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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: NOVEMBER 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000172-MR
2010-SC-000173-MR

MARK V. RAPONE — APPELLANT

V.

ON APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS FOUST, JUDGE
NOS. 09-CR-00254 AND 08-CR-00118

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Marshall Circuit Court jury found Appellant, Mark Rapone, guilty of first-degree rape and for being a first-degree persistent felony offender (PFO). For these crimes, Appellant received a sentence of life imprisonment without any possibility of parole for a period of twenty-five years. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

I. Introduction

During the morning of April 27, 2008, M.M.'s mother went to work and left M.M., a four-year-old child, and her brother in the care of Appellant. Around noon, M.M.'s cousin found the apartment door locked, which she

considered strange because she ordinarily knocked and let herself in. Moreover, M.M.'s brother was outside playing.

After repeated raps on the door, Appellant unlocked the deadbolt and unchained the door while wearing nothing but pajama pants. Inside the apartment, M.M. was similarly undressed, as she was wearing nothing but her panties and a jacket. The child went to her mother's room to get her clothes, which her cousin again considered strange because M.M. did not share a room with her mother and normally kept her clothes in her own room.

After M.M. dressed, she and her cousin proceeded to her grandmother's apartment. While there, M.M. eventually told her grandmother of an incident between her and Appellant and complained of painful urination. Upon inspecting M.M.'s genitals, her cousin noted that they were red and swollen.

M.M.'s mother then arrived home and took the child to the emergency room. M.M. was subsequently interviewed by Kelly Cox, a Marshall County social worker, and Marshall County Detective Dan Hilbrecht. During that interview, M.M. confirmed that she and Appellant had a secret and eventually stated that Appellant put his penis in her vagina.[1]

On April 28, 2008, Dr. Melissa Whitson, a forensic pediatrician contracted with the Purchase Area Sexual Assault Center, performed a microscopic examination of M.M.'s genitals. She discovered three abnormalities indicative of sexual abuse: a healing abrasion at the five o'clock

---

[1] M.M. actually used coarse language in describing this incident. We have substituted the proper nomenclature through this opinion.

position on the labia minora, a healing laceration at the eleven o'clock position on the hymen, and an asymmetrical thinning of the hymen. According to Dr. Whitson, the healing abrasion and healing laceration resulted from some sort of penetration that occurred within the previous two to three days while the asymmetrical thinning indicated a penetrating or tearing wound to the hymen.

During the examination, Dr. Whitson posed questions to M.M. to determine the source of the injuries. Specifically, M.M. complained of painful urination at the time of the exam and indicated no recent history of bike wrecks or other incidents that could have caused a healing abrasion or laceration. Most importantly, M.M. reported that Appellant put his penis in her vagina.

Following the examination, Detective Hilbrecht and another officer conducted a search of M.M.'s mother's apartment. Although unable to locate Appellant, the officers discovered a wash rag containing Appellant's seminal fluid on top of a pair his blue jeans in the laundry hamper of the bathroom. Appellant himself was eventually located in and retrieved from Pennsylvania in June 2008.

After returning to Kentucky, Detective Hilbrecht, along with Detective Matt Melone, conducted an interview with Appellant. During that interview, Appellant admitted putting his erect penis "on" M.M.'s vagina to demonstrate that it was too large to have sex with her. Following the interview, Appellant wrote out a statement reflecting his admission.

On July 22, 2008, Appellant was indicted by a Marshall County Grand Jury and charged with first-degree rape. After trial, the jury returned a guilty verdict and, based upon Appellant's PFO status, recommended a life sentence without parole for twenty-five years. He was sentenced accordingly and this appeal followed.

Appellant now alleges six assignments of error: (1) the trial court abused its discretion in finding M.M. competent to testify; (2) the trial court erroneously allowed the prosecution to introduce a taped statement of M.M.; (3) the trial court erred by allowing the prosecutor to introduce Appellant's recorded statement with redactions; (4) the closed-circuit television procedure used to present the testimony of M.M. violated his constitutional right to confront witnesses against him; (5) the trial court erroneously allowed Dr. Whitson to testify regarding M.M.'s hearsay statement; and (6) the prosecution failed to sufficiently prove an essential element of the PFO statute.

II. Analysis

A. Competency of M.M.

As it is best situated to evaluate witnesses, "[t]he determination of the competency of witnesses is within the sound discretion of the trial court." *Jarvis v. Commonwealth*, 960 S.W.2d 466, 468 (Ky. 1998). In light of such discretion, we refrain from disturbing competency determinations absent a clear abuse of discretion. *Id.* However, because the trial court's responsibility continues throughout the trial, we evaluate a determination of competency by reviewing the entire record, including the evidence subsequently introduced at

trial. *B.B. v. Commonwealth*, 226 S.W.3d 47, 49 (Ky. 2007) (*citing Kentucky v. Stincer*, 482 U.S. 730 (1987)).

Appellant argues that the trial court abused its discretion in finding M.M. competent as a witness. According to Appellant, M.M. demonstrated her incompetency at both her competency hearing and during her trial testimony. As a result, her testimony, along with her hearsay statements made to the social worker and Dr. Whitson, should have been excluded. Moreover, Appellant contends that, as a consequence of her lack of competency, he was denied his right of cross-examination. We disagree.

KRE 601 establishes a presumption of witness competency and permits disqualification only upon a showing of incompetency. *Price v. Commonwealth*, 31 S.W.3d 885, 892 (Ky. 2000); *See also* KRE 601(a) ("Every person is competent to be a witness except as otherwise provided in these rules or by statute."). KRE 601(b) specifically outlines the minimum qualifications of a competent witness:

> A person is disqualified to testify as a witness if the trial court determines that he:
>
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
>
> (2) Lacks the capacity to recollect facts;
>
> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
>
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

The presumption of competency and minimum qualifications set forth in KRE 601(b) apply to child witnesses because "[a]ge is not determinative of competency and there is no minimum age for testimonial capacity." *Pendleton v. Commonwealth*, 83 S.W.3d 522, 525 (Ky. 2002) (citation omitted). Nonetheless, we recognize that "[a] child's competency varies according to both her developmental level and the subject matter at hand." *Jarvis*, 960 S.W.2d at 468 (citation omitted).

Applying this analytical framework, we concluded that the trial court abused its discretion in finding a four-year-old witness competent to testify in *B.B.*, 226 S.W.3d at 49-50, because the witness failed to demonstrate either an understanding of the obligation to tell the truth or the consequences of lying during a competency hearing. In that case, "[m]any answers were not responsive to the questions, and, when asked directly if she understood 'what telling the truth means' or 'what being honest is and telling exactly what happens' means, [the witness] shook her head 'no.'" *Id.* at 49. Despite trying alternative approaches, the prosecutor could not establish that the child knew right from wrong:

> C.Y. could answer simple questions like "what color is your shirt", (pink), but did not know how to react or answer when the prosecutor said it was "orange". Trying another approach, the prosecutor tried to discuss the difference between lying and telling the truth, but C.Y. did not get those concepts either. She had no concept of a lie, nor the consequences of lying. Substitution of right and wrong for truth and lie went nowhere.

Id. Even an attempt by defense counsel to use cartoon characters to differentiate between real and make-believe offered no further clarity. *Id.*

Had we not held the child incompetent because she lacked the capacity to understand the obligation to tell the truth, we would have held her incompetent due to her inability to recollect facts at the adjudication hearing. *Id.* at 50-51. When questioned by the prosecutor, her "answers were nonsensical and conflicting" and she would "usually agree to whatever set of facts [were] suggested." *Id.* at 50. In sum, she continuously contradicted herself, as well as submitted made-up or false testimony. *Id.*

At the competency hearing in this case, six-year-old M.M. did not know the name of her elementary school and could not remember the name of one of her favorite television shows. However, she was able to recount her full name, her age, the location of her school, her teacher's name, and her grade. She also identified her principal as "Mr. B." and explained that she had gone to kindergarten at the same school she currently attended for first grade. In addition, M.M. exhibited an ability to recollect facts. Specifically, she identified Appellant as a bald adult (with a little hair) who previously lived in the same apartment as her at a time when it was hot outside. M.M. further testified her mother and brother lived in the same apartment as her, and that her grandmother lived in the same apartment complex. Most importantly, she differentiated a truth from a lie via examples. For instance, she explained that it would be a lie to say that it was snowing outside when the sun was shining[2]

[2] M.M. went to the window to confirm that the sun was actually shining outside before stating as such. Her actions affirmed that she "would not guess at or fabricate an answer to a question she did not know in order to please her questioner." *Jarvis*, 960 S.W.2d at 469.

or that the judge's robe was purple when it was actually black. Finally, she demonstrated an understanding of the obligation to tell the truth by responding that the rule in court was "don't lie"[3] and stating that she would get into trouble if she did not tell the truth.

We believe the trial court had more than adequate grounds to find M.M. competent to testify after conducting the competency hearing. However, we must also consider the evidence subsequently introduced at trial. *Id.* at 49.

As in her competency hearing, M.M. behaved in a manner typical of a six-year-old child,[4] yet reiterated her name and age for the court, as well as her grade and the name of her teacher. Additionally, she identified her birthday and the name of her school, as well as described where and with whom she lived. Moreover, M.M. again established an ability to recollect facts. She testified that she remembered when Appellant stayed with her. She also

---

[3] Appellant contends that the repetition of the phrase "don't lie" constituted rote repetition of a response that involved no real understanding on M.M.'s part. While we would agree that rote repetition does not necessarily equate to comprehension, a trial court is better situated to evaluate the underlying purpose of a repeated response.

[4] Appellant takes issue with M.M.'s rambunctious behavior at both the competency hearing and trial, i.e. climbing under the table and playing on the phone, as well as her inability to remember certain facts. The trial court's obligation, though, was to evaluate M.M.'s competency—not her maturity. If a witness "is able to perceive accurately that about which she is to testify, can recall the facts, can express herself intelligibly, and can understand the need to tell the truth," *Pendleton*, 83 S.W.3d at 525, then a trial court should allow them to testify. Furthermore, the entire record herein consistently shows that M.M. had the ability to recollect facts; any inability to remember particular facts is not preclusive. *Price*, 31 S.W.3d at 891 (affirming the trial court's competency finding despite the child's inability to "recollect all of the specific details surrounding her abuse"); *Jarvis*, 960 S.W.2d at 468-469 (concluding that the trial court did not abuse its discretion even though the child "testified that she did not remember her last birthday, that she did not know where she lived, or who brought her to court that day.").

remembered a conversation with Ms. Cox during which she told the social worker that she had a secret about Appellant and what the secret was. After identifying the different parts on a boy and girl doll and discussing the difference between good and bad touches, M.M. confirmed that she told the social worker that the secret about Appellant was that he had put his penis in her vagina. When asked if that was the truth, M.M. answered affirmatively.

Unlike the child in *B.B.*, M.M. consistently demonstrated both a comprehension of the term truth and an understanding of the obligation to tell the truth, as well an ability to recollect facts, throughout the entire record. As a result, we are satisfied that the trial court did not abuse its discretion in finding M.M. competent to testify. Furthermore, because the trial court did not abuse its discretion, Appellant's contention that he was denied his right of cross-examination due to her lack of competency is without merit.[5]

B. Taped Statement of M.M.

Appellant contends that the trial court erred to his substantial prejudice when it allowed the prosecution to introduce a video of M.M stating that Appellant put his penis in her vagina during its direct examination of the social worker, Ms. Cox. The Commonwealth responds that Appellant's trial counsel requested that the entire tape be played to put her statement in context. As such, Appellant cannot allege error with respect to the introduction of the tape. We agree.

---

[5] We note that defense counsel actually asked several follow-up questions and ended his examination by indicating that he had no more questions.

In *Estep v. Commonwealth*, 957 S.W.2d 191, 193 (Ky. 1997), the record contained an agreed order allowing a "deposition to be read and used as evidence at the trial of this action." As a result, this Court refused to consider the appellant's contention that the trial court committed reversible error by allowing the prosecution to introduce testimony via that deposition. *Id.*

Here, Appellant filed a motion in limine to exclude hearsay statements reported by M.M. to Ms. Cox. At trial, Appellant's defense counsel reiterated that objection and the prosecutor responded that he could introduce portions of the video for purposes of impeachment with respect to statements that M.M. denied or could not remember. Defense counsel conceded that admission was proper[6] and the trial judge noted that impeachment would be strictly limited to the circumstances articulated by the prosecutor. Defense counsel then requested that the entire interview be played so as to provide context to M.M.'s statements.

We liken the resolution reached by defense counsel and the prosecutor in this case to be analogous to the agreed order in *Estep*. Because his counsel agreed to the introduction of the video statement, Appellant "cannot now complain." *Id.*

---

[6] Appellant argues that defense counsel did not agree to the admission. According to Appellant, counsel simply agreed with the legal proposition that, given the proper foundation, a prior inconsistent statement is admissible to impeach a witness. Appellant further notes that counsel did not withdraw his objection or motion in limine. However, at no point did defense counsel request a ruling on said objection. Rather, he and the prosecutor seemingly resolved this dispute via a compromise—playing the entire interview to provide context. As such, Appellant's reliance upon *Salinas v. Commonwealth*, 84 S.W.3d 913, 920 (Ky. 2002), wherein this Court rejected the proposition that a defendant's objection to evidence is waived by subsequent cross-examination of witness concerning the evidence, is misplaced.

In anticipation of such a resolution, Appellant alternatively invites us to engage in palpable error review pursuant to RCr 10.26. According to Appellant, M.M. never said anything in her trial testimony that was inconsistent with her prerecorded trial statement. Moreover, Appellant argues that M.M.'s statement was inadmissible because she was incompetent. Finally, Appellant contends that introduction of her statement violated the Confrontation Clause and his right to due process of law.

The decision of whether to conduct palpable error review rests within the discretion of an appellate court. *See* RCr 10.26 ("A palpable error . . . *may* be considered . . . by an appellate court on appeal. . . .") (emphasis added); *See also Commonwealth v. Pace*, 82 S.W.3d 894, 895 (2002) ("An appellate court *may* consider [palpable error] . . . .") (emphasis added). Although we generally will engage in palpable error review if requested by an appellant, in *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) we rejected such a request. In that case, the appellant did not call for palpable error review of a *Bruton*[7] violation in his original brief. *Id.* He subsequently asked us to "analyze each failure of [his] trial counsel to object to the errors found on appeal as palpable errors subject to review under RCr 10.26" in the first section of his reply brief, although he did not mention palpable error nor cite to the rule in the section of the brief specifically dedicated to the *Bruton* violation, much less explain how this error rose to a manifest injustice. *Id.* We considered such a general request to be inadequate. *Id.*

---

[7] *See generally Bruton v. U.S.*, 391 U.S. 123 (1968).

Here, Appellant did not seek palpable error review in his original brief, instead delaying until his reply. Unlike *Shepherd*, Appellant mentioned palpable error and cited to RCr 10.26 in the section of the reply brief specifically dedicated to the introduction of M.M.'s recorded statement. However, Appellant failed to explain how this alleged erroneous admission constituted a manifest injustice.

Although certainly not as egregious as *Shepherd*, Appellant's request puts this Court and the Commonwealth on unsteady and unfair grounds, respectively. Assuming it was an error, Appellant provides this Court no guidance in determining whether the admission of M.M.'s statement resulted in a manifest injustice. And, due to its delay in seeking palpable error review, Appellant gives the Commonwealth no opportunity to articulate why this allegation does not constitute a palpable error or yield manifest injustice.[8]

Moreover, while Appellant asks for palpable error review should we conclude that his defense counsel failed to preserve or inadequately preserved this issue, his conduct is more so "akin to [circumstances] where an appellant has 'invited error.'" *Gray v. Commonwealth*, 203 S.W.3d 679, 686 (2006) (citations omitted); *See also Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011) ("These alleged errors, therefore, were not merely unpreserved, they were invited."). In *Gray*, we noted that one cannot commit to an act, i.e.

---

[8] In fact, the Commonwealth dedicated its response to explaining why Appellant's concession to the introduction of the video inhibited him from alleging error on appeal. As a result, the Commonwealth has not even addressed whether this allegation actually constituted an error, much less any notion with respect to palpable error.

requesting that the entire video be played, and later complain on appeal that the trial court erred to his detriment. 203 S.W.3d at 686. Our analysis of federal precedent in *Quisenberry*, 336 S.W.3d at 37, further elucidates the dichotomy between unpreserved errors and invited errors:

> Noting the United States Supreme Court's distinction, in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), between forfeited errors, which are subject to plain error review, and waived errors, which are not, the Ninth Circuit Court of Appeals has held that invited errors that amount to a waiver, i.e., invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review. *United States v. Perez*, 116 F.3d 840 (9th Cir.1997).

Based upon our decisions in *Gray* and *Quisenberry*, we believe our determination that Appellant "cannot now complain" applies with equal force to his request for palpable error review.

Finally, with respect to Appellant's argument that M.M.'s video statement does not constitute a prior inconsistent statement, we are flummoxed as to how we would begin to apply any sort of review. Specifically, the prosecutor never identified which portions from the out-of-court statement were admissible to impeach M.M.'s trial testimony. Importantly, such identification never occurred *because defense counsel requested that the video be played in its entirety*. The only means, then, to evaluate this alleged error would be to hypothesize as to what portions the prosecutor would have identified had defense counsel not made such a request.[9] However, unlike all the king's

---

[9] In order to set forth his argument, Appellant assumed that the prosecutor sought to introduce the portion of the out-of-court statement wherein M.M. stated that Appellant put his penis in her vagina.

horses and all the king's men, we are not so bold as to even attempt to put Humpty Dumpty back together again.

For these reasons, we decline Appellant's invitation to conduct palpable error review.

C. Redaction of Appellant's Statement to Police

Appellant next alleges the trial court erred by allowing the prosecutor to introduce portions of his recorded statement given to the two detectives while redacting other portions over Appellant's objection. At trial, defense counsel objected to redacting portions of his statement where Appellant indicated that M.M.'s brother may have had sex with her. Defense counsel also objected to redacting segments in which the officers, in responding to accusations of two alternative perpetrators[10] made by Appellant, stated that they believed the accusations and would go back to investigate, as well as took instructions from Appellant on how to locate one of the alleged perpetrators. Most importantly, defense counsel objected to removing segments which the detectives discussed recommending a lower charge and lower sentence if Appellant gave a satisfactory statement.

Appellant posits that the redactions contravened the rule of completeness outlined in KRE 106[11] and violated his right to present a defense. We address each argument in turn.

---

[10] Appellant identified not only M.M.'s brother, but also the ex-husband of M.M.'s grandmother as another potential perpetrator.

[11] KRE 106 reads:

1. Rule of Completeness

KRE 106 is a rule of admission that "allows a party to introduce the remainder of a statement offered by an adverse party for the purpose of putting the statement in its proper context and avoiding a misleading impression from an incomplete document." *Soto v. Commonwealth*, 139 S.W.3d 827, 865-866 (Ky. 2004) (citation omitted). We review a trial court's decision under KRE 106 for an abuse of discretion. *Commonwealth v. Stone*, 291 S.W.3d 696 (Ky. 2009). We find no such abuse in this case.

In *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 330-331 (Ky. 2006), we held that "a party purporting to invoke KRE 106 for the admission of otherwise inadmissible hearsay statements may only do so to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning." (Footnote omitted). In that case, the appellant sought to play the videotape of his interrogation in its entirety after a state trooper testified as to statements made by the appellant during said interrogation. *Id.* at 329. We found no error in the trial court's exclusion of the videotape because the appellant never explained how "putting [his] statements 'in context' by playing the entire videotape would correct any likely misconception as to [his statements]—or what misconception was likely at all." *Id.* at 331.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

As in *Schrimsher*, Appellant's recorded statement here was "admissible when offered by the Commonwealth as [an] admission[] of a party opponent, KRE 801A(b),[12] but inadmissible when offered by himself." *Id.* (citation omitted). Specifically, Appellant admitted that he placed his erect penis "on" M.M.'s vagina. "Accordingly, KRE 106 applied only to the extent that fairness required the introduction of additional portions of the interrogation to correct or guard against any likely misperception that would be created by [the prosecutor's] presentation of a fragmented version of the statement." *Id.*

Appellant's comments identifying alternative perpetrators constitute nothing more than an attempt to assert a defense without subjecting it to cross-examination.[13] As such, the trial court did not abuse its discretion in declining to admit these comments pursuant to KRE 106 because they did not "correct or guard against any likely misperception" with respect to Appellant's admissions.

Nor did the trial court abuse its discretion in excluding portions wherein the officers agreed to pursue the alternative perpetrators or discussed

---

[12] Hearsay rules do not exclude a party's admission if offered against the party. KRE 801A(b)(1).

[13] In *Schrimsher*, we explained KRE 106 does not simply "open the door" to admissibility:

> The objective of [the completeness] doctrine is to prevent a misleading impression as a result of an incomplete reproduction of a statement. *This does not mean that by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the Commonwealth opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination.*

190 S.W.3d at 331 (emphasis in original) (citation omitted).

recommended charges and sentences. At trial, Appellant failed to explain how putting his statements in "context" by introducing the entire recorded statement would correct any likely misconception as to his admission, much less identify what the misconception would be. Moreover, we note that Appellant had already confessed to touching his penis to M.M.'s vagina before the detectives thoroughly discussed recommended charges and sentences.[14]

2. Right to Present a Defense

We vigilantly observe the Supreme Court's pronouncement that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotations omitted); *See also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). However, "state and federal rulemakers have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials" because a "defendant's right to present relevant evidence is not unlimited." *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998) (emphasis added). This latitude is impermissibly exceeded when an accused's right to present a defense "is abridged by evidence rules that infring[e] upon a weighty interest of

[14] Notwithstanding his failure at trial to argue anything more than the necessity of "context," Appellant takes particular umbrage with discussion of recommended charges and sentences in his brief. However, this does not absolve his failure to thoroughly articulate such concerns to the trial court, which is of primacy when evaluating a potential abuse of discretion. In fact, Appellant only resorts to bald assertions in his brief, arguing that the removal of this dialogue materially alters the meaning (and context and significance) of his admission *without ever explaining why*.

the accused and are *arbitrary or disproportionate* to the purposes they are designed to serve." *Holmes*, 547 U.S. at 324 (internal quotations omitted) (emphasis added).

As discussed, Appellant disputed the redaction of portions of his recorded statement, particularly his discussion of recommended charges and sentences with investigating officers. However, he fails to argue that our hearsay rules are either "arbitrary or disproportionate to the purposes they are designed to serve." *See Harrison v. Commonwealth*, 858 S.W.2d 172, 176 (Ky.1993) (explaining that hearsay is inadmissible primarily due to its inherent unreliability).

Because his recorded statement was "admissible when offered by the Commonwealth as [an] admission[] of a party opponent, but inadmissible when offered by himself," *Schrimsher*, 190 S.W.3d at 331, the trial court properly redacted the portions not requested for use by the Commonwealth.[15] As we noted in *Mills v. Commonwealth*, 996 S.W.2d 473, 489 (Ky. 1999), "*Chambers* . . . does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense."[16]

---

[15] *See Fresh v. Commonwealth*, 2009-SC-000797-MR, 2011 WL 1642275 (Ky. April 21, 2011); *Gatewood v. Commonwealth*, 2009-SC-000644-MR, 2011 WL 2112566 (Ky. May 19, 2011).

[16] We note that Appellant was permitted to introduce extrinsic evidence surrounding his confession to support his defense that the police overbore his will, got him to a breaking point, and sweated a confession out of him.

D. Closed-Circuit Testimony of M.M.

Appellant argues that the procedure used in presenting the testimony of M.M. denied him his constitutional right to confront witnesses against him. The Commonwealth responds that Appellant failed to lodge a contemporaneous objection to this procedure at trial. As a result, the alleged error was not preserved for review. We agree.

In *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989), this Court noted that RCr 9.22 imposes a duty upon a party to make "known to the court the action he desires the court to take or his objection to the action of the court . . . ." As a result, "[i]f a party does not timely inform the trial judge of the alleged error and request the relief to which he considers himself entitled, the issue is not preserved for appellate review." *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997) (*citing West*, 780 S.W.2d at 602).

In this case, the Commonwealth filed a motion in limine seeking to take M.M.'s testimony pursuant to the closed-circuit procedures outlined in KRS 421.350.[17] After conducting a hearing, the trial court entered an order granting the Commonwealth's motion.[18] At no point did Appellant object to this procedure or dispute the necessity[19] of employing such a procedure.

---

[17] KRS 421.350 authorizes a trial court, under specified circumstances and in certain sex crime cases, to permit child victims to testify outside the defendant's presence.

[18] Appellant presumably believes the trial court order granting the Commonwealth's motion in limine preserves this issue because KRE 103(d) states that "[a] motion in limine resolved by order of record is sufficient to preserve error for appellate review." However, Appellant cannot rely upon the Commonwealth to preserve his allegations of error. For instance, in *Davis v. City of Winchester*, 206 S.W.3d 917, 919 (Ky. 2006) we deemed an issue preserved for review because the appellant objected to the motion in limine and the trial court order sustained the motion. We also

Because Appellant failed to object to this procedure, this allegation of error was not preserved for review.[20] As such, any review undertaken by this Court would be limited to palpable error review pursuant to RCr 10.26.

Appellant, though, fails to request palpable error review. Accordingly, we decline to evaluate Appellant's confrontation argument. *Shepherd*, 251 S.W.3d at 316 (Ky. 2008). ("Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant.") (citations omitted).

E. Dr. Whitson's Testimony

Appellant argues that the trial court erred when it allowed Dr. Whitson to testify regarding M.M.'s hearsay statement. Specifically, Appellant contends that M.M.'s statement was not given for medical diagnosis or treatment. And, notwithstanding the purpose of M.M.'s statement, Appellant particularly

---

question the applicability of KRE 103 in this context, as the rule applies to evidentiary rulings while Appellant's contention herein pertains to the procedure used in presenting the testimony rather than the testimony itself.

[19] KRS 421.350(2) reads, in pertinent part:

> The court may, on the motion of the attorney for any party and *upon a finding of compelling need,* order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding.

(Emphasis added).

[20] *See Johnson v. Commonwealth,* 2003-SC-0095-MR, 2004 WL 868234 (Ky. Apr. 22, 2004) (concluding that defense counsel failed to properly preserve objection to children testifying via closed-circuit television because he "neither objected to the procedure nor requested that the trial court make findings as to the necessity of employing such procedure.").

objects to the portion of the statement identifying him as the perpetrator. We address each contention in turn.

1. Purpose of Statement

An out-of-court statement offered to prove the truth of the matter asserted is generally inadmissible. *See* KRE 802; KRE 801(c). However, KRE 803(4) excepts "[s]tatements *made for purposes of medical treatment or diagnosis* and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis."[21] (Emphasis added).

According to Appellant, the medical treatment or diagnosis exception does not apply in this case because the prosecution put forth no evidence that M.M. was aware that her meeting with Dr. Whitson was for the purpose of medical diagnosis or treatment or that her mother was seeking diagnosis or treatment. Appellant posits that, because it was the social worker and the sheriff's detective who chose to have M.M. examined, the fruits of the interview conducted by Dr. Whitson should be treated like any other out-of-court statement. Notwithstanding the merits of this contention,[22] our review of the

---

[21] KRE 803(4) allows for the admission of statements regardless of the availability of the declarant.

[22] "Sometimes it clearly appears that the statement is made more for investigation purposes than to secure treatment." FPP § 7045, 30B Fed. Prac. & Proc. Evid. § 7045 (1st ed.).

video record indicates that Appellant waived his objection to Dr. Whitson testifying regarding M.M.'s hearsay statement.[23]

Consistent with the terms of KRE 103(a)[24], a party objecting to the introduction of evidence "must obtain a ruling on the objection from the trial court." R. Lawson, Kentucky Evidence Law Handbook, § 1.10[4][e] (4th ed. 2003). Failure to do so "waives any objection the party might have had to the admissibility of the evidence." *Id.*; *See also Dep't of Highways v. Parker*, 388 S.W.2d 366, 368 (Ky. 1965) (considering a motion to strike and objection to incompetent evidence to be waived because "the appellant failed to pursue its motion and did not obtain a ruling of the court.").

Here, defense counsel initially requested to approach the bench when the prosecutor began to ask Dr. Whitson what M.M. conveyed to her. Defense counsel first noted his objection to the doctor testifying as to any statements made by M.M. because the interview was not conducted for purposes of medical diagnosis or treatment. Defense counsel then objected to Dr. Whitson testifying as to any statements made by family members. Finally, defense

---

[23] Although we agree with Appellant that the trial court erred by allowing Dr. Whitson to testify that M.M. identified him as the perpetrator, our analysis as to whether M.M.'s statement was given for medical diagnosis or treatment is not without reason. Dr. Whitson also testified that M.M. complained of painful urination at the time of the exam and indicated no recent history of bike wrecks or other incidents that could have caused a healing abrasion or laceration.

[24] KRE 103(a) reads, in pertinent part:

> Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> > (1) Objection. In case the ruling is one admitting evidence, a timely objection . . . appears of record . . . .

counsel stated that, if the court were to allow the doctor testify as to what M.M. conveyed to her, he objected to the portion of the statement identifying Appellant as the perpetrator.

In response, the prosecutor explained that he did not intend to inquire as to statements made by family members and argued that if the foundation is laid to establish medical necessity, any pertinent information would be admissible. The trial judge then stated that he would sustain defense counsel's objection if the prosecutor failed to set forth proper foundation. Notably, defense counsel did not ask the judge at this juncture to also consider whether M.M.'s statements to Dr. Whitson were made for purposes of medical treatment or diagnosis.

On direct examination, Dr. Whitson testified that it was medically important for her to elicit certain information from M.M. Specifically, she needed to know whether any object penetrated the child's vagina and, if so, what the object was. She further explained that a penis can cause infection and sexually transmitted diseases. Finally, Dr. Whitson testified that she needed M.M. to clarify whether the conduct involved an adult or a child to understand the size and extent of the damage, explain how the event happened to determine if an abnormal finding was the result of something besides a sexual assault, and to identity of the perpetrator to ensure that he or she was not still in the home.

Defense counsel again requested to approach. However, at no point did he request a ruling on his first objection—that the interview was not conducted

for purposes of medical diagnosis or treatment. In fact, counsel conceded that the prosecutor generally established a proper foundation, although he argued that the identity of the perpetrator was not "reasonably pertinent to treatment or diagnosis." KRE 803(4). Based upon our decisions in *Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001) and *Edwards v. Commonwealth*, 833 S.W.2d 842 (Ky.1992), the trial judge disagreed and overruled defense counsel's objection, thereby allowing Dr. Whitson to testify as to whom M.M identified as the perpetrator—he did not address whether M.M. conveyed such information to Dr. Whitson for purposes consistent with the rule.

Based upon the record, we conclude that the trial judge only ruled on defense counsel's objection to M.M.'s statement identifying the perpetrator. Appellant thus waived his objection premised upon the underlying purpose of the statement. As a result, this allegation of error was not preserved for review and any action undertaken by this Court would therefore be limited to palpable error review pursuant to RCr 10.26. However, we decline to evaluate whether M.M.'s statement was given for medical diagnosis or treatment because Appellant fails to request such review. *Shepherd*, 251 S.W.3d 309 at 316.

2. Identity of Perpetrator

Appellant next contends that the portion of M.M.'s statement identifying him as the perpetrator was not "reasonably pertinent to treatment or diagnosis." KRE 803(4). We agree.

In *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010), this Court reviewed all of our earlier cases concerning the use of KRE 803(4) to admit out-

of-court statements identifying the perpetrator in a child sexual abuse case. Lawson, Kentucky Evidence Law Handbook, § 8.55[6]. In so doing, we explicitly overruled earlier authority[25] and "held that such statements are not covered by the exception because identity of a person committing such an act (even if that person is a member of the alleged victim's family) is not pertinent to diagnosis or treatment and therefore lacks the reliability needed for use of a hearsay exception that is meant for statement made by persons seeking treatment and likely to tell the truth." *Id.*; *See also Colvard*, 309 S.W.3d at 247.

Here, Dr. Whitson testified that M.M. reported that Appellant put his penis in her vagina. As in *Colvard*, this identification was not "reasonably pertinent to treatment or diagnosis." Accordingly, we conclude that it was error for the trial court to have permitted Dr. Whitson to testify about M.M.'s statement identifying Appellant as the perpetrator pursuant to the medical treatment exception to the hearsay rule.

Although we agree that the trial court erred with respect to Dr. Whitson's testimony, Appellant is not entitled to relief because the error was harmless. RCr 9.24. We follow the harmless error standard set forth by the United States Supreme Court in *Kotteakos v. United States*, 328 U.S. 750 (1946), when evaluating non-constitutional errors:

---

[25] Specifically, our decision overruled *Edwards v. Commonwealth*, 833 S.W.2d 842 (Ky. 1992) and *J.M.R. v. Commonwealth, Cabinet for Health and Family Services*, 239 S.W.3d 116, (Ky. App. 2007). *Colvard*, 309 S.W.3d at 244.

> A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Winstead v. Commonwealth, 283 S.W.3d 678, 688-689 & n.1 (Ky. 2009) (citations omitted).

Even without the admission of Dr. Whitson's testimony, other evidence showed that M.M. identified Appellant as the perpetrator. Specifically, M.M. confirmed that she told Ms. Cox that the secret about Appellant was that he had put penis in her vagina during her testimony. Furthermore, M.M. actually stated as such in her taped statement viewed by the jury.

In conjunction with the identification evidence, the remaining evidence in this case overwhelmingly pointed to Appellant as the perpetrator. Without reiterating the entire factual background, we specifically note Appellant's admission that he put his erect penis "on" M.M.'s vagina. Moreover, a wash rag containing Appellant's seminal fluid was found in the bathroom. Finally, both Appellant and the child were discovered partially undressed by M.M.'s cousin and Appellant immediately left the state after the incident occurred.

Because there is no substantial possibility that the verdict was swayed by Dr. Whitson's testimony relating M.M.'s statement identifying Appellant as the perpetrator, we consider this error to be harmless and therefore decline to grant Appellant any relief.

F. First-Degree PFO Conviction

Appellant finally argues that the Commonwealth failed to sufficiently prove that he was a first-degree PFO. Specifically, Appellant contends that there was no showing that Appellant's prior offenses in Florida and Kansas resulted in interrupted terms of imprisonment. According to Appellant, in order to prove an interruption, the prosecution needed to provide the date on which Appellant was convicted of the Florida charge.[26] We disagree.

To be deemed a first-degree PFO, a person must, among other things, have been convicted of two previous felonies. KRS 532.080(3). KRS 532.080(4) outlines the methodology used to evaluate whether an individual has been convicted of two previous felonies:

> For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

We recognize that "[t]he Commonwealth bears the burden of the strict proof requirements for a PFO conviction." *Merriweather v. Commonwealth*, 99 S.W.3d 448, 453 (Ky. 2003). Moreover, felony convictions from other states are considered "previous felony convictions" for purposes of KRS 532.080. *Ware v. Commonwealth*, 47 S.W.3d 333 (Ky. 2001) (recognizing that the appellant's two

---

[26] Appellant actually claims that the trial court erred by instructing the jury on first-degree PFO, yet sets forth a sufficiency argument. While Appellant failed to properly preserve any protestation with respect to the jury instructions, the trial court overruled his motion for a directed verdict, properly preserving his sufficiency argument.

prior convictions in North Carolina qualify as "previous felony convictions" under KRS 532.080(3)). However, we simply cannot agree with the premise that, in order to prove interrupted terms of imprisonment, the Commonwealth must always provide the date of conviction (or sentencing) in circumstances involving felony offenses committed in two separate states.[27]

A trial court should grant a motion for a directed verdict if the Commonwealth fails to provide sufficient evidence to establish PFO status. The standard of review for the denial of a directed verdict is set forth in *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky.1991):

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

For our purposes, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Id.* (*citing Commonwealth v. Sawhill,* 660 S .W.2d 3 (Ky.1983)); *See also Beaumont v. Commonwealth,* 295 S.W. 3d 60 (Ky. 2009). Thus, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham,* 816 S.W.2d at 187-88. However, we reemphasize that an

---

[27] Although we decline to mandate the submission of such evidence, we certainly believe it to be "best practice" on the part of the Commonwealth to supply the date of conviction and sentencing for each prior felony when seeking a first-degree PFO conviction.

evaluation of the sufficiency of evidence depends on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont v. Commonwealth*, 295 S.W. 3d 60, 68 (*citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In this case, the Commonwealth failed to set forth the date of conviction or sentencing of the Florida offense.[28] However, the Commonwealth showed that Appellant allegedly committed an armed robbery in Florida on January 25, 1980. He subsequently received a one year prison sentence for that offense. The Commonwealth then showed that Appellant was convicted of a robbery committed on January 31, 1982 in Kansas. On March 22, 1982, he received a sentence of five to fifteen years imprisonment for the subsequent offense.

Viewing this evidence in the light most favorable to the prosecution, we believe the Commonwealth set forth more than "a mere scintilla of evidence" that the sentences from the Florida and Kansas convictions were not served uninterrupted. While one might certainly concoct a scenario wherein two prison sentences from separate states were served uninterrupted, the evidence submitted herein certainly makes it "more probable" that Appellant served at least some of a one year prison sentence in Florida, was released, and later served another sentence in Kansas. KRE 401.

---

[28] In its brief, the Commonwealth states that Appellant entered a plea of *nolo contendere* and was sentenced on March 20, 1980, receiving credit for one hundred seventeen days served. According to the Commonwealth, even if Appellant served every day of his sentence, he would have been released on or before January 23, 1981. The jury, though, never received this information.

Because the evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Appellant served interrupted terms of imprisonment for his prior offenses in Florida and Kansas, we must affirm the PFO conviction.

III. Conclusion

For the foregoing reasons, Appellant's convictions and corresponding sentence are affirmed.

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

COUNSEL FOR APPELLANT:

Thomas More Ransdell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane
Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Bryan Darwin Morrow
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601