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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000008-MR

DENNIS JACKSON — APPELLANT

V.

ON APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 10-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

After a jury trial, Appellant Dennis Jackson was convicted of one count of first-degree sodomy, four counts of first-degree sex abuse and four misdemeanor sexual abuse charges. Jackson was sentenced to life imprisonment. He raises six claims of error on appeal. This Court concludes that the trial court committed error as to three of the sexual abuse convictions, which are hereby reversed, but no reversible error as to the sodomy conviction and the other convictions, which are hereby affirmed.

I. Background

Appellant was accused of sexually abusing four children and sodomizing one of them. He knew or met each of these children through his role as a youth minister at a local church, his role as a baseball coach at a local private Christian school, or as a relative.

The first victim, C.C., testified that he met Appellant during a summer baseball league and that Appellant touched him several times in an inappropriate sexual manner. Once, while C.C. was in Appellant's vehicle with other children playing a "game" in which they tapped each other's crotches to check for an athletic supporter, Appellant reached from the front seat to the back seat and grabbed C.C.'s crotch. Another time, after a baseball game, Appellant and C.C. were taking equipment to Appellant's vehicle when Appellant reached over and grabbed C.C.'s crotch. C.C. testified that Appellant also grabbed his crotch when they were playing a game of Twister and another time in Appellant's car. C.C. also testified that Appellant placed his hand over C.C.'s crotch one time in C.C.'s home in front of C.C.'s mother.

The second victim, G.M.A., knew Appellant because Appellant was G.M.A.'s great-uncle by marriage. G.M.A. testified that while spending the night at Appellant's house, Appellant pulled down G.M.A.'s pants as G.M.A. stood up and anally penetrated him with his penis. G.M.A. testified that during another occasion in which G.M.A. slept at Appellant's home, Appellant attempted to sexually abuse G.M.A. a second time.

The third victim, R.C., testified that he met Appellant through the Full Gospel Church and that one time after a church service when Appellant was taking children back to their homes, Appellant reached into the backseat and touched R.C. in his crotch area.

The fourth victim, B.M., was Appellant's next door neighbor and got to know Appellant when he began attending the Full Gospel Church. B.M. testified that he often spent the night at Appellant's home and that each time

he spent the night at Appellant's house he awoke because Appellant had put his hands down B.M.'s pants. He also testified that Appellant exposed his genitals and that Appellant grabbed B.M.'s hand and tried to make him touch his penis.

During the first part of April 2010, Jeff Terry, a social worker for the Commonwealth, received a call about possible child sexual abuse. The caller, who may have been anonymous, stated that C.C. and G.M.A. were being abused. This prompted an investigation, which identified Appellant as the perpetrator of the abuse. This, in turn, led to an indictment against Appellant for numerous counts of sexual abuse, for a total of 13 counts against four victims.

At trial Appellant denied all charges against him. The jury found Appellant guilty of one count of first-degree sodomy and four counts of first-degree sexual abuse, along with several misdemeanor counts of sexual abuse. He was found not guilty of two counts of first-degree sexual abuse and two other lesser counts. The jury recommended five-year sentences for each count of first-degree sexual abuse and a life sentence for the count of first-degree sodomy, with each count to be run consecutively. Limited by *Bedell v. Commonwealth*, 870 S.W.2d 779, 783 (Ky. 1994) ("[N]o sentence can be ordered to run consecutively with such a life sentence in any case...."), the trial court sentenced Appellant to life in prison. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. The amendment of the indictment and denial of a continuance was not an abuse of discretion.

Appellant asserts that the Commonwealth violated his right to answer to the charges against him by amending the indictment the morning of trial. Additionally, Appellant claims that the trial court erred in denying his motion for a continuance. Appellant concludes that the amendment and the denial of the continuance violated his rights to due process and effective assistance of counsel under the United States and Kentucky Constitutions.

The morning of trial, the Commonwealth moved to amend the indictment as to some of the charges, specifically, as to the date ranges during which the crimes against three of the victims were alleged to have occurred. The range for the allegations by C.C., as originally indicted, was February 2009 through February 2010; this was changed to April 2007 through August 2009. Likewise, the time frame for G.M.A.'s allegations, originally indicted as having occurred between August 2006 and November 2009, was changed to August 2006 through November 2006. The time frame of the allegations of B.M., originally indicted as having occurred between January 2009 and February 2010, was changed to May 2006 until February 2010. The dates for R.C. remained the same.

The Commonwealth did not add any additional charge to the indictment and merely changed the dates to reflect information obtained through investigation after the original indictment. Over Appellant's objection, the trial court sustained the motion and allowed the indictment to be amended.

Appellant then moved for a continuance in light of the changed dates, but this too was denied.

Amendment of an indictment is not an unusual practice and is provided for by our rules. To this end, RCr 6.16 states:

> The court may permit an indictment ... to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

On appeal, the trial court's decision is reviewed for an abuse of discretion. *Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003). This Court has held that "an indictment may be amended at any time to conform to the proof provided the substantial rights of the defendant are not prejudiced and no additional evidence is required to amend the offense." *Wolbrecht v. Commonwealth*, 955 S.W.2d 533, 537 (Ky. 1997).

RCr. 6.16 makes clear that the Commonwealth is given broad authority to amend an indictment so long as two requirements are met: the Commonwealth does not add additional or different offenses and the substantial rights of the defendant are not prejudiced. Appellant concedes that the substantive charges contained in the indictment had not changed, but he argues that his substantial rights were violated because he was not able to adequately prepare a defense to account for the new time periods.

Appellant claims that his substantial right to prepare a defense was violated by the amendment because the dates of the allegations of three of the

victims were changed the morning of trial, making it impossible to prepare a defense on such short notice.

But Appellant repeatedly testified that he had never engaged in any of the wrongdoing of which he was accused and that he had never touched any child. Therefore, expanding the dates of the allegations could not influence his defense strategy of total denial.

This Court has held that when a defendant testifies that sexual abuse never occurred, no prejudice accrues to the defendant when an indictment is amended to change the time of the offense without charging additional offenses, *Anderson v. Commonwealth*, 63 S.W.3d 135, 140–41 (Ky. 2001), because "any sort of alibi defense was not prejudiced by an amendment to an indictment." *Id.* at 141. Moreover, it was found to be significant that the amendment occurred before the Appellant's case-in-chief. *Id.* Here, the amendment was made before the Commonwealth put on any of its proof, at an even earlier point in the trial.

Appellant further contends that the trial court abused its discretion by failing to grant his motion for continuance in light of the amended indictment. But RCr. 6.16 does not guarantee a continuance after the indictment is amended; rather, a continuance is mandatory only if "justice requires" it.

When ruling on a motion for a continuance, "a trial court should consider the facts of each case, especially ... 'length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; ... complexity of the case; and whether denying the continuance will lead to identifiable

prejudice.'" *Edmonds v. Commonwealth*, 189 S.W.3d 558, 564 (Ky. 2006) (quoting *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), and discussing RCr 9.04)). Of course, when the continuance is sought because of an amendment to the indictment, the primary consideration is whether it is required by justice.

On appeal, the trial court's decision not to grant the continuance is reviewed for abuse of discretion. *See Edmonds*, 189 S.W.3d at 564; *Wells v. Salyer*, 452 S.W.2d 392, 395–96 (Ky. 1970) ("An application for a continuance is addressed to the sound discretion of the trial court and unless the discretion has been abused the action of that court will not be disturbed."). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The trial court denied the motion for continuance primarily because of the difficulty of seating a jury and presumably the inconvenience to the litigants, witnesses, counsel, and the court. Although Appellant argues that the difficulty of seating a jury is not a sufficient reason to deny the motion, it clearly causes inconvenience to the court. And delay at the brink of trial inconveniences the witnesses and attorneys. Additionally, Appellant had an opportunity to aggressively argue that, if granted a continuance, he could prove that he had an alibi for the dates that were added to the indictment. He was in the best position to make such an argument because he knew of his actions and whereabouts at those times, but he did not do so.

In denying Appellant's motion for continuance, the trial court clearly weighed the inconvenience of a continuance on the court, litigants, witnesses, and counsel against any prejudice to the Appellant due to denial of the motion, especially when no alibi claim was made. Absent a showing by the moving party that a continuance would allow the Appellant to provide new evidence of his innocence, the trial court exercised its sound discretion by denying the motion. Thus, the trial court's decision to deny the motion for continuance cannot be said to be "arbitrary, unreasonable, unfair, or supported by sound legal principles." Perhaps more importantly, the Appellant's failure to articulate a real theory of prejudice, such as a possible alibi, indicates no viable need for a continuance.

Yet Appellant claims that *Anderson* and RCr 6.16 *require* a trial court to grant a continuance whenever it amends the indictment. The language in the rule upon which Appellant relies is: "If the defendant felt such an amendment was prejudicial, though it is our conclusion that it was not, the defense could have moved to continue the trial in an effort to revamp his defense." 63 S.W.3d at 141. This statement, however, merely specifies that a defendant *could* move for a continuance, but does not indicate that a trial court must grant that motion. A court must not disregard the standard for granting a continuance merely because it allowed an amendment to an indictment, though the amendment can be a strong factor indicating that a continuance might be necessary to prevent identifiable prejudice to a defendant.

Because Appellant's substantial rights were not prejudiced, the trial court did not abuse its discretion in permitting an amendment to the

indictment. Moreover, the trial court did not abuse its discretion by denying Appellant's motion for a continuance.

B. The denial of the motion to sever was not an abuse of discretion.

Appellant also claims that the trial court abused its discretion by denying his motion to sever the newly amended counts. After the amendments and denial of the motion for continuance, Appellant moved to sever the amended counts for a separate trial. The trial court denied this motion.

Before addressing the merits of this claim, it must be noted that despite the Commonwealth's claim to the contrary, Appellant did properly preserve this issue for appeal. The Commonwealth claims that Appellant's objection was based on prejudice caused by the amended indictment, not the joinder of claims. However, both issues require an examination of prejudice, and Appellant clearly indicated his preference to sever the amended claims. Thus, the issue was properly preserved for appeal.

RCr 9.16 states, in pertinent part:

> If it appears that a defendant ... is or will be prejudiced by a joinder of offenses ... in an indictment ... the court shall order separate trials of counts ... . A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received.

On its face, the rule provides a procedural bar to a motion to sever: a motion must be made before the jury is sworn. However, this procedural bar does not apply in this case because the indictment was amended after the jury had been sworn and Appellant could not have made his objection before then. Indeed, at that time, he would not have had the grounds for the objection on which he now relies. So, Appellant's failure to make this objection prior to the jury being

sworn did not automatically foreclose his ability to contest that the charges be severed under these circumstances.

On the other hand, the rule makes clear that the separation of counts is only permitted where the defendant has been prejudiced by the joinder of offenses. RCr 6.18 states that separate offenses may be joined in a single indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." Even taking the amended indictment into consideration, no prejudice accrued to the Appellant in this case by forcing him to defend himself against numerous allegations all related to inappropriate sexual behavior with a juvenile. A significant factor in determining whether joinder is proper, or whether prejudice exists, is the extent to which evidence of one offense would be admissible in a trial of the other offenses. In this light, "evidence of independent sexual acts between the accused and persons other than the victim, if similar to the act charged, and not too remote in time, are admissible to show intent, motive or a common plan." *Anastasi v. Commonwealth,* 754 S.W.2d 860, 861 (Ky. 1988).

Appellant was charged with myriad counts of conduct amounting to inappropriate sexual behavior with four victims within a short time window ranging from a few months to multiple years. Appellant had access to each victim by virtue of his position in the community, primarily as a baseball coach for a few of the children. The specific conduct of which the Appellant was accused was similar in most instances. The similarities between the crimes are such that evidence of one crime would be admissible in a separate trial of one

of the others. *Cf. id.* at 862 ("These facts establish such similarity between the charged and uncharged crimes as to show a pattern of conduct which renders evidence of the occurrence of the uncharged crimes admissible."). Because we find that no prejudice accrued to the Appellant by the joinder of offenses, this Court holds that the trial court did not abuse its discretion by denying Appellant's motion to sever.

C. Striking potential jurors for cause was not an abuse of discretion.

Appellant further argues that the trial court erred when it excused for cause two potential jurors. The Commonwealth challenged the first juror for cause because she indicated during voir dire that her nephew had been charged with molesting a young boy and ultimately pleaded to a lesser charge in order to avoid a rape charge. She cited her belief that her nephew was wrongly convicted and "done unfair" as her rationale for why she would be impartial. The Commonwealth noted that the juror's nephew had not only pleaded guilty to a felony, but to the felony offense of sexually abusing a young boy, the same offense that she would be called on to consider against the Appellant. The court determined that there was a probability of prejudice against the Commonwealth and struck the juror for cause.

The Commonwealth challenged the second juror for cause because the Commonwealth's Attorney stated that he had represented a plaintiff in a civil case against the juror, which eventually led to a criminal indictment against the juror. In fact, the Commonwealth's Attorney had to recuse himself from the juror's criminal case when he became Commonwealth's Attorney because of a conflict of interest. The juror said that he had forgotten the civil suit and did

not hold anything against the Commonwealth's Attorney. Additionally, the juror stated that his son shot and killed a man in Perry County in 2002, was found guilty, received seven years' imprisonment, and was shock probated after six months. However, while the juror indicated this on his written jury questionnaire, he had not responded to this question when it was posed to the jury pool in voir dire. The trial court expressed concern over the juror's previous history with the Commonwealth's Attorney and struck him for cause.

Appellant argues that these grounds are insufficient to strike these jurors. While it is questionable whether a defendant can even properly complain about the striking of a single juror for cause absent proof of discriminatory animus or that the strike was based only on certain aspects of the juror's view on the criminal justice system, we need not answer that question as the trial judge did not err in this case.

Criminal Rule 9.26 states that "when there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict ... that juror shall be excused." On appeal, "[l]ong-standing Kentucky law has held that a trial court's decision on whether to strike a juror for cause must be reviewed for abuse of discretion." *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). Moreover, "a trial court's decision whether a juror possessed 'this mental attitude of appropriate indifference' must be reviewed in the totality of the circumstances. It is not limited to a juror's response to a 'magic question.'" *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991).

The decision to strike the first juror does not meet this abuse of discretion standard. While the juror indicated that she would be able to render

impartial judgment, she could not say that she would ignore her nephew's experience with the Commonwealth during his sexual abuse prosecution. In fact, she indicated that her nephew's experience is the precise reason why she would be able to remain impartial. Although she expressed her desire to remain fair and impartial, she also indicated on more than one occasion that she believed that her nephew was convicted of crimes that he did not commit and that he felt pressure from the prosecutor to plead to lesser crimes. As noted in *Shane*, "subsequent comments or demeanor" can negate statements of an asserted ability to remain impartial. *Shane,* 243 S.W.3d at 338. In this instance, the juror's colloquy about her nephew and her indications that she believed that her nephew was wronged by the justice system were reasonable grounds for the trial court to conclude that she would not maintain impartiality, despite her previous assertions.

Likewise, the decision to strike the second juror does not meet the abuse of discretion standard. While the juror stated that he would not be biased against the Commonwealth, it is clear from the record that the Commonwealth had a number of grounds to challenge the juror. The trial court's decision was not arbitrary, was based on sound reasoning, and was not an abuse of discretion.

Much of the point of allowing a trial judge discretion in this type of decision making is to recognize that there may be more than one permissible decision. The trial judge is given sound discretion to choose among those multiple permissible options, guided by his own experience, the law, and the facts of the case before him. The abuse-of-discretion standard defers to the trial

court's choice among those possibilities, even where the appellate court might have chosen differently. Thus, this Court concludes that the trial court did not abuse his discretion in excusing the jurors for cause.

D. The Commonwealth's closing argument was not improper.

Appellant contends that the Commonwealth improperly vouched for the testimony of witnesses during its closing arguments. Appellant claims that the Commonwealth asked the jury why the four independent victims pointed to the same person as a sex offender, stated that the only reason why these four victims would make these accusations is because they were telling the truth, and made similar statements that the child victims told the truth. Such statements, according to Appellant, amounted to the Commonwealth voicing his personal opinion of the Appellant's guilt. Appellant concedes that this issue was not properly preserved for appeal and, therefore, this Court must examine whether the Commonwealth's closing argument amounted to palpable error.

Criminal Rule 10.26 states that a "palpable error which affects the substantial rights of a party may be considered by ... an appellate court on appeal, even though insufficiently preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Under this rule, "the required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

A prosecutor may not vouch for his or her witnesses, which "occurs when the prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the

[prosecutor's] office behind the witness." *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999). The rationale for such a rule is to avoid the suggestion that the prosecutor has knowledge of facts not presented to the jury which bear on the witness's credibility. *See Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993). On the other hand, the prosecutor is allowed great leeway in closing argument to comment on the evidence. *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987).

Each of the comments to which Appellant objects were comments about the evidence. In none of the comments does the Commonwealth indicate some personal knowledge of the witness's credibility or knowledge of the facts not known by the jury. In fact, the form of the comments is clearly that of making an argument rather than stating an opinion. Thus, no manifest injustice occurred and there was clearly no palpable error.

E. The testimony of Jeff Terry was reversible error as to convictions involving C.C. but was harmless error as to the other convictions.

Appellant claims that much of the testimony of Jeff Terry, an intake worker for Social Services who conducted interviews with each of the four victims, was reversible error because it constituted impermissible expert testimony about the demeanor and behavior of sexually abused children. Appellant contends that the trial court's admission of evidence concerning the demeanor of abused children and the percentages of children who initially deny, then later disclose, allegations of abuse violates KRE 702. Although Appellant argues generally that Terry's testimony broadly was inadmissible, the argument contained in his brief is essentially twofold.

First, Appellant contends that Terry's testimony as to the demeanor of one of the victims, C.C., during the initial interview conducted by Terry was inadmissible because it is scientific expert testimony proffered by a non-expert. When asked by the Commonwealth to describe C.C.'s behavior during the initial interview, Terry stated that the child C.C. would not make eye contact and put his head down when directly asked about the Appellant. Terry began to describe that, based on his approximately 500 investigations over three and a half years, this type of behavior generally suggests that abuse has occurred because non-abused children typically will make eye contact. If the questioning had continued down this path, Appellant's contention that Terry's testimony crossed the threshold into "expert" testimony governed by the standard developed in *Stringer v. Commonwealth*, 956 S.W.2d 883, 891–92 (Ky. 1997),[1] would be more meritorious.

Appellant's argument, however, implicates neither KRE 702 nor *Stringer* because Appellant promptly objected as Terry was in the midst of answering the initial question about the significance he attached to C.C.'s demeanor during the interview. The trial court sustained the objection and allowed Terry to describe only C.C.'s mannerisms. After the objection was sustained, Appellant did not request an admonition concerning Terry's partial response and the Commonwealth moved to a new line of questioning. Appellant had an opportunity to request the court to admonish the jury to disregard Terry's

[1] As noted in *Stringer*, "Expert testimony is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrill Dow Pharmaceuticals*, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702." 956 S.W.2d at 891–92.

partial response, but did not do so. Any error here was not significant enough to sway the verdict, and thus is harmless.

Criminal Rule 9.24 provides that harmless error is "any error or defect in the proceeding that does not affect the substantial rights of the parties." In *Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky. 2009), this Court determined that "non-constitutional evidentiary error may be deemed harmless ... if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Id.* at 688–89 (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)). A reviewing court should not simply ask "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." *Id.* at 689 (quoting *Kotteakos*, 328 U.S. at 765). Contrary to the Commonwealth's suggestion in its brief, after *Winstead*, the focus of the reviewing court's inquiry should be on the degree of influence the evidentiary error had on the result, not whether the result necessarily would have been different.

Second, Appellant claims that the trial court improperly admitted testimony about child sexual abuse accommodation syndrome (or CSAAS) from Terry. Terry testified that one of the victims, C.C., had denied abuse during the first two interviews he conducted but later admitted abuse during the third interview. Terry testified that C.C.'s behavior was fairly common among child sexual abuse victims. Over objection, the trial court permitted Terry to testify that in 50 to 65 percent of the child sexual abuse cases he investigated, the

children initially made denials, and then later divulged allegations of abuse. The trial court's rationale for permitting this type of testimony was that Appellant initiated the issue of the children's changing stories and, therefore, testimony about such changes was relevant. Appellant contends that permitting this testimony was reversible error.

CSAAS testimony is generally that in which a seasoned sexual abuse investigator testifies that it is common for sexually abused victims to delay reporting of the abuse or to initially deny the abuse, only later to disclose it. The testimony also frequently includes testimony about various "symptoms" associated with CSAAS, and the investigator's statement that the child victim's behavior was consistent with CSAAS. At its worst, CSAAS testimony functions as a sort of quasi-medical or psychological bolstering of the child witness, since it effectively places the imprimatur of science on the child's behavior and testimony. While Terry never described his observations as CSAAS or used similar terminology, his testimony was nevertheless similar in substance to other CSAAS testimony.

More importantly, CSAAS testimony has routinely been held improper by this Court, most recently in *Sanderson v. Commonwealth*, 291 S.W.3d 610, 612–14 (Ky. 2009). The Court's rationale is that "a party cannot introduce evidence of the habit of a class of individuals either to prove that another member of a class acted the same way under similar circumstances or to prove that the person was a member of that class *because* he/she acted the same way under similar circumstances." *Kurtz v. Commonwealth*, 172 S.W.3d 409, 414 (Ky. 2005) (quoting *Miller v. Commonwealth*, 77 S.W.3d 566, 571–72 (Ky.

2002)). This Court has applied the rule against CSAAS testimony to experts, expressing multiple rationales including "the lack of diagnostic reliability, the lack of general acceptance within the discipline from which such testimony emanates, and the overwhelmingly persuasive nature of such testimony effectively dominating the decision-making process, uniquely the function of the jury." *Newkirk v. Commonwealth*, 937 S.W.2d 690, 691 (Ky. 1996).

In this case, after testifying that one of the victims, C.C., denied any abuse the first two times he was interviewed, Terry was asked how prevalent such behavior is among children alleging sexual abuse. He provided the jury with a percentage of cases (50 to 65%) that he had investigated in which sexual abuse victims exhibited similar behavior. Moreover, his testimony focused specifically on child sexual abuse cases within a specified region of Kentucky. Terry's direct involvement with the investigation of sexual abuse against C.C. compounded the problem because he strongly implied that C.C. fell into the percentage of interviewees who initially made denials and later claimed abuse, which effectively bolstered C.C.'s testimony. This Court's jurisprudence clearly demonstrates that this testimony amounted to error.

The Commonwealth, while not conceding that Terry's testimony was error, recognizes the importance of this Court's decision in *Sanderson*. In spite of the clarity of that case, the Commonwealth argues that any error that occurred was harmless. The Commonwealth argues that any error was mitigated on cross-examination when Terry was asked about cases where the victim first alleges abuse and later recants, and admitted that the percentages

of times that this situation, in essence the reverse of CSAAS evidence, occurs are similar.

The Commonwealth's proposed theory of how Terry's testimony was harmless error is not convincing. That a similar percentage of victims make allegations and later recant simply does not counter the claim that a percentage of children come forth only after first denying abuse. The two scenarios are not opposites, and C.C.'s testimony only matches the initial denial scenario. Basically, the testimony elicited from Terry on cross-examination is not responsive to his testimony on direct.

More importantly, Terry's testimony, while not explicitly CSAAS testimony was very similar to that found to be reversible error in *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002). In that case, a police officer with expertise in child sex abuse cases testified to having investigated about 1,000 such cases. *Id.* at 571. When asked if her experience had been to observe a delay in the reporting of sexual abuse by children, she answered affirmatively. She also testified that delays in reporting had occurred in 90% of the cases she had investigated. *Id.*

Like Terry's testimony in this case, the officer in Miller never used scientific or medical terminology and never said "child sexual abuse accommodation syndrome." In fact, the Court differentiated her testimony from traditional CSAAS testimony:

> [The officer was] not an expert and was not purporting to render a medical opinion that A.M. was suffering from CSAAS. She was offering empirical evidence of her observation of the habit of other abused children, as a class, to delay reporting sexual abuse as

> proof either that A.M. was sexually abused or that an inference of fabrication should not arise from the fact that she delayed reporting the sexual abuse.

Id. at 572. Nevertheless, because the evidence was used only to bolster the child's claims, the Court found it to be one of several reversible errors. *Id.* Indeed, this Court has repeatedly said that the failure to couch the testimony in scientific or medical terms does not remove its sting. *See, e.g., Brown v. Commonwealth*, 812 S.W.2d 502, 504 (Ky. 1991), *overruled on other grounds by Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997) (condemning social worker testimony that related "components of the Syndrome but did not label the theory").

Ultimately, the problem with CSAAS-style testimony is that it allows an authority figure, usually a police officer, physician, or social worker with expertise in child abuse, to vouch for a child. As in *Miller*, the testimony either shows that the child victim is part of a class of abused children who all behave similarly or it opposes an inference that the child fabricated the evidence. Either way, such testimony tends to affect how a jury views the evidence.

Under these circumstances, this Court cannot say that the testimony of Terry did not affect the verdict. Indeed, it seems apparent that with respect to C.C., such testimony either influenced the jury or raises "grave doubt" that the verdict was not influenced. *Winstead*, 283 S.W.3d at 689. Under either scenario, the convictions for abusing C.C. must be reversed.

Without stating it directly in his brief, Appellant also contends that Terry's testimony constituted reversible error as to Appellant's convictions as to the remaining three victims, G.M.A., R.C., and B.M. A review of Terry's

testimony, however, clearly indicates that any CSAAS testimony focused entirely on C.C. In fact, Terry testified that the other three victims admitted abuse by Appellant during the first interview that was conducted. There was not an issue of whether those victims changed their story or whether their behavior was consistent with CSAAS. Therefore, any error that may have occurred as to the other three victims was also harmless.

F. Jury Misconduct

Appellant claims that there were suspicious circumstances surrounding one of the jurors in his case. Although the Appellant's rationale for why the conduct of this juror constitutes error is unclear, it appears that Appellant relies on three arguments.

First, Appellant argues that the juror was not qualified because of a mix-up about the juror's name. At orientation of a new jury panel about a week before trial,[2] the clerk called a list of names of potential jurors. The clerk then asked if any juror's name had not been called. One woman stepped forward and gave her name. The clerk stated that her list included a person with the same last name but a different, albeit similar, first name. Specifically, the clerk's list had the juror's name listed as "Marilyn," but the juror insisted that her name was "Mary." (The clerk read the Marilyn name earlier when excusing the qualified jurors for the rest of the day.)

The clerk asked whether the juror was in court for some other reason because she was not on the jury qualification list. The juror insisted that she

[2] Based on the trial judge's statements to the panel, it appears to have been the monthly panel for circuit court.

had been told to show up that day. The clerk then asked the juror whether she had already been qualified as a juror, to which she stated she had been there on a previous day. The clerk then told her that she was not supposed to be present that day since she was not on the list and that she was supposed to be on a different jury. The clerk asked the juror to go to the clerk's office to find out on which jury panel she was supposed to be. After addressing several other jurors whose names were not on the clerk's list, the circuit judge swore the panel in and asked further questions about the jurors' ages, prior jury service, and possible felony convictions to confirm they were qualified to be jurors.

Despite the confusion over names, the woman named Mary, or at least someone with the same name, was eventually included in the venire for Appellant's trial. She survived voir dire and ultimately sat on the jury that convicted the Appellant.

Second, Appellant claims that the same juror made audible comments during the witness testimony. Counsel for Appellant told the trial court that there was commotion in the courtroom during testimony, and that he was not sure that it was just the bailiffs who were carrying on conversations and speaking out during testimony— juror "Mary" had also allegedly been making comments while witnesses were testifying. The trial judge spoke to the people in the courtroom, but focused on the bailiffs. He made it clear to the entire courtroom, however, that any disturbance by anyone in the courtroom would not be tolerated and that any transgressors, including the bailiffs, were subject to contempt.

Third, relating to the sentencing phase, Appellant claimed that juror "Mary" had not responded truthfully during voir dire when asked whether she personally knew one of the victims' grandfather. Appellant informed the court that he had been told "by a very reliable source" that the juror and the victim's grandfather had been seen joking after the verdict and had also heard that the juror had worked for the grandfather. Appellant first raised this issue during his opportunity to address the court at his sentencing hearing.

Appellant's allegations are at best speculative and far short of what is needed for any relief. In *Gordon v. Commonwealth*, 916 S.W.2d 176, 179 (Ky. 1995), this Court noted:

> In circumstances where no challenge is made to juror qualification prior to or during trial and the challenge first occurs after rendition of a verdict, a party seeking relief from the effect of the verdict bears a heavy burden. It is incumbent upon such a party to allege facts, which if proven to be true, are sufficient to undermine the integrity of the verdict.

Of particular importance in this quoted language is this Court's placing upon Appellant a "heavy burden" based on "facts." *Id.* In this case, Appellant provides speculation, rather than facts, that issues with the juror may have undermined the verdict.

That there was some confusion about a juror's identity when the panel was first sworn in for its month of service simply does not rise to the level required by *Gordon*. In fact, absent an allegation of substantial deviation from the rules of jury selection, a conflict of interest or misbehavior by the juror, or discriminatory animus, it is questionable whether a defendant can even complain about the procedures used in selecting the overall venire from which

a jury will be drawn. *See, e.g., Meece v. Commonwealth*, 348 S.W.3d 627, 700–01 (Ky. 2011) ("[T]he trial court is vested with broad discretion to oversee the entire process, from summoning the venire to choosing the petit jury which actually hears and decides the case."); *Hayes v. Commonwealth*, 320 S.W.3d 93, 97 (Ky. 2010) (allowing addition of jurors from another division's jury pool). Ultimately, the Appellant must show prejudice, *Monroe v. Commonwealth*, 244 S.W.3d 69, 74 (Ky. 2008) ("This Court has made it clear that it will not consider minor errors in jury selection reversible unless some prejudice is demonstrated."), which this allegation fails to do.

Claiming that the juror may have, without any level of certainty or specificity, spoken aloud during trial similarly fails to allege facts to meet Appellant's heavy burden. Based on the record, it is not even clear that the juror did speak out. It was incumbent on the Appellant to make his record about any possible problems with the juror when she allegedly spoke out by bringing the issue to the trial court's attention. Since he complained no further after initially pointing out the commotion, there is a presumption that he was satisfied by what the trial court did. A silent record is presumed to support the trial court's action and cannot be the basis of an error. *See, e.g., Commonwealth v. Thompson*, 697 S.W.2d 143, 144 (Ky. 1985).

Likewise, Appellant's mention that a "reliable source" told him of the juror's potential acquaintance with the victim's grandfather does not meet this burden. Such a statement is essentially anonymous hearsay, which, without more information, is insufficient to meet such a heavy burden.

As noted previously, this jury included "Mary" and it acquitted Appellant of some charges. Appellant can point to nothing concerning the alleged juror misconduct that would have undermined the verdict. No error occurred.

III. Conclusion

For the foregoing reasons, this Court reverses Appellant's convictions for sexually abusing C.C. and affirms all his other convictions. Because Appellant was sentenced to life in prison for the sodomy conviction, with all other sentences to run concurrently, his overall sentence is not affected. This matter is remanded for correction of the judgment in conformity with this opinion.

All sitting. All concur.

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