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RENDERED: JUNE 21, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000109-MR

CECIL GENE LINVILLE — APPELLANT

V.

ON APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
NO. 10-CR-00008

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Cecil Gene Linville appeals as of right from a February 1, 2011 Judgment of the Mason Circuit Court convicting him following a jury trial of first-degree unlawful imprisonment, Kentucky Revised Statute (KRS) 509.020; fourth-degree assault, KRS 508.030; and third-degree terroristic threatening, KRS 508.080. For the felony unlawful imprisonment offense, Linville was sentenced as a first-degree persistent felon to a maximum term of twenty years in prison; he was sentenced to concurrent twelve month sentences for the misdemeanor assault and terroristic threatening offenses. These charges arose from an incident in December 2009 between Linville and his then-girlfriend AJ. AJ accused Linville of having restrained her in their bedroom one morning and of subjecting her to verbal and physical threats and to physical assaults that culminated in sodomy and rape. The jury acquitted Linville of the sodomy and rape charges, but, as noted, found him guilty of other offenses. On appeal,

Linville contends that the trial court erred (1) by denying his motion for a directed verdict; (2) by refusing to dismiss the unlawful imprisonment charge for lack of evidence; (3) by misapplying the kidnapping exemption statute, KRS 509.050; (4) by failing to instruct the jury with respect to that statute; (5) by excluding evidence offered to impeach AJ; (6) by permitting the introduction into evidence of Linville's arrest photo; and (7) by amending the persistent felony offender portion of the indictment. Finding no reversible error, we affirm both Linville's convictions and his sentence.

RELEVANT FACTS

The Commonwealth's case rested largely on the testimony of twenty-five year old AJ. She, it appears, had lived for several years with one Jonathon Henderson with whom she had had two children. In September 2009, Henderson was incarcerated. Not long thereafter AJ and her children, then aged one and two years, began living with Linville. They lived for a few weeks with Linville's mother, in Maysville, but in about the second week of December 2009 they moved to Sardis, Kentucky, into the mobile home of Linville's former girlfriend, Valerie Berry, who shared the three-bedroom home with her then-boyfriend Darrin Mitchell.

According to AJ, at about 7:00 on the morning of December 20, she and Linville were alone in their bedroom in Berry's mobile home when Linville awakened her by hitting her in the face. He was angry because he had found a letter from Henderson to AJ in which Henderson declared his continued love and his hope that he and AJ could resume their life together upon his release

from prison. AJ testified that Linville repeatedly struck her, threatened to continue to strike her if she made any noise, and told her how he would kill Henderson in front of her and then kill her. After this had gone on for some time, according to AJ, she tried to dial 911 on her mobile phone. Linville saw her, held an opened pocketknife to her throat, and said, "Try me now, bitch." Several times AJ asked Linville to let her go, but he refused and told her that she was not leaving until he got what he wanted. What he wanted, AJ testified, was sex, and ultimately he forcibly compelled her to engage in both oral sex and intercourse. At that point, according to AJ, Linville became remorseful and finally agreed to let her go.

AJ then went to Berry and Mitchell's bedroom and asked Berry to give her the Christmas gifts for AJ's children that she had stored in Berry's closet. Berry and Mitchell testified that this was sometime between 9:00 and 10:00 a.m. AJ then loaded the gifts and her children in her car and drove to her grandmother's house in Maysville. She told her grandmother some at least of what had happened, and her grandmother advised her to contact the police. Because Sardis, where the alleged incident occurred, is outside the jurisdiction of the Maysville Police Department, a Maysville police officer referred AJ to the Mason County Sheriff's Department.

AJ made her complaint to a Mason County deputy sheriff. The deputy testified that AJ appeared to him to have bruises beneath one of her eyes and inside her upper lip and that her lower lip appeared swollen. He photographed those injuries—the photographs were introduced into evidence--and then took

AJ to the Meadowview Regional Medical Center. A sexual assault nurse examined AJ, and though, aside from the minor facial bruises the deputy had noted, she found no evidence of injury, she collected samples which eventually proved to contain DNA matching that of Linville. Later that evening, still December 20, 2009, the deputy arrested Linville at Berry's mobile home. Linville had on his person two small pocketknives. The deputy did not, at that time, interview either Berry or Mitchell, but Berry gave him a letter written by AJ that Berry and Linville had found in AJ's vehicle shortly before the alleged attack. The deputy testified that because this was not a letter from Henderson to AJ, he had not deemed it very important and had lost it. A few months later, the deputy did take a statement from Berry, who told him, among other things, that Linville had been very possessive of AJ.

The Commonwealth's case consisted of AJ's testimony, corroborated to some extent by what appeared to have been minor bruising on her face; by forensic evidence showing that intercourse had occurred; by Linville's possession of the two knives; by Linville's having seen, shortly before the incident, at least one letter apparently not meant for his eyes; and by Berry's statement to the deputy about Linville's possessiveness.

Linville did not testify, but in addition to vigorously cross-examining AJ, he presented testimony by Berry and Mitchell and by AJ's mother and grandmother meant to impeach AJ's account of that December morning and to cast doubt upon her veracity. Berry and Mitchell both testified that the mobile home was small and not at all sound proofed, making it likely that they would

have heard an angry and violent assault such as AJ alleged, but they had heard nothing. Berry in particular testified that she had been awake all night playing a computer game and so would have heard any disturbance. Berry and Mitchell also testified that AJ's demeanor that morning was normal and pleasant and that her interaction with Linville appeared affectionate. Berry testified that she had gone to the kitchen that morning and had encountered AJ there getting something to drink. AJ had not appeared at all upset, and she had said nothing about any mistreatment by Linville. On cross-examination, Berry and Mitchell, both convicted felons, conceded that their testimonies did not jibe with statements they had made before trial essentially to the effect that they had heard nothing that morning because they had been asleep until AJ came to their room to retrieve the Christmas gifts. Berry conceded as well that she remained particularly fond of Linville, with whom she had had a child and whom she had known for more than thirty years.

AJ's mother and grandmother—the mother lived with the grandmother and had seen AJ the day of the alleged assault when AJ brought her children to her grandmother's house—both testified that AJ's complexion around her eyes was naturally bruised looking and that AJ's eyes appeared normal in the photographs the deputy had taken. This was contrary to the mother's pre-trial statement in which she had described AJ's face that day as not bleeding but as bearing the marks of someone's hand. Both women were also asked about AJ's reputation for truth telling, and both said that it was not good, the grandmother adding that AJ lied when it was convenient, and the mother that

AJ's stories were sometimes true and sometimes not. It was Linville's theory in closing that AJ had fabricated her allegations as a means of terminating the relationship. AJ's mother and grandmother both had known Linville and his family for years.

As noted above, the jury acquitted Linville of rape and sodomy, the most serious charges, but found him guilty of first-degree unlawful imprisonment, of fourth-degree assault, and of third-degree terroristic threatening. Linville's first contention on appeal is that the trial court erred by denying his motion for a directed verdict and in particular by refusing to dismiss the unlawful imprisonment charge. We begin our analysis with these contentions.

ANALYSIS

I. There Was Sufficient Evidence to Support Linville's Convictions.

Linville's attack on the sufficiency of the Commonwealth's unlawful imprisonment evidence is twofold. He first contends that AJ's testimony, which he characterizes as uncorroborated and unreliable, was insufficient as a matter of law to support the Commonwealth's charges. He also contends that even if Linville restrained AJ, there was no evidence that he exposed her to a risk of serious physical injury, one of the elements of first-degree unlawful imprisonment, and thus the first-degree charge, at least, should have been dismissed.

A. The Trial Court Did Not Err By Denying Linville's Directed Verdict Motion.

Turning first to Linville's more general contention, he correctly notes that under both the common law of Kentucky and the Due Process Clause of the

Fourteenth Amendment to the United States Constitution, the Commonwealth bore the burden of proving each element of his alleged offenses beyond a reasonable doubt. *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991); *Jackson v. Virginia,* 443 U.S. 307 (1979). This standard requires more of the Commonwealth than mere speculation. *Hodges v. Commonwealth,* 473 S.W.2d 811, 814 (Ky. 1971) ("Suspicion alone is not enough."). The Commonwealth must produce evidence of substance. Evidence that amounts to no more than a scintilla of proof is grounds for a directed verdict. *Benham,* 816 S.W.2d at 187-88. A directed verdict is not appropriate, however, if, construed favorably to the Commonwealth, the evidence would permit a rational juror to believe the defendant guilty beyond a reasonable doubt. *Beaumont v. Commonwealth,* 295 S.W.3d 60 (Ky. 2009) (citing *Benham*). In other words, in deciding upon the propriety of a directed verdict, the court, either trial court or reviewing court, must presume that if the evidence supports conflicting inferences the conflict will be resolved in favor of the prosecution. *Cf. McDaniel v. Brown,* ___ U.S. ___, 130 S. Ct. 665, 175 L. Ed.2d 582 (2010) (explaining the "rational juror" standard required under the Due Process Clause and citing *Jackson v. Virginia*). The credibility of witnesses, likewise, is generally left for the jury to determine. *Potts v. Commonwealth,* 172 S.W.3d 345 (Ky. 2005) (citing *Schlup v. Delo,* 513 U.S. 298 (1995)). Thus, a single witness's testimony may support a conviction, even if there is testimony to the contrary, provided only that it is not clearly unreasonable to believe the single witness. *Commonwealth v. Suttles,* 80 S.W.3d 424 (Ky. 2002) (single witness can be sufficient); *Robinson v.*

Commonwealth, 212 S.W.3d 100 (Ky. 2006) (alleged rape victim's testimony sufficient to establish that intercourse occurred through forcible compulsion).

Here, AJ testified that by hitting her and threatening her with a knife Linville restrained her for some two hours, during which he threatened her with violence for her interest in resuming her relationship with Henderson and forced her to engage in sex. In addition to AJ's testimony, there was evidence of an assault—what the jury could have believed was slight bruising to AJ's face and a definite cut on the underside of her lip; there was forensic evidence of intercourse; there was evidence that Linville tended to be jealous; there was evidence that he had read AJ's correspondence with Henderson, as a jealous person might do; and there was evidence that he carried the sort of knife AJ claimed he held to her throat. Construed favorably to the Commonwealth, this evidence lends credence to AJ's allegations and, consequently, a reasonable juror could return a guilty verdict. The trial court did not err, therefore, by denying Linville's directed verdict motion.

Against this conclusion, Linville refers us to cases such as *Coney Island Co. v. Brown*, 290 Ky. 750, 162 S.W.2d 785 (1942), and *Weinel v. Commonwealth*, 302 Ky. 742, 196 S.W.2d 375 (1946), for the proposition that a judgment should not be allowed to stand on testimony so clearly at odds with natural laws or other similarly undisputed facts that no rational juror would credit it. In *Weinel*, for example, our predecessor Court reversed a rape conviction because, in the Court's view, it was based on allegations so contrary to human experience as to have no probative value. The alleged victim claimed

to have been raped at about 11:00 a.m. in the bedroom of her apartment. It was undisputed that the apartment's walls were very thin and that at the time of the alleged assault the victim's landlord was working in a nearby room. The victim admitted that she submitted to her assailant after he told her, "You better not," when she threatened to cry out. The Court deemed it inconceivable that a forcible rape could have taken place without more resistance by the alleged victim and without the landlord's having heard it. While we would not be so quick today to assume how a woman should or should not respond to a sexual assault, to the extent that *Weinel* stands for the proposition that testimony inconsistent with physical laws or basic human experiences does not have probative value, it is not inconsistent with our post-*Benham* cases.

Linville maintains that AJ's allegations, like the allegations in *Weinel,* are not probative because Berry or Mitchell would have overheard an assault in the thin-walled mobile home, and because AJ surely would have responded to an assault by crying for help. Even assuming, however, that the law was correctly applied in *Weinel,* this case is distinguishable. Unlike *Weinel,* where the landlord was awake and working in a nearby room, there was evidence here that Berry and Mitchell were asleep at the time of the restraint and assault, and so, construing that evidence in favor of the Commonwealth, would not have heard noises even if there were some. Also unlike *Weinel,* where the victim alleged no physical act of force and only a mild verbal threat, AJ testified that Linville struck her, threatened to strike her again if she cried out, and then threatened to cut her throat when she tried to call 911. In these

circumstances, AJ's not crying for help can hardly be deemed outside human experience.

Linville also maintains that AJ's testimony should be discounted because her own mother and grandmother discredited her veracity. As we noted in *Potts,* 172 S.W.3d at 345, however, there is a difference between testimony inherently without probative value because contrary to undisputed facts and testimony challenged on the ground that the witness lacks credibility. The rule of cases such as *Weinel* and *Coney Island, supra,* does not apply to cases of the latter sort, to claims that a witness's perception was impaired, for example, or, as here, that a witness's character for honesty is not good. As we have many times held, witness credibility of this sort is for the jury to determine. *Potts,* (citing examples).[1] In this case, as in most, several of the witnesses, Linville's witnesses as well as AJ, were impeached with evidence tending to show that their testimonies may to some extent have been fabricated. Sorting through such evidence and deciding which witnesses to believe is precisely what juries are employed to do. The trial court did not err by allowing the jury to perform its role.[2]

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[1] Linville refers us to a case from Illinois, *People v. Smith,* 708 N.E.2d 365 (1999), in which that state's Supreme Court reversed a murder conviction because in its view the testimony by the lone witness identifying the defendant as the killer was not probative. Although, as Linville notes, the Court supported its decision by discussing evidence that tended to call that witness's credibility into question, the main reason for its decision was that the witness's testimony was starkly contradicted in several key respects by the undisputed testimony of other witnesses. We understand *Smith,* therefore, as applying a rule like that of *Coney Island* and *Weinel* and thus as being distinguishable from this case.

[2] As noted, the jury was not convinced beyond a reasonable doubt either that the sexual encounters occurred or that they were compelled, but it did credit AJ's

B. There Was Sufficient Evidence of First-Degree Unlawful Imprisonment.

Linville also challenges the sufficiency of the unlawful imprisonment evidence on more particular grounds. KRS 509.030 defines second-degree unlawful imprisonment, making it an offense to "knowingly and unlawfully restrain[] another person." "Restrain" means, in pertinent part, "to restrict another person's movements in such a manner as to cause a substantial interference with his liberty . . . by confining him . . . in the place where the restriction commences . . . without consent. A person is . . . confined 'without consent' when the . . . confinement is accomplished by physical force, intimidation, or deception." KRS 509.010(2). Second-degree unlawful imprisonment is a Class-A misdemeanor. The crime becomes a Class-D felony, first-degree unlawful imprisonment, if the unlawful restraint occurs "under circumstances which expose [the restrained] person to a risk of serious physical injury." KRS 509.020. In this case, the jury was instructed as to both first-degree and second-degree unlawful imprisonment. Linville contends that he was entitled to a "directed verdict"[3] with respect to the charge of first-degree

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testimony that she had been restrained for some time by an angry boyfriend who gave vent to his jealousy by assaulting and threatening her. Linville maintains that no rational juror could have doubted the sexual assault but believed AJ's other allegations and for this reason, too, he contends that he was entitled to a directed verdict. Even if we agreed with Linville, and we do not, that the jury's verdicts were inconsistent, that fact would not bear on the correctness of the trial court's directed verdict ruling. Such rulings are assessed not in hindsight with reference to what the particular jury may actually have believed, but only prospectively in terms of what the evidence would permit any rational juror to believe.

[3] Of course, the proper way to raise and preserve a sufficiency of the evidence claim that does not seek acquittal is not by means of a directed verdict motion, but rather by objecting to the jury instruction claimed to be unsupported. *Noakes v.*

unlawful imprisonment, because even if he restrained AJ there was no evidence that he did so under circumstances that exposed her to a risk of serious physical injury. We disagree.

Although the case law addressing the point is not extensive, it appears that whether a weapon can be deemed a circumstance creating a risk of serious injury depends on how the weapon is employed. In *McClellan v. Commonwealth,* 715 S.W.2d 464 (Ky. 1986), for example, the defendant was convicted of kidnapping, among other offenses, for having abducted his wife, transporting her to a farm in Indiana, and there holding her hostage for several hours. Throughout the ordeal the defendant was armed with a rifle. At trial the jury was instructed on first-degree unlawful imprisonment as a lesser-included offense of kidnapping, but it was not instructed on second-degree unlawful imprisonment. This Court held that the second-degree instruction should have been given and thus, implicitly at least, indicated that the presence of the rifle did not, per se, create a risk of serious injury. Also, germane to this case is KRS 500.080, which defines "deadly weapon" so as to exclude "an ordinary pocket knife," KRS 500.080(4), but leaves open the possibility that such a knife could be deemed a "dangerous instrument" depending upon "the circumstances in which it is used, attempted to be used, or threatened to be used." KRS 500.080(3).

Commonwealth, 354 S.W.3d 116 (Ky. 2011); *Johnson v. Commonwealth,* 292 S.W.3d 889 (Ky. 2009). We decline to address the lack of preservation, however, since even had Linville's claim been properly preserved he would not be entitled to relief.

With limited precedent in Kentucky, we look to other jurisdictions. In Texas a knife may or may not be a deadly weapon depending on, among other things, how it is used. *Tucker v. State,* 274 S.W.3d 688 (Tex. Crim. App. 2008); *Blain v. State,* 647 S.W.2d 293 (Tex. Crim. App. 1983). Arguably, merely showing a weapon to the victim of an unlawful restraint, a gun in one's pocket, say, or a knife in a sheath on one's belt, does not expose the victim to a risk of serious injury. *Cf. State v. Alexander,* 795 A.2d 1248 (Vt. 2002) (fact that defendant brandished knife did not preclude second-degree unlawful imprisonment instruction); *Commonwealth v. Schilling,* 431 A.2d 1088 (Pa. Super. 1981) (brandishing unloaded pellet gun does not create risk of serious injury). Brandishing the weapon, however, or threatening the victim with it can, in some circumstances at least, reasonably be thought to create such a risk. *See People v. Fogler,* 585 N.Y.S.2d 26 (N.Y. Sup. Ct. 1992) (grabbing victim's collar and holding knife a foot from his chest supported finding that defendant created risk of serious injury); *Key v. State,* 463 A.2d 633 (Del. 1983) (threatening the use of a deadly weapon—knife was held just in front of victim's face—necessarily creates risk of serious injury).

Here, AJ testified that when she attempted to call 911, Linville drew a knife, held it to her throat, and said, "Try me now, bitch." When he was arrested later that day, Linville was in possession of two knives like the one AJ described. Notably, the jury was instructed as to both first and second-degree unlawful imprisonment and found Linville guilty of the more serious offense. We agree with the cases discussed above to the extent that they hold that the

risk posed by a pocket knife depends on how the weapon is used, and we agree with the trial court that Linville's alleged use of his knife here, holding it to AJ's throat while he threatened her, was evidence from which a reasonable juror could find that he exposed AJ to a risk of serious physical injury. To adopt Linville's position would require us to conclude as a matter of law that these circumstances posed no risk of serious physical injury, something we cannot do. On this ground, therefore, the first-degree unlawful imprisonment instruction was not improper.

II. Linville is Not Entitled to Relief Pursuant to the Exemption Statute.

A. Exemption Did Not Require Dismissal of the Unlawful Imprisonment Charge.

Linville next attacks the unlawful imprisonment instruction on the ground that he should have been relieved of that charge pursuant to KRS 509.050, the exemption statute. Under that statute,

> [a] person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

Linville concedes that he did not invoke the exemption statute in the trial court, but he asserts, nevertheless, that, despite the lack of preservation, his restraint of AJ should have been deemed merely incidental to the alleged sexual assault and thus to have merged with the alleged sex offenses. We have explained, however, that for this statutory merger to apply the restraint of the

victim must have occurred strictly as an incident of a charged offense defined outside KRS Chapter 509, and must not have exceeded the restraint necessary for the commission of that underlying crime. *Stinnett v. Commonwealth*, 364 S.W.3d 70, 2011 WL 5878143 (Ky. 2011); *Hatfield v. Commonwealth*, 250 S.W.3d 590 (Ky. 2008). Generally, this means that for merger to apply, the restraint will have occurred close to the other crime in both time and space. *Timmons v. Commonwealth*, 555 S.W.2d 234 (Ky. 1977).

Here, however, AJ described a restraint in excess of two hours, from about 7:00 a.m. until Linville released her and she went to Berry and Mitchell's room to get Christmas gifts, which, according to Berry and Mitchell was sometime between 9:00 and 10:00 a.m. Obviously this is a longer restraint than necessary for the alleged sex offenses,[4] and indeed AJ testified that a good portion of it had nothing to do with sex but involved Linville's berating her for her relationship with Henderson and his threats to kill them both. Because the restraint could not be thought merely incidental to the alleged sex offenses, Linville would not have been entitled to the statutory exemption even had he requested it.

B. An Exemption Jury Instruction Was Not Required.

The same fact scuttles Linville's next argument as well. He contends that the exemption statute should have been incorporated into the unlawful imprisonment jury instructions so as to require the jury to find, in addition to

[4] It was longer than the restraint necessary for the assault and terroristic threatening offenses, as well. Linville's suggestion, therefore, that those offenses precluded the unlawful imprisonment charge is likewise unavailing.

the usual elements of unlawful imprisonment, that the unlawful restraint was not merely incidental to one of the other charged offenses. Again, Linville concedes that he did not request such an instruction, but he maintains that without the additional element the unlawful imprisonment instructions were palpably erroneous. An error may be deemed palpable if it is clear on the face of the record, is prejudicial, and its correction is necessary to prevent a manifest injustice. RCr 10.26; *Grady v. Commonwealth,* 325 S.W.3d 333 (Ky. 2010). There was no such error here.

As Linville acknowledges, in *Calloway v. Commonwealth,* 550 S.W.2d 501 (Ky. 1977), this Court upheld the trial court's refusal to give the sort of instruction Linville claims he was entitled to and ruled that application of the exemption statute is a question of law for the court to decide and not a question of fact to be submitted to the jury. Urging us to revisit that ruling, Linville contends that the exemption statute in effect creates a defense to the charge of unlawful imprisonment and that due process therefore requires that the jury be allowed to consider that defense. Linville is correct, of course, that the jury instructions should reflect the whole law of the case including "'an instruction on any lawful defense which [the defendant] has.'" *Ratliff v. Commonwealth,* 194 S.W.3d 258, 274 (Ky. 2006) (quoting from *Slaven v. Commonwealth,* 962 S.W.2d 845, 856 (Ky. 1997)). We need not decide, however, whether exemption could ever be deemed a defense subject to this rule, for even if it could be the rule applies only where there is evidence in the record from which a reasonable juror could conclude that the circumstances

constituting the defense existed. *Id.* (citing *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (due process requires a defense instruction only "when the evidence warrants such an instruction.").

Here, as noted, the only evidence of what occurred between Linville and AJ was AJ's account of a two-hour-plus restraint during which Linville gave vent to his anger and only at the end of which committed the alleged sex offenses. While the jury was free to doubt AJ's account in whole or in part, there was no evidence to support a conclusion that Linville restrained AJ, but did so only to the extent the sex offenses required. Since there was no evidence of merely incidental restraint, an exemption instruction would not have been appropriate, and so the trial court did not err, palpably or otherwise, by not giving the instruction Linville belatedly claims was due.

III. The Trial Court's Misapplication of KRE 608(a) Did Not Amount to a Palpable Error.

Prior to trial in this case, AJ's mother and grandmother swore to affidavits in which they opined, respectively, that AJ "tends to over exaggerate things on occasions," and that AJ "is a compulsive liar and is in need of help with her temper." The Commonwealth moved to exclude those statements, and at the hearing to consider that motion the trial court ruled that, assuming a proper foundation were laid, the mother and grandmother could testify concerning AJ's reputation for truthfulness, but that they could not give their personal opinions about her character. Linville contends that this ruling erroneously and unduly restricted his effort to impeach AJ and rendered his

trial unfair. He correctly notes that KRE 608(a) allows the credibility of a witness to be attacked or supported

> by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Under this rule and KRE 701, the rule governing lay opinion testimony, a character witness sufficiently acquainted with another witness to have formed a meaningful, experienced-based opinion of that witness's character for truthfulness or untruthfulness may testify as to that opinion. *Cf. United States v. Whitmore,* 359 F.3d 609 (D.C. Cir. 2004) (discussing the foundational requirements for reputation and opinion evidence under the very similar federal rules). The trial court erred, therefore, by disallowing, per se, the mother's and grandmother's opinion testimony. It may be that the trial court had in mind an earlier version of KRE 608, which, prior to its amendment in 2003, limited this sort of impeachment to reputation evidence. *See Stewart v. Commonwealth,* 197 S.W.3d 568 (Ky. App. 2006) (discussing the 2003 amendment). Be that as it may, Linville did not invoke the amended rule or otherwise present to the trial court the argument he now presents to us, and so again he is entitled to relief only if the trial court's error can be deemed palpable, *i.e.,* so clearly prejudicial or otherwise so at odds with the ideals of fairness our system strives to embody that correction is necessary to prevent a

manifest injustice. *Grady*, 325 S.W.3d at 333. The error here does not rise to that level.

As noted above, although Linville was not allowed to ask AJ's mother and grandmother for their opinions of AJ's truthfulness, he was allowed to ask them about AJ's reputation for telling the truth, and both testified that her reputation was bad. AJ's mother added, "You can take what she [AJ] says, and part of the time it's the truth, part of the time it's not, but sometimes it's hard to decipher." Clearly, this is opinion testimony in the guise of reputation testimony, and compared to the opinion Linville claims he was entitled to elicit--"[AJ] tends to over exaggerate things on occasions."—it is equally clear that the opinion he did elicit conveyed to the jury as strong, if not a stronger, aspersion.

AJ's grandmother testified that "she [AJ] lies when it's convenient." Again, it is clear that this is "reputation" testimony indistinguishable from "opinion" testimony, testimony to the effect that "not only is AJ's reputation bad, but, as far as I'm concerned, the reputation is well deserved."[5] Linville maintains that the grandmother should have been allowed to opine that "[AJ] is a compulsive liar," but even overlooking doubts about the grandmother's qualifications to give such an opinion, we are not prepared to say that the difference between the excluded opinion and the opinion the grandmother was

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[5] The fact that witnesses offering reputation testimony "'often seem in fact to be giving their opinions, disguised somewhat misleadingly as reputation,'" was a principal reason the federal rules were amended to allow opinion testimony. *United States v. Dotson*, 799 F.2d 189, 191 (5th Cir. 1986) (quoting from the Advisory Committee's Note to Fed. R. Evid. 608(a)).

allowed to express is apt to have had any meaningful effect on the jury. The jury is certain to have understood that AJ's mother and grandmother both took a dim view of AJ's credibility. This being so, the exclusion of the "tends to exaggerate," and "compulsive liar" opinions, even if erroneous, did not render Linville's trial manifestly unjust.

Finally, Jonathan Henderson, the boyfriend whose letter to AJ from prison was alleged to have sparked Linville's anger, also gave a pre-trial affidavit in which he registered an unfavorable opinion—"compulsive liar"—of AJ's truthfulness. At the same hearing where it considered the mother's and grandmother's proposed character testimony, the trial court indicated that if he testified, Henderson too would not be allowed to express an opinion, but would be allowed to comment on AJ's reputation. Again Linville acquiesced in the court's erroneous ruling without raising any argument in favor of the opinion testimony, much less the argument he raises now, so again the per se exclusion of Henderson's opinion testimony entitles Linville to relief only if it rendered his trial manifestly unjust. It did not.

As it happened, Linville chose not call Henderson as a witness, so we do not have the benefit of knowing whether his opinion, too, would essentially have been admitted under the guise of reputation, but even assuming that Henderson should have been allowed to testify as he averred, that in his opinion AJ was a compulsive liar,[6] that testimony was cumulative of the

[6] We do not mean to suggest that Henderson was qualified to offer such an opinion, but we consider it for the sake of argument.

mother's and grandmother's testimony and would have come from someone whose own credibility, unlike that of the mother and grandmother, was subject to significant attack. Henderson was a convicted felon; he was incarcerated at the time of trial; and by his own admission he had, a short time before he gave his affidavit, separated from AJ, who had then married another man. These considerations may well have led counsel not to pit Henderson's character against AJ's. In any event, Henderson's testimony was not calculated to add much to the character evidence Linville succeeded in introducing through AJ's mother and grandmother, and its exclusion, therefore, did not constitute a palpable error.

IV. The Introduction of Linville's Arrest Photograph Was Harmless.

Near the end of his direct examination, the deputy sheriff in charge of the investigation described his arrest of Linville at Berry's mobile home on the evening of December 20. He identified a photograph of Linville as one he had taken that evening in the course of Linville's booking and testified that the photograph accurately reflected Linville's appearance at the time. Upon the Commonwealth's motion, the photograph was then admitted into evidence. Prior to trial, Linville had objected to the introduction of the photograph, but the trial court overruled the objection and explained that in its view the photograph was in no way prejudicial. Linville now renews his objection and contends that the photograph, taken in a jail setting, unduly suggested that he was a criminal. We disagree.

As Linville correctly notes, a defendant's "mug shots,"—booking photos and the like on file with police or prison agencies—are generally not admissible at trial because of their apparent implication that the defendant previously engaged in criminal conduct. *Williams v. Commonwealth,* 810 S.W.2d 511 (Ky. 1991). Such photos may be admitted, however, if (1) the prosecution has a demonstrable need for the evidence; (2) the photo, either as taken or as edited, does not imply that the defendant had a criminal record; and (3) the photo is introduced in a manner that does not draw attention to its source or implications. *Id.* at 513 (citing *Redd v. Commonwealth,* 591 S.W.2d 704 (Ky. App. 1979). A defendant's current arrest photo, on the other hand, such as the arrest photo of Linville involved here, implies nothing about the defendant's criminal history. Such photos do not implicate, therefore, the prior-bad-act concerns raised by file photos from previous arrests or incarcerations. *Cane v. Commonwealth,* 556 S.W.2d 902 (Ky. 1977) (not error to admit arrest photo as evidence of identity); *State v. Johnson,* 618 S.W.2d 191 (Mo. 1981) (not error to admit arrest photo as evidence of appearance at time of offense). Nevertheless, Linville contends that because the Commonwealth had no need for the photo evidence and because the photo's jail setting casts him in a bad light, the photo's prejudicial effect outweighed its probative value, and for that reason the photo should not have been admitted.

Linville is certainly correct that the photo's relevance in this case was marginal, at best. Arguably, perhaps, the photo contributed in a small way to the proof that Linville was the person who had restrained AJ in Berry's mobile

home. Identity, however, was not a contested issue, and AJ's testimony sufficed to meet the Commonwealth's burden on that score. Nor was there anything about Linville's appearance at the time of his arrest suggestive of the alleged crimes or otherwise corroborative of AJ's account of her ordeal. On the other hand, as the trial court noted, there was nothing about the photo prejudicial to Linville either. The jury knew that it was a photo from Linville's current arrest, not from some past incident, and the photo itself was not unflattering or demeaning. In it Linville appears much as he appeared at trial. Linville contends that the jail setting, arguably discernable in the photo's background, unfairly branded him as a criminal, but we disagree. The jury obviously knew that Linville had been arrested and taken to the jail. The photo documenting that fact added nothing to the jury's knowledge or to the prejudice unavoidably attaching to an arrest. The photo, in other words, was innocuous. Its introduction therefore, even if erroneous, was harmless and so does not entitle Linville to relief.

V. The Trial Court Did Not Err By Amending Linville's Indictment.

Linville's last contention is that the trial court erred when it amended the Persistent Felony Offender (PFO) count of the indictment so as to charge first-degree instead of second-degree PFO status. On the cover sheet of the indictment its counts were listed, with the last being "Ct 6 – PFO 1st." In the body of the indictment, however, the last count, which should have been labeled Count Six but was erroneously labeled Count Three, charged that Linville "[c]ommitted the offense of being a Persistent Felony Offender, Second

Degree, when being more than 21 years of age: . . . he was convicted of Criminal Possession of a Forged Instrument, Second Degree, . . . Escape, Second Degree, . . . Criminal Possession of a Forged Instrument, Second Degree, . . . Possession of a Firearm by a Convicted Felon." The prior offenses were all alleged to have been committed when Linville was over eighteen years of age and to have subjected him to terms of imprisonment of a year or more.

Prior to Linville's arraignment, the Commonwealth moved the court to amend the indictment so as to correct the mislabeling of Count Six and to reflect that Linville was in fact charged with being a first-degree instead of a second-degree PFO. Linville did not object, and in February 2010, some eleven months prior to Linville's January 2011 trial, the trial court granted the Commonwealth's motion. It noted in its order the inconsistency not only between the cover sheet and the body of the indictment, but within the body as well, where the alleged prior offenses were clearly meant to establish first-degree and not second-degree PFO status. Linville does not contend that the amendment surprised him or in any way compromised his defense. He contends, rather, that the trial court exceeded its authority under RCr 6.16, which allows for the amendment of indictments, but only if "no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Linville maintains that first-degree and second-degree PFO status amount to different offenses, and that the amendment here therefore violated the rule.

As Linville concedes, this Court rejected this argument in *Riley v. Commonwealth,* 120 S.W.3d 622 (Ky. 2003), a case squarely on point. In *Riley,* we held that because enhancement statutes such as KRS 532.080, the PFO statute, do not create separate offenses, but only attach stiffer penalties to offenses otherwise defined, the PFO count of an indictment could be amended to charge first rather than second-degree PFO status without running afoul of RCr 6.16. Linville invites us to reconsider *Riley,* but inasmuch as he offers no reason to abandon the distinction we have long recognized between criminal offenses and punishment statuses, *Hardin v. Commonwealth,* 573 S.W.2d 657 (Ky. 1978), a distinction that retains its validity, we decline the invitation.

CONCLUSION

In sum, Linville was fairly tried and lawfully sentenced. AJ's testimony did not cease to be probative merely because Linville presented evidence tending to impeach it. Her testimony and the rest of the Commonwealth's evidence was properly submitted to the jury, and there was sufficient evidence to support the findings that Linville restrained AJ under circumstances that subjected her to serious physical injury, that he assaulted her, and that he terroristically threatened her. There was no evidence that Linville's restraint of AJ was merely incidental to any of the other alleged offenses, so the exemption statute would not have applied at any stage of the proceedings even had Linville invoked it. The trial court's erroneous ruling with respect to the tendered opinion testimony by AJ's mother, grandmother, and former boyfriend was largely rendered moot by the "reputation" testimony to the same effect the

mother and grandmother were allowed to give notwithstanding that ruling. In light of their testimony the trial court's unobjected-to error cannot be deemed palpable. Nor was the introduction of Linville's arrest photo at all prejudicial even though it probably should have been excluded for lack of relevance. Finally, Linville was properly sentenced as a first-degree persistent felony offender. Although initially the title of the charge in the indictment erroneously stated second-degree PFO, the body of the indictment actually charged Linville with the offense of first-degree PFO so amendment of the title to reflect the more serious allegation and conform to the substance of the charge did not amount to charging Linville with a different offense and did not violate RCr 6.16. Accordingly, we hereby affirm the February 1, 2011 Judgment of the Mason Circuit Court.

All sitting. All concur.

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