center.

The grand jury indicted May, charging him with two counts of third-degree rape, two counts of first-degree unlawful transaction with a minor, and one count of first-degree sodomy. Before trial, the Commonwealth dismissed the rape charges. At trial, May represented himself, aided by standby counsel.

² 968 S.W.2d 670 (Ky. 1998).

C.M. testified that she became acquainted with May through her best friend, K.C., who was also May's neighbor. According to C.M., the first sexual contact occurred in June 2009, on her birthday, when she spent the night with K.C. C.M. and K.C. went to May's home that night where K.C. and May enticed C.M. into having sex as her birthday present. That night, May inserted his finger into C.M.'s vagina and had vaginal intercourse with her while K.C. watched. The second sexual encounter with May occurred sometime in August 2008 when C.M. again spent the night at K.C.'s house. The two girls went to May's home where C.M. and May engaged in vaginal, oral, and anal sex.

The jury convicted May of two counts of first-degree unlawful transaction with a minor and one count of third-degree sodomy and fixed punishment at twenty-four years in prison. After the verdict, May filed a motion for a new trial under Kentucky Rules of Criminal Procedure (RCr) 10.02 and requested an evidentiary hearing on the motion. The trial court declined to conduct an evidentiary hearing and denied the motion for new trial.

II. ANALYSIS.

A. Any Error in the Trial Court's Ruling Regarding May's Proffer of Evidence of His Reporting Sex Abuse of Another Child was Harmless.

May argues the trial court erred by ruling that May could not present evidence that he reported the sexual abuse of K.C. to school officials without opening the door to evidence of his own prior convictions. The trial court's error, if any, was harmless and does not require reversal.

On the morning of trial, counsel for the local school board appeared and moved, in part, to quash May's subpoena for Sheila Burns to testify at trial. Burns was a counselor at C.M. and K.C.'s school. During an in-chambers conference, May explained that he would call Burns to testify that May reported the sexual molestation of K.C. by her father and sought counseling for K.C. The trial court found this evidence irrelevant to whether May abused C.M. Rather, the trial court termed this as character evidence introduced to suggest May was a good person for reporting the abuse of K.C. The trial court warned May that if he elicited this testimony from Burns, the Commonwealth would be entitled to introduce evidence of May's prior convictions. Because May did not want the jury to hear of his prior convictions, he decided not to call Burns as a witness. This issue was preserved for appellate review.

On appeal, the standard of review for the trial court's ruling on an evidentiary issue is abuse of discretion.³ Under the abuse of discretion test, we reverse the ruling of the trial court only if the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."⁴ Preserved evidentiary errors are harmless when the error did not have a substantial influence on the outcome of the case.⁵

As a general rule, relevant evidence is admissible at trial, except as otherwise provided in the Kentucky Rules of Evidence (KRE), the Kentucky

³ *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (reversed on other grounds).

⁴ *Commonwealth v. English*, 933 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

⁵ *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010) (citations omitted).

Constitution, or the U.S. Constitution.⁶ Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁷ Whether evidence is relevant is a factual determination properly left to the sound discretion of the trial court.⁸

Character evidence is admissible only in limited circumstances. A criminal defendant may introduce “[e]vidence of a pertinent trait of character or of general moral character” to prove conformity therewith.⁹ Such evidence is admissible only in the form of testimony concerning a defendant’s general reputation in the community or testimony of a witness’s opinion of the defendant.¹⁰ The trial court decides whether evidence is being introduced to show a defendant’s character.

May now argues that his report of K.C.’s abuse to Burns is relevant to show that he did not have sex with C.M. The Commonwealth’s proof at trial included allegations that May was also in a sexual relationship with K.C. and that K.C. was present during May and C.M.’s sexual encounters. Because the alleged sexual encounters with C.M. and K.C. were intertwined, May argues that his report of K.C.’s abuse showed that he had nothing to hide with respect to C.M. But during the in-chambers conference, May explained that the

⁶ KRE 402.

⁷ KRE 401.

⁸ *Berryman v. Commonwealth*, 237 S.W.3d 175, 179 (Ky. 2007) (citations omitted).

⁹ KRE 404(a)(1).

¹⁰ KRE 405(a).

testimony would be introduced to prove his good character — to show that he is not the perpetrator.

Based on May's argument during the in-chambers conference, the trial court did not abuse its discretion by ruling that May was seeking to use Burns's proposed testimony as character evidence. May was charged with sexually abusing C.M., not K.C. Despite May's current argument, the trial court was within its discretion to find that May sought to use Burns's proposed testimony to show his own good character. So the trial court's decision cannot be viewed as "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" when it ruled that May's report of K.C.'s abuse was not relevant to May's guilt or innocence of the crime charged.

As character evidence, Burns's proposed testimony was inadmissible because it concerned a specific act showing good character. Good character can only be shown through evidence of the accused's reputation or the witness's opinion. The trial court indicated its willingness to give May more evidentiary leeway by allowing him to introduce such testimony, but the trial court also warned that doing so would open the door for the Commonwealth to introduce evidence of May's prior convictions.¹¹ May ultimately chose not to call Burns as a witness, so the jury never heard evidence of May's reporting of K.C.'s abuse or of his prior convictions. Because the proposed testimony by

¹¹ This too was improper. Under KRE 404(b), evidence of other crimes is not admissible to show propensity or bad character but is admissible only if offered for some other purpose. So the Commonwealth's introduction of May's prior convictions would have been improper character evidence.

Burns was inadmissible in the first instance, the trial court did not err by its ruling that had the effect of dissuading May from calling Burns as a witness.

Even assuming for argument that the trial court did abuse its discretion in finding that the testimony was irrelevant character evidence, the error was harmless because it did not substantially affect May's rights.¹² The testimony that May sought to introduce through Burns was merely a different way of communicating the same evidence that the jury heard through other means. Jamie Campbell, K.C.'s mother, testified of K.C.'s love for May and of K.C.'s adamant denial that she and May had sex. Campbell also testified that K.C.'s father sexually abused her. Campbell testified that after K.C.'s father went to jail, May became a father figure to her and that K.C. wishes May were her father. The trial court gave May substantial leeway in his direct examination of Campbell. Her testimony was full of descriptions of May's acts evincing good will toward K.C. So the introduction of Burns's testimony would not have had a substantial impact on the outcome of May's trial.

In the sentencing phase of the trial, the jury heard testimony that May reported K.C.'s sexual abuse to school officials. Despite hearing that fact, the jury recommended a prison sentence of twenty-four years, buttressing further our determination that the absence of this testimony during the guilt phase of the trial did not substantially affect May's rights.

¹² KRE 103(a).

B. The Trial Court Erred in Allowing the Treating Physician to Identify May to the Jury as C.M.'s Abuser.

May contends the trial court erred by allowing C.M.'s physician, Dr. Sugarman, to testify that C.M. identified May as the perpetrator who sexually abused her. We agree that the trial court erred in this regard. But the error was not palpable.

This issue is not preserved. So we review for palpable error under RCr 10.26.¹³ If a palpable error has occurred, relief may be granted if the error resulted in manifest injustice.¹⁴ Manifest injustice is found only if the error seriously affected the "fairness, integrity, or public reputation of the proceeding."¹⁵

Statements describing the general character or cause of an injury for purposes of medical diagnosis or treatment are admissible as an exception to the hearsay rule.¹⁶ The identification of a perpetrator is generally impermissible under this rule because it is not pertinent to medical

¹³ Instead of properly briefing the issues for the Court, the Commonwealth argues that the Court should not review unpreserved issues of self-represented defendants. We find the Commonwealth's argument unconvincing. RCr 10.26 makes no distinction between represented defendants and self-represented defendants. Neither is there any support for the Commonwealth's argument in our case law. This Court regularly grants palpable error review for those defendants who were represented by counsel and arguably were in a better position to preserve the error for review than self-represented defendants. We decline to foreclose the same opportunity for review to defendants who exercise their Constitutional right to self-representation.

¹⁴ *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

¹⁵ *Id.* at 4 (citations omitted).

¹⁶ KRE 803(4).

diagnosis.¹⁷ We recently held in *Colvard* that “we no longer recognize a special exception to the hearsay rule which allows medical providers to testify in court to the hearsay statements of a victim of sexual offenses which identify the alleged perpetrator because that identification is not pertinent to the medical treatment being provided.”¹⁸

Dr. Sugarman was the pediatrician who examined C.M. at the Children’s Advocacy Center. The doctor testified that when she asked C.M. about her symptoms, C.M. told her that May touched her in a way that made her feel uncomfortable. C.M.’s identification of May did not fall under the KRE 803(4) medical diagnosis hearsay exception because it was not pertinent to C.M.’s medical treatment. Under *Colvard*, Dr. Sugarman’s testimony identifying May as the perpetrator is inadmissible hearsay.

Although the trial court erred in admitting C.M.’s identification of May through Dr. Sugarman’s testimony, the admission did not rise to the level of palpable error. Dr. Sugarman did not dwell on the identification but mentioned once that C.M. identified May as the perpetrator. This was the only time Dr. Sugarman specifically stated May’s name. At that juncture in the trial proceeding, the jury had already heard unobjected-to testimony from the investigating officer that C.M. said she had sex with May. The jury had also heard from C.M. herself when she took the stand and testified to her sexual contact with May. So it cannot be said that Dr. Sugarman’s statement

¹⁷ *Colvard v. Commonwealth*, 309 S.W.3d 239, 244 (Ky. 2010).

¹⁸ *Colvard*, 309 S.W.3d at 247.

seriously affected the fairness of the proceeding. Because there is no manifest injustice here, reversal is not required.

C. There was No Improper Bolstering of C.M.'s Testimony.

May asserts that (1) inadmissible prior consistent statements, (2) the trial court's finding of C.M.'s testimonial competency, and (3) the prosecutor's improper argument improperly bolstered C.M.'s testimony. None of these issues were preserved, so we review these arguments for palpable error.

1. Prior Consistent Statements Did Not Bolster C.M.'s Testimony.

We disagree with May's assertion that inadmissible prior consistent statements bolstered C.M.'s testimony. Prior consistent statements of a declarant are excluded by the hearsay rule unless offered to "rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."¹⁹ When prior consistent statements are improperly admitted, they serve to bolster the declarant's testimony.

May points to the Court's decision in *Smith v. Commonwealth* to support his argument for reversal.²⁰ In *Smith*, this Court reversed the defendant's conviction because improper admission of the victim's prior consistent statements served only to bolster the victim's testimony.²¹ But *Smith* is distinguishable from this case. We first note that the bolstering issue in *Smith*

¹⁹ KRE 801A(a)(2).

²⁰ 920 S.W.2d 514 (Ky. 1995).

²¹ *Id.* at 516-17.

was preserved for appellate review. The issue here is not preserved, so we will reverse only for palpable error.

The investigating officer was the Commonwealth's first witness at May's trial. The officer testified, without objection, that during C.M.'s statement to investigators, she reported that (1) in June, May inserted his index finger into C.M.'s vagina and had anal penetration and (2) in August, she had oral and anal sex with May. But the officer could not recall precisely the events C.M. reported. May contends that these statements were inadmissible prior consistent statements with C.M.'s in-court testimony.²²

We agree with May that the officer's statements were inadmissible hearsay. May did not contend that C.M. recently fabricated or changed her story. So the hearsay statements could not be introduced under KRE 801A(a).²³ But we disagree with May's contention that the improper admission of this statement was highly prejudicial bolstering of C.M.'s testimony. The officer's statements were not consistent with C.M.'s testimony. C.M. testified at trial that (1) on June 8, May inserted his finger into her vagina and that she had vaginal intercourse with May and (2) in August, she and May had oral, anal, and vaginal sex. The officer's testimony of the events did not mirror C.M.'s testimony. A reasonable juror could have

²² May also points out that the investigating officer testified that C.M.'s statement to Dr. Sugarman at the Children's Advocacy Center was consistent with C.M.'s report to him. Because May does not argue that this was improper and does not request review for palpable error on this issue, we decline to discuss it.

²³ We also note that the statements could not fall under the prior consistent statement hearsay exception because the investigating officer's statements were not, in fact, consistent with C.M.'s testimony.

wondered why the allegations of abuse did not correspond. So the officer's statements did not bolster C.M.'s testimony to the level of palpable error.

The Commonwealth's second witness was C.M.'s father. He testified, without objection, that his friend overheard a conversation between C.M. and another girl indicating that C.M. had sex with May. When the friend reported this to C.M.'s father, he confronted C.M. about it and told her to tell the truth. C.M. told him that May persuaded her to have sex with him. Again, May claims that the father's testimony was inadmissible and served only to bolster C.M.'s credibility.

We agree that the father's testimony of what C.M. told him was inadmissible hearsay if it was introduced to prove that May had sex with C.M. But, unlike the statement in *Smith*, the present statement did have probative value. The father's testimony relayed how he was informed of the sexual contact between his daughter and May and why he contacted the police to report the matter. The fact that C.M. did not initiate the allegations against May, but was overheard talking about the matter, tended to negate May's defense that C.M. was lying. The evidence was not intended to bolster or enhance C.M.'s testimony. In this regard, the testimony was not hearsay at all. Additionally, any bolstering that occurred was slight because the father only gave basic information concerning May's contact with C.M.; he did not simply repeat C.M.'s testimony. We cannot say that the father's testimony improperly bolstered C.M.'s credibility in a way, which resulted in manifest injustice.

Finally, Dr. Sugarman testified for the Commonwealth concerning her physical examination of C.M. The doctor explained that she told C.M. that she needed to know what happened to her so she could order the appropriate sexually-transmitted disease screening. C.M. told Dr. Sugarman that on two occasions, May touched her in a way that made her feel uncomfortable. On the first occasion, he touched his front private-part to her front private-part and put his hands on her front private-part. On the other occasion, he put his front private-part in her front and back private-parts. He also put his private-part into her mouth during one of the occasions. May contends that Dr. Sugarman's testimony bolstered C.M.'s credibility through inadmissible prior consistent statements.

We do not agree with May that Dr. Sugarman's testimony included inadmissible prior consistent statements. The statements were admissible under the medical diagnosis or treatment hearsay exception. Statements made for purposes of medical treatment or diagnosis and describing the "inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis" are excepted from the hearsay rule.²⁴ As discussed above, Dr. Sugarman's identification of May as the perpetrator was inadmissible hearsay. But the statements regarding how C.M. was abused were admissible under KRE 803(4). Dr. Sugarman made clear to C.M. that she needed to know where and how C.M. was touched in order to treat her properly. C.M.'s statements to Dr. Sugarman are reasonably reliable because

²⁴ KRE 803(4).

C.M. believed the information was necessary for Dr. Sugarman to test and treat her. Accordingly, C.M.'s statements were admissible under KRE 803(4). This is distinguishable from *Smith*, where the prior consistent statements were not admissible under any other hearsay exception.

Regardless of whether the statements were admissible, they did not bolster C.M.'s testimony to an extent that affected the fairness of the trial. Dr. Sugarman presented this testimony in a clinical matter. The relevant testimony lasted under a minute. And the doctor did not vouch for C.M.'s truthfulness or credibility. So no manifest injustice occurred as a result of Dr. Sugarman's testimony.

2. *The Trial Court did not Err by Questioning C.M. and Ruling on Her Testimonial Competency in the Presence of the Jury.*

When C.M. took the stand, the court asked her a few questions to determine whether she understood her obligation to testify truthfully. For example, the court asked whether she understood the difference between fantasy and reality, noted that movies are typically fantasy, and explained that she was to tell all of the truth. The questioning lasted for under a minute. May argues that the trial judge's competency finding in the jury's presence was improper and unfairly bolstered C.M.'s testimony. We disagree.

KRE 601 creates a presumption favoring the competency of witnesses; and KRE 104 requires the trial court to determine, as a preliminary matter, whether a witness is qualified to testify. Unlike suppression hearings and hearings on the admissibility of confessions, this preliminary determination

does not have to occur outside the presence of a jury.²⁵ Rather, hearings on “other preliminary matters shall be so conducted when the interests of justice require.”²⁶ So the trial court has discretion to determine whether to qualify a witness as competent in front of the jury.²⁷

The trial court did not abuse its discretion by examining and ruling on C.M.’s competency in the jury’s presence. Nor did the trial court’s actions bolster C.M.’s testimony. The trial judge stated only that C.M. was competent to testify, not that she was honest or truthful. Unlike child abuse cases where the victim witness is very young, C.M. was 15 years old when she testified at May’s trial. So it is unlikely that the jury relied on the trial judge’s statement when determining C.M.’s credibility. The trial court’s qualification of C.M. before the jury did not result in manifest injustice.

3. *There was No Improper Argument by the Prosecutor.*

May argues that the prosecutor’s closing argument was improper and bolstered C.M.’s credibility because he (1) defined *reasonable doubt*, (2) said that C.M. was consistent, and (3) said that C.M. had no motive to lie.²⁸ We disagree.

²⁵ KRE 104.

²⁶ KRE 104(c).

²⁷ *Pate v. Com.*, 2002-SC-000037-MR, 2004 WL 868485 at *4 (Ky. Apr. 22, 2004).

²⁸ May also mentions that the prosecutor commented in his closing argument that C.M. told the truth and that the police ran a good investigation. Because May does not argue that these comments were improper, we decline to discuss them in this opinion. But we note that these issues were unpreserved, so even if these comments were in error, they would not rise to the level of palpable error.

As stated above, we review these issues for palpable error because they are not preserved by objection at trial. Further, review of prosecutorial misconduct on appeal centers around the overall fairness of the trial.²⁹ Reversal is required only if the misconduct renders the entire trial fundamentally unfair.³⁰

In *Commonwealth v. Callahan*, this Court held that counsel shall not give a definition of *reasonable doubt* during any part of a trial.³¹ But, in the same case, we held that attempting to show what *reasonable doubt* is not does not violate the rule against defining *reasonable doubt*.³² Likewise, in *Johnson v. Commonwealth*, this Court found that the prosecutor's statement that "beyond a shadow of a doubt" is not the same as "beyond a reasonable doubt" was proper.³³

We recently held that it was improper for a prosecutor to say that *beyond a reasonable doubt* was not equivalent to *beyond all doubt*.³⁴ But "[t]here was no attempt to illustrate the standards by examples or hypotheticals as has been done in other cases which have come before this Court."³⁵ So the error we examined in that case did not rise to the level of palpable error because the prosecutor did not dwell on the issue.

²⁹ *Carver v. Commonwealth*, 303 S.W.3d 110, 117 (Ky. 2010) (citations omitted).

³⁰ *Id.*

³¹ 675 S.W.2d 391, 393 (Ky. 1984).

³² *Id.*

³³ 184 S.W.3d 544, 549-50 (Ky. 2005).

³⁴ *Brooks v. Commonwealth*, 217 S.W.3d 219, 225 (Ky. 2007).

³⁵ *Id.*

In the case at hand, the prosecutor stated that while he could not define *reasonable doubt*, he could say that it does not mean *no doubt whatsoever*. This simple statement was the extent of the prosecutor's discussion of *reasonable doubt*. We cannot say that the prosecutor's argument resulted in manifest injustice. So even if the prosecutor's argument was improper, it did not rise to the level of palpable error.

Nor was it an improper expression of the prosecutor's opinion when the prosecutor stated in closing argument that C.M. was "consistent." May argues that this statement was an opinion that improperly vouched for C.M. A prosecutor cannot state a personal opinion of a witness's character.³⁶ But here, the prosecutor was not stating an opinion of C.M.; he was stating the fact that C.M.'s allegations were consistent throughout the case. It was not improper for the prosecutor to make a factual statement that C.M.'s story did not change.

Likewise, it was proper for the prosecutor to argue that C.M. had no motive to lie. The prosecutor was not expressing an opinion of C.M.'s credibility; he was simply arguing that C.M. had no motive to lie.³⁷ This was a fair comment, especially because May's entire defense was based upon the theory that C.M. was lying. It was proper for the prosecutor to combat this defense by pointing out to the jury that C.M. had no motive to lie.

³⁶ *Moore v. Commonwealth*, 634 S.W.2d 426, 438 (Ky. 1982) (citations omitted).

³⁷ *See Carver*, 303 S.W.3d at 118.

D. The Trial Court Did Not Err by Failing to Admonish the Jury.

During May's questioning of K.C.'s mother, Jamie Campbell, he asked her whether he had been in contact with K.C. for the last five months. Campbell responded in the negative. In chambers, the prosecutor announced that he intended to impeach Campbell on this issue because K.C. visited May in jail within the last five months. May objected to the impeachment because the testimony would inform the jury that he had been in jail. The trial judge ruled that the prosecutor could ask the question, but he agreed to admonish the jury to consider the statement only for impeachment purposes. But when Campbell testified that K.C. visited May in jail, the trial judge failed to admonish the jury; and May did not renew his objection. May contends that this issue is preserved and the error requires reversal. We disagree.

The error is not preserved for appellate review. If evidence is admissible for one purpose but not another, the trial court must admonish the jury if the defendant requests it.³⁸ If the defendant fails to request the admonition, the admission of the evidence without limitation is reviewed on appeal for palpable error.³⁹ Although May requested an admonition in chambers, it was his duty to request it again after the evidence was actually introduced. So we review the issue for palpable error.

The trial court's failure to admonish the jury not to consider the testimony that May was in jail as character evidence was not palpable error.

³⁸ KRE 105.

³⁹ *Id.*

May opened the door to the prosecutor's question when he asked Campbell whether he had been with her daughter in the last five months. The prosecutor was entitled to impeach Campbell on this point. It was Campbell, not the prosecutor, who brought up the fact that May was in jail. The prosecutor focused on the ongoing relationship between May and K.C. and did not dwell on the fact that May was in jail. So the trial court's failure to admonish the jury did not result in manifest injustice.

E. The Trial Court's Error in Qualifying an Expert in Front of the Jury is Not Palpable Error.

Dr. Sugarman testified about her education, experience in pediatrics, and her lectures and writings on child sexual abuse. The prosecutor asked the judge to allow the doctor to testify as an expert, and the trial court responded that she could testify as an expert. May claims reversal is required because the trial court abused its discretion in qualifying the doctor as an expert in front of the jury. This issue was not preserved for appellate review.

We agree that the trial court should not have so anointed Dr. Sugarman in the presence of the jury.⁴⁰ But the judge's comment was not palpable error requiring reversal. May had an opportunity to cross-examine Dr. Sugarman and attack her credibility before the jury. Cross-examination is the "primary means by which trial counsel can attempt to persuade jurors of the weight or significance to be attached to testimony of the witnesses."⁴¹ Because the trial

⁴⁰ *Applegate v. Commonwealth*, 299 S.W.3d 266, 274 (Ky. 2009) (citing *Luttrell v. Commonwealth*, 952 S.W.2d 216, 218 (Ky.1997)).

⁴¹ *Id.* (citing *Edwards v. Commonwealth*, 554 S.W.2d 380, 385 (Ky.1977)).

court's error did not seriously affect the fairness, integrity, or public reputation of the proceeding, reversal is not required.

F. The Trial Court Did Not Abuse its Discretion by Denying May's Motion for a New Trial Without Holding an Evidentiary Hearing.

May filed a motion for a new trial under RCr 10.02 based on (1) ineffective assistance of standby counsel and the DPA investigator, (2) an allegation the jury took Dr. Sugarman's report to the jury room, (3) an allegation a juror was asleep during the trial, and (4) failure of the prosecution to turn over *Brady*⁴² material. The trial court declined May's request for an evidentiary hearing on the motion and denied the motion for a new trial. While May states in one sentence of his brief that the trial judge erred in denying the motion for a new trial, he seems to argue only the narrow issue that the trial court erred in not holding an evidentiary hearing. We find that the trial court did not abuse its discretion by denying May an evidentiary hearing on his motion for a new trial.

The issue has been preserved through May's motion for a new trial and request for an evidentiary hearing. The denial of a motion for a new trial is reviewed under the abuse of discretion standard.⁴³ The trial court "may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice."⁴⁴ No evidentiary hearing is

⁴² *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴³ *Foley v. Commonwealth*, 55 S.W.3d 809, 814 (Ky. 2000).

⁴⁴ RCr 10.02.

required if the appellant's allegations for the RCr. 10.02 motion are insufficient, even if true,⁴⁵ or if the issue could be decided on the record.⁴⁶

It is an appellant's responsibility to present the Court with a complete record for review.⁴⁷ "When the record is incomplete, this Court must assume that the omitted record supports the trial court."⁴⁸ "In the absence of any showing to the contrary, we assume the correctness of the ruling by the trial court."⁴⁹

May argues in a piecemeal fashion that the trial court abused its discretion by not granting an evidentiary hearing on his motion for a new trial. But May fails to include in his brief the full extent of the allegations supporting his motion for a new trial. Without the necessary information, we cannot determine whether the trial court properly decided May's motion for a new trial based only on the record. We will not speculate about issues May did not properly brief for the Court.⁵⁰ It is not our responsibility to make May's arguments for him. Because May has not made any showing to the contrary, we find that the trial court did not abuse its discretion by denying May's motion for a new trial without holding an evidentiary hearing.

⁴⁵ See *Harper v. Commonwealth*, 978 S.W.2d 311, 314 (Ky. 1998) (referring to RCr 11.42 motions).

⁴⁶ *Skaggs v. Commonwealth*, 803 S.W.2d 573, 576 (Ky. 1990).

⁴⁷ *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303 (Ky. 2008) (citations omitted).

⁴⁸ *Id.* (citing *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985); See also *Wilkins v. Hubbard*, 113 S.W.2d 441, 442 (Ky. 1938).

⁴⁹ *Davis v. Commonwealth*, 795 S.W.2d 942, 949 (Ky. 1990) (citations omitted).

⁵⁰ See *Thompson*, 697 S.W.2d at 145.

G. Unlawful Transaction with a Minor Charges.

The jury convicted May of two counts of first-degree unlawful transaction with a minor. A person is guilty of this crime when “he or she knowingly induces, assists, or causes a minor to engage in illegal sexual activity.”⁵¹ In *Young v. Commonwealth*, this Court declined to limit the scope of the offense to situations in which the defendant induced, assisted, or caused a minor to engage in illegal sexual activity with *someone else*.⁵² May urges the Court to reconsider the rule in *Young* to prevent what May terms the overcharging of defendants. We decline to do so.

As we stated in *Young*,

If the legislature had intended to limit the scope of this offense, it would have been a simple matter to have written the statute with that limitation, *e.g.*, ‘to engage in illegal sexual activity with another.’ Nor does the 1974 Commentary indicate any intent to so limit the scope of this statute.⁵³

Since our decision in *Young*, the legislature has not revised the statute to limit its scope. “Our function is not to legislate but to ascertain the legislative intent.”⁵⁴ We decline May’s invitation to depart from our holding in *Young*.

⁵¹ KRS 530.064.

⁵² 698 S.W.2d 670, 673 (Ky. 1998).

⁵³ *Id.*

⁵⁴ *Id.*

H. Appellate Review of the Constitutionality of the Violent Offender Statute is not Available.

May argues that the Violent Offender Statute is unconstitutional. Because May failed to provide notice to the Attorney General of this attempted constitutional challenge to the statute, appellate review is not available.

The Attorney General must be served a copy of the petition in any proceeding that involves the validity of a statute.⁵⁵ The Attorney General must also be given notice of an appeal to this Court that involves the constitutional validity of a statute.⁵⁶ Strict compliance with the notification provision is required.⁵⁷ We are unconvinced by May's conclusory statement that the Court should grant review because sentencing is jurisdictional. Because May did not give proper notice to the Attorney General, we must decline to review the constitutionality of the Violent Offender Statute.

III. CONCLUSION.

For the foregoing reasons, the trial court's judgment is affirmed.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., concurs in result only.

⁵⁵ KRS 418.075(1).

⁵⁶ KRS 418.075(2).

⁵⁷ *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008).

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