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RENDERED: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000198-MR

MICHAEL LADD — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
NO. 09-CR-00153

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

Michael Ladd appeals as a matter of right from a March 18, 2010 Judgment of the Christian Circuit Court convicting him of first-degree sexual abuse, in violation of KRS 510.110, and of intimidating a participant in the legal process, in violation of KRS 524.040. After finding Ladd to be a first-degree persistent felon, the jury recommended enhanced sentences of life without parole for twenty-five years for the abuse offense and of twenty years in prison for the intimidation offense. The Commonwealth alleged that Ladd sexually abused his girlfriend's six-year-old daughter and then threatened to kill her and her mother if she told anyone about the abuse. On appeal, Ladd maintains that the Commonwealth failed to prove either offense and maintains

further that the trial court erred (1) by admitting into evidence hearsay testimony regarding statements the victim made shortly after the alleged incident, (2) by admitting medical records into evidence in violation of Ladd's right to confrontation, and (3) by admitting victim impact evidence during the guilt phase of the trial. Agreeing with Ladd that the Commonwealth failed to prove the intimidation offense, we must reverse his conviction and vacate his sentence for that offense. Ladd's other claims of error do not entitle him to relief, and thus we affirm his conviction and sentence for first-degree sexual abuse.

RELEVANT FACTS

Construed favorably to the Commonwealth, the proof showed that for some months prior to the 2007 Christmas holidays Ladd had been friends with Jasmen Quarles. He was a frequent visitor at her home on 18th Street in Hopkinsville, and occasionally an overnight guest. He had also become acquainted with Jasmen's sister, Jackie, who lived a few doors away on 18th Street, and with Jasmen's six-year-old daughter, T.Q., and Jackie's ten-year-old daughter, J.Q., both of whom lived with Jackie. Although T.Q. lived primarily with her aunt, she maintained contact with her mother, and at Christmas time in 2007 she and J.Q. spent either Christmas Eve or Christmas night with Jasmen. Ladd stayed over as well. The next morning the two girls were up first. T.Q. testified that at Ladd's invitation she had gone into the bedroom, and as she stood there watching television next to the bed where Ladd was lying, he grabbed her, pulled her closer, reached his hand inside her

panties, and inserted his finger in her vagina. He stopped when J.Q. came into the room and then he whispered to T.Q. that he would kill her and her mother if she told anyone. As soon as T.Q. got away, just a moment later, she went into the kitchen and told her cousin J.Q. what Ladd had done.

J.Q. testified that she was in the kitchen cooking when she heard T.Q. say from the adjacent bedroom, "No, she's not coming." Curious, J.Q. went into the bedroom, where she saw Ladd lying on the bed and T.Q. standing next to it. Ladd was clothed and partially covered by a blanket. According to J.Q., Ladd was reaching out toward T.Q. They may have been holding hands, but she was not sure, and he had his lips pursed as though he intended to kiss her. When they became aware of J.Q.'s presence they hastily pulled apart. T.Q. came into the kitchen a short time later, and J.Q. asked her what she and Ladd had been doing. Twice T.Q. said, "Nothing." Only when J.Q. promised not to tell anyone did T.Q. confide that Ladd had "put his hand in my pants." J.Q. thereupon awakened Jasmen, who was sleeping in the living room, told her what had happened, and then ran down the street to her own home and reported the incident to her mother, T.Q.'s aunt Jackie.

Jackie testified that J.Q. came home that morning upset by news about T.Q. and that T.Q. herself came home right after that and said that Ladd had "put his finger down my pants." T.Q. was scared, Jackie testified, and so she waited a few minutes and then asked her again what had happened. When T.Q. repeated the allegation, Jackie took her to the emergency room at Jennie Stuart Hospital. She was present for T.Q.'s examination, and when shown

certified hospital records, which were introduced into evidence without objection, Jackie testified that they accorded with her recollection of the emergency room proceedings. Although the examining physician found no bruises or other external signs of trauma, he did note a hymenal tear, which appeared "raw and recent." Jackie also testified that for a while following the incident T.Q. was "frightened all the time," that she had nightmares, and that she found it difficult to sleep alone.

Ladd denied the allegations and testified that he had spent Christmas Eve of 2007 with a different girlfriend and Christmas Day with family members. He claimed that he could not have been at Jasmen's home during the Christmas holidays because at that time a foot injury kept him from driving. Consistent with that claim, a friend testified that he had given Ladd a ride to a family member's house on Christmas Day. Asked if he could think of any reason for T.Q.'s allegations, Ladd stated that Jasmen had been angry with him because he had promised her $300.00 to help with Christmas shopping, but had reneged on that promise.

As noted, the jury convicted Ladd of both offenses and found him to be a persistent felony offender in the first degree (PFOI). Because one of the four prior felony convictions (which resulted in the PFOI conviction) was also for sexual abuse in the first degree and the current charge was a sex crime committed against a minor, Ladd, who was 51 years old at the time of the current offense, was eligible for life without parole for 25 years pursuant to KRS 532.080(6). The jury recommended and the court imposed that enhanced

sentence for the sex abuse offense and twenty years for the intimidation offense.

Ladd now contends that his defense was unfairly countered at trial when J.Q. and Jackie were permitted to repeat T.Q.'s out-of-court allegations against him. We begin our analysis with this contention and conclude that T.Q's out-of-court allegations were excited utterances admissible pursuant to KRE 803(2), which excepts such utterances from the general rule—KRE 802—disallowing hearsay.

ANALYSIS

I. The Trial Court Did Not Err By Admitting Evidence of T.Q.'s Excited Utterances.

The trial court permitted J.Q. and Jackie to recount the allegations T.Q. made to them against Ladd on that December morning. Those allegations were consistent with T.Q.'s testimony at trial, and as Ladd correctly notes a witness's prior consistent statement is hearsay and is not admissible merely to bolster her testimony from the witness stand. *Dickerson v. Commonwealth,* 174 S.W.3d 451 (Ky. 2005). The rule against hearsay allows for several exceptions, however. One such exception is provided by KRE 801A, which exempts from the hearsay rule a witness's prior consistent statement when offered "to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." It was KRE 801A that the trial court first invoked when it overruled Ladd's objection to J.Q.'s repetition of T.Q.'s prior allegation.

We agree with Ladd that the trial court's reliance on KRE 801A was misplaced. J.Q. was the Commonwealth's second witness, right after T.Q., and at that point Ladd had not, either in his opening statement or in his cross-examination of T.Q., suggested that T.Q.'s testimony was a recent fabrication or that it may have been prompted by an improper influence or motive. The rule applies, moreover, only to prior statements made before the alleged improper influence or motive came to bear on the witness. *Bussey v. Commonwealth,* 797 S.W.2d 483 (Ky. 1990). Here the improper motive that Ladd did finally suggest—Jasmen's alleged desire to get back at him for failing to give her Christmas money—arose before T.Q.'s out-of-court statements, and thus did not serve to bring those statements within the KRE 801A hearsay exemption.[1]

The trial court itself appears to have later recognized the inapplicability of KRE 801A, for when, during Jackie's testimony, Ladd renewed his hearsay objection, the trial court modified its grounds for admitting T.Q.'s prior statements. The court then referred to KRE 803, which provides exceptions to the hearsay rule for out-of-court statements made in circumstances believed to provide adequate assurance of the statement's reliability. In particular, the

[1] In *Noel v. Commonwealth,* 76 S.W.3d 923 (Ky. 2002), we observed that whereas a post-motive prior consistent statement is not admissible under KRE 801A as substantive evidence, it might still be admissible for strictly rehabilitative purposes provided it has "some rebutting force beyond the mere fact that the witness had repeated [it] on a prior occasion." *Id,* at 929 (citation and internal quotation marks omitted). Since the Commonwealth's introduction of T.Q.'s prior statements was clearly intended primarily to bolster its substantive case, and since there was no mention at trial of a substantive/rehabilitative distinction, much less a jury admonition regarding that distinction, we need not consider the statements' admissibility as rehabilitative evidence.

court referred to the KRE 803(1) and 803(3) exceptions for statements reflecting the declarant's present sense impression or her then existing state of mind. Ladd maintains that neither of those rules applies to the sort of allegations T.Q. made to J.Q. and Jackie, allegations of conduct completed some appreciable time before the allegation was made. There may be some merit to Ladd's objections, but we need not address them for we have held that a trial court's evidentiary rulings may be affirmed if they were correct even though the court did not identify the correct ground. *Noel v. Commonwealth,* 76 S.W.3d 923 (Ky. 2002); *Jarvis v. Commonwealth,* 960 S.W.2d 466 (Ky. 1998). Since we are convinced that T.Q.'s statements to J.Q. and Jackie were admissible as excited utterances under KRE 803(2), we need not decide whether they were also admissible under the rules the trial court invoked.

As provided by KRE 803(2), an "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Hearsay statements qualifying as excited utterances are admissible into evidence notwithstanding the general rule against hearsay, because experience teaches that one does not fabricate or tailor the statements one makes under the immediate stress of strong emotion. Such statements are deemed substantially more reliable than out-of-court statements made in the absence of that guarantee. In determining whether a statement is admissible as an excited utterance courts are to consider the totality of the surrounding circumstances, and those circumstances "must give the impression that the statement was spontaneous,

excited, or impulsive rather than the product of reflection and deliberation." *Hartsfield v. Commonwealth,* 277 S.W.3d 239, 245 (Ky. 2009). Among the circumstances particularly germane to this determination are the lapse of time between the stressful occurrence and the declaration, the degree to which the declarant was actually in the grip of emotion, and the potential for mistake or fabrication. *Souder v. Commonwealth,* 719 S.W.2d 730 (Ky. 1986) (listing eight factors relevant to excited utterance determinations). Although in *Mounce v. Commonwealth,* 795 S.W.2d 375 (Ky. 1990), and *Noel v. Commonwealth,* we held that sexual abuse allegations made nine and five days, respectively, after the alleged abuse came too late to be considered excited utterances, in *McClure v. Commonwealth,* 686 S.W.2d 469 (Ky. App. 1985), the Court of Appeals upheld as excited utterances statements a five-year-old child made to her mother, the mother's friend, and an investigator within a few hours of the alleged abuse. More recently, in *Hartsfield v. Commonwealth,* 277 S.W.3d at 245-46, this Court held that rape allegations the victim made to a passerby immediately following the alleged rape and again a few minutes later to her daughter should both have been admitted as excited utterances. Finally, in assessing an excited utterance it "is not controlling that the declarations were in response to questioning . . . where . . . the questions were brief and not suggestive, and the declarant remained agitated throughout the entire discussion." *Ernst v. Commonwealth,* 160 S.W.3d 744, 755. (Ky. 2005).

T.Q.'s statements to J.Q. and to Jackie come within the excited utterance rule. Her statement to J.Q. followed within mere moments of the alleged

abuse, and it was expressed, not, perhaps, with the outrage or distress that an adult victim might be expected to display, but with the fear of a child confronted with an experience beyond her understanding and a death threat. That fear was reflected in her initial reluctance to confide in J.Q., and it strongly suggests that the statement was not the product of reflection or calculation.[2] Although the record does not make entirely clear how much time elapsed between T.Q.'s two statements, T.Q. appears to have followed J.Q. promptly to Jackie's house a few doors away. Jackie testified that when she spoke to T.Q., T.Q. was still visibly "scared." There is little chance, moreover, that T.Q.'s statements were the result of a mistake, and the circumstances do not present a scenario in which a six-year-old child is at all likely to have fabricated such an allegation. There was no evidence that T.Q. disliked Ladd, and the statement to her cousin J.Q. was made without any intervention by T.Q.'s mother, Jasmen, who supposedly was angry with Ladd for not providing money for Christmas presents. In sum, the trial court did not err by permitting

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[2] In his opinion concurring in part and dissenting in part, Justice Venters maintains that the rules of evidence make no "adjustment for the innocence of a six-year old declarant, and T.Q.'s tender years do not render her incapable of reflective or deliberative thought." While young children are capable of deliberative thought at some level, it is apparent that T.Q.'s hesitancy was not about what to say, thus raising the "opportunity or likelihood of fabrication" that can come following "reflection and deliberation," *Noel*, 76 S.W.3d at 926-27, but rather, whether to say anything at all given the threat Ladd had made to kill T.Q. and her mother. Moreover, determining whether a statement is an excited utterance is a fact-intensive inquiry and the age of the speaker may be relevant to "the opportunity or likelihood of fabrication" just as the speaker's mental condition, competency or physical condition could bear on this factor. *Id.* If the declarant were a mentally handicapped person or a severely injured elderly person those attributes would be available for consideration in the excited utterance's "likelihood of fabrication" calculus and so, too, is the very young age of a declarant.

J.Q. and Jackie to repeat during their testimonies T.Q.'s initial, excited utterances regarding the abuse which had just occurred.

II. Palpable Error Review of the Medical Records Issue Was Waived and the Admission of Evidence of Emotional Injury Does Not Constitute Palpable Error.

Ladd also challenges the admission into evidence of T.Q.'s medical records and what he characterizes as victim impact evidence—Jackie's testimony that for a time following the abuse T.Q. was afraid, suffered nightmares, and had trouble sleeping alone. He concedes that neither of these alleged errors was preserved, but he seeks review pursuant to RCr 10.26. That rule gives an appellate court discretion to grant relief, even in the absence of preservation, for palpable errors, *i.e.,* plain, clearly prejudicial errors, correction of which is necessary to prevent a manifest injustice. *Brown v. Commonwealth,* 313 S.W.3d 577 (Ky. 2010). Neither of Ladd's objections merits palpable error relief.

A. The Medical Records Issue Is Not Subject to Palpable Error Review.

Ladd does not dispute that T.Q's medical records were properly certified for self-authentication under KRS 422.030, were relevant, and were thus admissible absent a particular reason to exclude them. He contends, however, that T.Q.'s medical records come within the ban on testimonial hearsay the United States Supreme Court has delineated in *Crawford v. Washington,* 541 U.S. 36 (2004), and its progeny.

In deciding whether to exercise our discretion to grant palpable error review, we have noted the distinction the United States Supreme Court has

made between a forfeited error, on the one hand, *i.e.*, an error to which a party failed to make a timely objection, and, on the other hand, a waived error, *i.e.*, an error of which the party was aware but to which he has knowingly decided not to object. *United States v. Olano,* 507 U.S. 725 (1993). A waived error, we have held, having been invited by the party, will not provide grounds for RCr 10.26 relief. *Quisenberry v. Commonwealth,* 336 S.W.3d 19 (Ky. 2011). Although the circumstances suggesting waiver are not as compelling in this case as they were in *Quisenberry,* they nevertheless raise serious concerns about the propriety of palpable error review.

The medical records to which Ladd now belatedly objects were introduced during the testimony of T.Q.'s aunt, Jackie. Moments before the records were introduced, Ladd objected on hearsay grounds to Jackie's testimony concerning things T.Q. said to her. Overruling the objection, the trial court explained why in its view Jackie's testimony violated neither the hearsay rules nor Ladd's right to confrontation. Hardly a minute later, Ladd's right to confrontation having just been discussed, the Commonwealth moved to introduce the hospital records. In response to the court's request for objections, Ladd expressly acknowledged that he was familiar with the records and had no objection to their introduction. During his cross-examination of Jackie, Ladd then had her confirm that according to the records T.Q. did not appear upset and had not been bruised, and that the records did not purport to say what caused T.Q.'s hymenal tear. Although these circumstances do not present a textbook example of waiver, they nevertheless raise disturbing this

issue concerns that Ladd deliberately chose not to raise an objection of which he was aware and thus invited the error for which he now seeks review. Accordingly, we decline to engage in palpable error review of.

B. Evidence of T.Q.'s Emotional Injury Was Admissible to Show That Abuse Occurred.

The court also did not err in admitting Jackie's unobjected-to testimony to the effect that following the abuse T.Q. suffered nightmares, had trouble sleeping alone, and often felt afraid. Relying on cases such as *Bowling v. Commonwealth,* 942 S.W.2d 293 (Ky. 1997) and *Ice v. Commonwealth,* 667 S.W.2d 671 (Ky. 1984), in which this Court has noted that during the guilt phase of trial evidence is not to be admitted for the sake of enlarging or eliciting sympathy for a crime's alleged victims, Ladd contends that Jackie's testimony violated that proscription and rendered his trial manifestly unjust. Jackie's testimony was introduced, however, not to elicit sympathy for T.Q., but to prove, by evidence of its effects, that abuse had occurred, a fact materially at issue in the determination of Ladd's guilt. We upheld the introduction of such "emotional injury" evidence as "directly relevant to prove that [the ten-year-old victim] was sexually assaulted" in *Dickerson v. Commonwealth,* 174 S.W.3d 451, 471 (Ky. 2005), and noted that it was particularly relevant in cases such as this one in which the defendant denies that the sexual abuse happened. Jackie's emotional injury testimony was not improper, therefore, and provides Ladd no basis for relief.

III. Sufficient Evidence Supported Ladd's Conviction for Sexual Abuse.

With respect to his first-degree sexual abuse conviction, Ladd contends that he should have been granted a directed verdict because the Commonwealth failed to prove one of that crime's elements. We disagree.

As applied to Ladd, KRS 510.110 prohibits a person twenty-one years old or more from subjecting a person less than sixteen years old to "sexual contact." If, as here, the victim is less than twelve-years-old, the crime is enhanced from a class D to a class C felony. The statute also prohibits sexual contact with a person incapable of consenting to the contact because, among other reasons, he or she is less than twelve years old. "Sexual contact," is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." KRS 510.010(7). Ladd maintains that the Commonwealth failed to prove that his touching of T.Q. was for the purpose of gratifying his sexual desire.

As Ladd correctly notes, the burden is on the Commonwealth to prove each element of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *In the Matter of Winship,* 397 U.S. 358 (1970). To meet its burden, the Commonwealth must produce 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." *Commonwealth v. Benham,* 816 S.W.2d 186, 187-88 (Ky. 1991). A directed verdict is not authorized, however, if, construed in favor of the Commonwealth, the evidence could induce a reasonable juror to believe beyond a reasonable

doubt that the defendant is guilty. *Id.* Applying the same standard on review, we may not overturn the trial court's denial of a motion for directed unless, considering the evidence as a whole and drawing all reasonable inferences in favor of the Commonwealth, "it would be clearly unreasonable for a jury to find guilt." *Benham,* 816 S.W.2d at 187-88. It was not unreasonable in this case for the jury to conclude that Ladd's digital penetration of T.Q. was sexually motivated.

A defendant's mens rea, his criminal state of mind, need not be proven directly—an impossibility in most cases—but may be inferred from the defendant's acts, his knowledge, and the circumstances surrounding the alleged crime. *Davis v. Commonwealth,* 967 S.W.2d 574 (Ky. 1998). Sexual motivation is one such state of mind, and in *Tungate v. Commonwealth,* 901 S.W.2d 41 (Ky. 1995) (citing *Anastasi v. Commonwealth,* 754 S.W.2d 860 (Ky. 1988)), we held that circumstantial evidence of sexual motivation could be sufficient. It was sufficient here.

There is first the particular act of touching involved, a penetration of the victim's vagina, an act highly suggestive in itself of sexual motivation. That suggestion is strengthened by the act's bedroom setting, by Ladd's furtiveness, by the absence of any evidence suggesting an innocent motive, by Ladd's threatening T.Q. not to tell and thereby making plain his awareness of wrongdoing, and of course by J.Q.'s testimony that when she interrupted Ladd and T.Q., Ladd was attempting to kiss T.Q., another sexual aspect of Ladd's behavior. Together, these circumstances amply support the jury's

determination that Ladd's touching of T.Q. was for the purpose of gratifying his sexual desire, and accordingly the trial court did not err by denying Ladd's motion for a directed verdict on the sexual abuse charge.

IV. Ladd's Alleged Threat Did Not Violate KRS 524.040(1).

Ladd's final contention is that the Commonwealth failed to prove the other charge against him, that of intimidating a participant in the legal process, and with this contention we agree. The Commonwealth alleged that Ladd violated KRS 524.040(1)(f) by threatening to kill T.Q. if she told anyone what he had done to her. In pertinent part that statute provides that "[a] person is guilty of intimidating a participant in the legal process when, by use of physical force or a threat directed to a person he believes to be a participant in the legal process, he or she . . . [h]inders, delays, or prevents the communication to a law enforcement officer or judge of information relating to the possible commission of an offense." We may leave aside the question of whether Ladd's utterly ineffective threat could reasonably be deemed to have hindered or delayed communication of the alleged offense to the police, for there is a more fundamental gap in the Commonwealth's allegation, a gap we recently discussed in *Moreland v. Commonwealth,* 322 S.W.3d 66 (Ky. 2010).

In that case, an alleged rapist was convicted of having violated KRS 524.040(1) when he threatened to kill his victims if they reported his assaults. Overturning the conviction, we noted that the General Assembly's amendment to the intimidation statute in 2002 had narrowed the class of potential victims to those persons the intimidator believes then, at the time of the intimidation,

to be participants in the legal process. Because the defendant in that case could not possibly have believed that the rape victims were, at the time of his threats, participants in the legal process, a process not yet underway, his threats against them did not come within the intimidation statute.

As the Commonwealth concedes, this case is indistinguishable from *Moreland*. At the time of his alleged threat, Ladd could not have believed that T.Q. or her mother was a participant in non-existent legal proceedings, and therefore the threat did not violate KRS 524.040(1). Ladd's intimidation conviction must be reversed.

CONCLUSION

In sum, Ladd was justly convicted of sexually abusing T.Q. T.Q.'s spontaneous descriptions of the abuse soon after it occurred were admissible as excited utterances; objection to the admissibility of T.Q.'s medical records was waived; and evidence that T.Q. exhibited emotional injury in the wake of the abuse was admissible evidence that the abuse occurred. There was sufficient evidence, moreover, that Ladd's touching of T.Q. was a sexual act. Ladd was not justly convicted, however, of intimidating a participant in the legal process. To be guilty of that crime, the intimidator must believe that his victim is, at the time of the intimidation, participating in legal proceedings. Ladd was not shown, and likely could not have been shown, to have had that belief when he threatened T.Q., and so the threat did not come within the statutory proscription. Accordingly, we affirm the March 18, 2010 Judgment of

the Christian Circuit Court as to Ladd's first-degree sexual abuse conviction but we reverse his intimidation conviction.

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

VENTERS, J., CONCURS IN RESULT ONLY: Although I concur with the result of the Majority opinion, I strongly disagree with the Majority's use of the excited utterance exception to the hearsay rule, KRE 803(2), to save the erroneous admission of T.Q.'s statement to J.Q. Although under the circumstances present here, the admission of the statement through J.Q.'s testimony was harmless,[3] it was nonetheless error because the statement was hearsay and it was not covered by any exception to the hearsay rule.

First, I note that it is the trial court's function, not the appellate court's function, to ascertain the applicable facts governing the admission or exclusion of evidence. As the majority even notes in its second footnote, "whether a statement is an excited utterance is a fact-intensive inquiry." Neither the trial court nor trial counsel for either party saw T.Q.'s statement as fitting within the excited utterance exception to the hearsay rule. That alone is a strong indicator that the facts as they saw them do not support admission under KRE 803(2). In *Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002), this Court

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[3] T.Q. herself testified and was subject to effective cross-examination with regard to the accusations covered by J.Q.'s hearsay testimony. The charge was also corroborated by extrinsic evidence. The hearsay statement was not particularly inflammatory or otherwise likely to arouse passions or prejudices of a jury.

identified eight factors "as relevant to a determination of whether an out-of-court statement is admissible under KRE 803(2)," one of which is "whether the utterance was made in response to a question." *Id.* at 926. Despite the fact that we ordinarily defer such findings of fact to the sound discretion of the trial court, the majority forges ahead with its own findings.

Second, and more importantly, the majority has misapplied the excited utterance exception by ignoring the quintessential element from which the exception derives its legitimacy. Our decision in *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 245 (Ky. 2009) captured the essence of the traditional "excited utterance" exception, stating, "For an out-of-court statement to meet that definition [KRE 803(2)], the declarant's condition at the time must give the impression that *the statement was spontaneous, excited, or impulsive rather than the product of reflection and deliberation.*" (emphasis added.)

J.Q.'s testimony as described by the Majority established without question that T.Q's statement *was not* spontaneous, excited, or impulsive. It was the product of the kind of reflective deliberation reasonably expected of a six-year old child. As the majority notes, when asked by J.Q. what Ladd had done to her, T.Q. said *twice* that he had done "nothing." In her own way, she was consciously looking out for her need to be protected from Ladd's threats. Recognizing that T.Q. was afraid (not excited), J.Q. promised T.Q. she would keep her statement a secret. After deciding that she could trust J.Q. to help her, T.Q. chose to reveal her secret that Ladd had sexually abused her. In so doing, she was anything but impulsive, excited or spontaneous. She was a

scared little girl, keeping her wits about her well enough to decide what to say and when it was safe to say it. We can certainly sympathize with her being victimized, but our sympathy does not convert her conscious and deliberate statement into a spontaneous, excited, or impulsive utterance.[4]

The hearsay rule was born of common sense and centuries of judicial experience in trials and human nature that have taught us that out-of-court statements repeated by in-court witnesses generally are not reliable. However, the same experience taught that certain circumstances infuse the out-of-court statement with inherent trustworthiness. Thus were born the assortment of exceptions to the hearsay rule that make up a large part of the law of evidence. The premise for the excited utterance exception is that statements made spontaneously, excitedly, or impulsively in reaction to a startling occurrence are trustworthy because they are uttered before the possibility of distortion by the deceptive influences that might accompany a reflective or deliberative thought process. *Noel*, 76 S.W.3d at 926.

Our hearsay law makes no adjustment for the innocence of a six-year old declarant, and T.Q.'s tender years do not render her incapable of reflective or deliberative thought. She obviously thought about how to respond to J.Q.'s concern, and her comments were the products of that thought. Her statement

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[4] We have long-recognized that statements made in response to questions may qualify as an excited utterance, so long as the response arises excitedly, spontaneously, or impulsively from the startling event and is not the product of reflective and deliberative thought. *Roland v. Beckham*, 408 S.W.2d 628, 632 (Ky. 1966) ("Although the statement was in response to an inquiry it hardly may be said that there was such an 'interrogation' as would remove the declarant from the mental attitude of expostulation influenced by the excitement and stress of the event itself.")

to J.Q. may very well have been true, but we can say that only because it comports well with the other corroborative evidence, not because it was uttered under conditions that lend it the kind of inherent reliability demanded by our rules of evidence. The excited utterance exception does not apply here.

Our Rules of Evidence lend credence and integrity to our adjudicative process because the rules are based upon logic and experience. When we use a rule in a way that disconnects it from its rational underpinning, we erode the confidence that fairly resides in our adjudicative process. I respectfully submit that sustaining the admission of T.Q.'s hearsay statement to J.Q. as an excited utterance under KRE 803(2) is error.

Schroder, J., joins.

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