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RENDERED: FEBRUARY 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000100-MR

CHARLES MARTIN STOWERS, JR. — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 09-CR-00930

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Charles Martin Stowers, Jr., appeals as a matter of right from a judgment of the Warren Circuit Court sentencing him to a fifty-year prison term for two counts of rape in the first degree and for being a second-degree persistent felony offender. Ky. Const. § 110(2)(b). Stowers raises three errors on appeal. First, he argues that the trial court erred when it denied his motion for directed verdict of acquittal as to the rape charges. Second, Stowers claims that a nurse's testimony improperly bolstered the victim's truthfulness. Finally, Stowers contends that the Commonwealth's "golden-rule argument" was substantially prejudicial. For the reasons stated herein, we affirm the judgment of the Warren Circuit Court.

FACTS

Appellant Charles Stowers married Amy Webster in June 2009 and lived with her and her two teenage daughters for most of that year, both before and

after the marriage. On the night of September 9, 2009, Webster's thirteen-year old daughter, "Diane," was taken to an emergency room complaining of bleeding, a heavy period, and abdominal pain. After a series of routine tests, the hospital staff discovered that Diane was pregnant and suffering a miscarriage. At the behest of the treating physician, Nurse Rebecca Melloan spoke with Diane. When Melloan told Diane that she was pregnant and miscarrying, Diane stated that Stowers had raped her. Subsequent DNA testing on the fetus revealed that Stowers could not be excluded as the father, with a 99.99999% probability of paternity.

Stowers was indicted by a Warren County grand jury on two counts of first-degree rape and charged as a second-degree persistent felony offender. At trial Diane testified that Stowers entered her bedroom while she was sleeping. Diane suspected that it was her younger sister sneaking into her room until Stowers began to touch her chest and "privates." She further testified that Stowers touched her "private" with his "private," and that his "private" went inside of her. Diane testified that she was scared and she told Stowers to stop several times before he left the bedroom. Stowers returned to her bedroom three or four nights later and began touching her again. Diane testified that Stowers again placed his "private" inside of her. She explained that she was scared and again did not know what to do, so she told Stowers to stop. When he left her bedroom, Diane testified that she retreated to her sister's bedroom and locked the doors and windows.

Stowers was found guilty of two counts of first-degree rape and of being a PFO in the second degree. The jury recommended twenty-years enhanced to twenty-five years on each count, to run consecutively for a total sentence of fifty years in prison. In its final judgment, the trial court sentenced Stowers in accordance with the jury's recommendation.

ANALYSIS

I. The Trial Court Properly Denied Stowers's Motion for a Directed Verdict.

For his first issue on appeal, Stowers contends that the trial court erred when it did not direct a verdict of acquittal on the first-degree rape charges, arguing that the Commonwealth failed to produce evidence of "forcible compulsion." Stowers moved for a directed verdict on these grounds at the conclusion of the Commonwealth's case-in-chief, and again at the close of evidence.

The standard for a directed verdict is well-established in the Commonwealth:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). *See also Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

The elements of first-degree rape are set forth in KRS 510.040(1), in pertinent part, as follows: "1) A person is guilty of rape in the first degree when . . . He engages in sexual intercourse with another person by forcible compulsion[.]" Stowers does not challenge the sufficiency of the evidence establishing that he in fact engaged in sexual intercourse with the victim. Rather, he argues that the Commonwealth failed to offer evidence of substance that he did so by "forcible compulsion." KRS 510.010(2) defines forcible compulsion as:

> "[P]hysical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition."[1]

While the Commonwealth did not and does not allege that Stowers restrained Diane in the commission of the sexual act, actual physical force is not required to prove forcible compulsion for first-degree rape. *Yarnell v. Commonwealth*, 833 S.W.2d 834 (Ky. 1992). Rather, we must determine if it was unreasonable for a jury to conclude that there was an implicit threat of physical force sufficient to meet the requirements of KRS 510.010(2).

On appeal, both the Commonwealth and Stowers have advanced arguments based on two cases which interpret the implicit threat element of

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[1] The jury received instructions that included this definition of "forcible compulsion."

forcible compulsion. Stowers argues that *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002), mandates proof of a specific type of fear or a specific threat to support a finding of forcible compulsion. The Commonwealth, on the other hand, argues that *Gibbs v. Commonwealth*, 208 S.W.3d 848 (Ky. 2006), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010), controls and that *Miller* is distinguishable.

The defendant in *Miller* was convicted of one hundred fifty counts of first-degree rape, seventy-five counts of first-degree sodomy, and intimidating a witness for a long history of alleged sexual attacks on his biological daughter. 77 S.W.3d at 568. The sufficiency of the evidence proving forcible compulsion was challenged on appeal. *Id.* at 575. This Court held that the evidence did not establish that the victim was threatened, either expressly or implicitly, to engage in sexual acts with the defendant, nor that the victim submitted to the defendant's advances out of fear. *Id.* Specifically, "[t]he only threat [the victim] described was that, on one unspecified occasion, Appellant told her they would both get in trouble if she told anyone what they were doing." *Id.* The victim's only expression of fear was recorded in a handwritten note that the Court ruled should have been excluded as hearsay. *Id.* Stowers contends that Diane's unspecified "fear" is insufficient to satisfy the statutory elements of forcible compulsion. He posits that because Diane failed to articulate any specific threat made against her or her family, the lack of proof beyond a "vague threat" falls into the same category as the insufficient evidence presented in *Miller*.

In *Gibbs*, the defendant was convicted of multiple counts of incest, sodomy, rape, and sexual abuse. 208 S.W.3d at 850. One of the sexual abuse charges arose from an incident when the defendant took the victim's hand and placed it on his pants. *Id.* at 855. The sufficiency of the evidence concerning forcible compulsion as to that charge[2] was raised on appeal. *Id.* at 856. This Court, examining *Miller*, concluded that "the act of taking [the victim's hand] and placing it on his penis" met the requisite physical force element of the statute, and that the defendant's intention in so doing was to cause sexual contact between the two. *Id.* at 856. The Commonwealth argues that just as the victim in *Gibbs* did not contribute to the sexual contact with the defendant when he forced her to touch his penis, Diane similarly was forced to submit to Stowers by physical force when he entered her bedroom, climbed into her bed and engaged in intercourse with her.

Miller and *Gibbs* are both similar and distinct from the case at bar. Like the victim in *Miller*, Diane never testified to any utterance of a particularized threat on Stowers's part. However, unlike the victim in *Miller*, Diane testified that she was scared and "did not know what to do" during both attacks. It is clear that Stowers intended to have sexual intercourse with Diane and that, despite the fact that she told him to stop on both occasions, Diane became pregnant and miscarried. *See Gibbs*, 208 S.W.3d at 856. Furthermore, the Court in *Gibbs* seems to draw a distinction between the forcible compulsion

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[2] The statutory definition of "forcible compulsion" is the same for rape and sexual abuse.

concerning rape and forcible compulsion in the case of sexual abuse, specifically that "with rape and sodomy, both . . . require *some form of penetration*" while "only contact by force is required" to prove forcible compulsion with a sexual abuse charge. *Id.* at 856 (emphasis supplied). There is no argument that penetration did not occur—forensic testing determined that Stowers was the father of Diane's miscarried fetus with 99.99999% probability.[3]

As this Court recently emphasized in *Newcomb v. Commonwealth*, a subjective test must be applied when determining whether the victim felt threatened to engage in sex or feared harm from the attacker. 410 S.W.3d 63, 79 (Ky. 2013); *see also James v. Commonwealth*, 360 S.W.3d 189 (Ky. 2012), *Salsman v. Commonwealth*, 565 S.W.2d 638 (Ky. App. 1978). As a part of this subjective analysis, the jury is entitled to consider a wide range of factors in determining whether forcible compulsion by implicit threat has occurred. *Salsman*, 565 S.W.2d at 641-42. In *Newcomb*, we concluded that it was not unreasonable for a jury to conclude that the defendant had forcibly compelled the victim to engage in sexual intercourse based on the following evidence:

> According to the Commonwealth's proof, Newcomb appeared suddenly in Jennifer's home without invitation. Newcomb forced Jennifer to him and began kissing her neck. Jennifer rejected Newcomb's advances; but Newcomb ignored her objections, kept kissing her neck and said, "Don't push me away. You know you want me." Again, ignoring Jennifer's

[3] Dr. Rick Staub testified to performing DNA testing on the placenta recovered following Diane's miscarriage. Dr. Staub compared the DNA profile of the fetus to the DNA profiles of Diane and Stowers prepared by the Kentucky State Police forensic laboratory.

> protests, Newcomb unfastened her belt. When Jennifer re-fastened her belt, he unbuckled it again. Jennifer testified that she then submitted to Newcomb's sexual advances out of fear and shock at Newcomb's actions.

410 S.W.3d at 80.

Applying a subjective analysis to the instant case, we conclude that it was not unreasonable for the jury to find Stowers guilty of first-degree rape.[4] There is little doubt that, in viewing the evidence in the light most favorable to the Commonwealth, this was not only an unwelcome act, but one that was accomplished by means of forcible compulsion. The encounters are similar to those described in *Newcomb*: the perpetrator entered the victim's room at night uninvited, subjected her to unwanted sexual contact despite her verbal demands that he stop, and the victim "submitted to [the perpetrator's] sexual advances out of fear and shock." 410 S.W.3d at 80. According to trial testimony, Diane had little opportunity to object to Stowers presence when he first entered her bed, as she mistook his presence for that of her younger sister. She did, however, tell Stowers to "stop" three or four times, stating that she was "scared" and "did not know what to do." After each attack, Diane hid in her sister's room where she locked the doors and windows.

Stowers suggests that the fear Diane spoke of on the stand was actually a fear of her father and mother's reaction if she were to tell them about her encounters with Stowers. This assumption is based on Diane's interview with Tonya Hocker at the Child Advocacy Center. In that interview, Diane told Ms.

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[4] The jury received instructions on first-degree rape, incest and second-degree rape. The latter two charges do not require a finding of forcible compulsion.

Hocker that she did not tell her mother about the attacks because she was afraid she would get in trouble, and that her biological father was very strict. We disagree with Stowers's implication that Diane's interview statements prove a *lack* of forcible compulsion. Although Diane's interview statements concerning her fear of her mother and father tend to explain the delay in reporting the crime, they do not contradict her trial testimony. *See Miller*, 77 S.W.3d at 575 (the victim's fear of getting in trouble for engaging in sexual intercourse with the perpetrator was sufficient to explain the delay in reporting). Even if the interview statements and Diane's testimony *were* somehow contradictory in that sense, any perceived discrepancies between Diane s testimony and her interview with Ms. Hocker were matters of credibility to be weighed by the jury. *Garrett v. Commonwealth*, 48 S.W.3d 6, 10 (Ky. 2001). As established in *Benham*, a trial court is entitled to draw all fair and reasonable inferences in favor of the Commonwealth when ruling on a motion for a directed verdict. 816 S.W.2d at 187. Ultimately we agree that the inference that Diane was shocked and fearful of Stowers's sexual assault and penetration as the attack occurred based on her trial testimony was a "fair and reasonable" one. *Id.*

Finally, in *Miller*, the Court concluded that the forcible compulsion element of KRS 510.040(1) is not satisfied where the Commonwealth has failed to offer evidence of any threat against the victim, or proof that the victim submitted to the perpetrator out of fear. 77 S.W.3d at 575. Here, the Commonwealth offered Diane's testimony where she stated that she was afraid

and did not know what to do, and that she told Stowers to stop. The evidence was sufficient to induce a reasonable jury to find him guilty of rape in the first degree beyond a reasonable doubt. *Benham*, 816 S.W.2d at 187. There was no error.

II. A Witness's Statement That She Believed the Intercourse That Led to Diane's Pregnancy Was "Not Consensual" Did Not Improperly Bolster the Victim's Testimony.

Next, Stowers contends that a statement made during Nurse Melloan's testimony constituted inadmissible bolstering of Diane's truthfulness. Stowers asks that this Court analyze this unpreserved error for palpable error pursuant to Kentucky Rule of Criminal Procedure ("RCr") 10.26. Under our palpable error standard of review, "[a]n appellate court may consider an issue that was not preserved if it deems the error to be a palpable one which affected the defendant's substantial rights and resulted in manifest injustice." *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (*citing Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)).

Nurse Melloan testified that she was on duty in the emergency room on the night that Diane arrived complaining of heavy bleeding and abdominal cramping. After Diane submitted to various tests, the treating physician informed Melloan of Diane's positive pregnancy test and asked Melloan to speak to Diane. Melloan testified that she asked Diane if she had a boyfriend, and what kind of things they would do, to which Diane replied that they would "talk and watch movies." It was then that Melloan stated she "was pretty certain that this wasn't a consensual act," and asked Diane if "anyone had

[done] anything to [her] that they shouldn't have." Stowers challenges Melloan's opinion that Diane's pregnancy was the result of a non-consensual act, arguing that her opinion was improper as went to the ultimate issue of whether Stowers was guilty of rape by forcible compulsion. He further complains that Melloan's statement constituted improper bolstering of Diane's testimony.

We agree with the Commonwealth's assessment that Melloan's statement concerning a "consensual act" must be construed to mean that at that point in her conversation with Diane, Melloan had concluded that Diane's boyfriend had not impregnated her. This statement, when properly read in context of her entire testimony, does not run afoul of *Miller* because lack of consent and forcible compulsion are two different statutory elements. 77 S.W.3d at 575. Moreover, consent was immaterial to the jury's analysis, as Diane was thirteen at the time of the commission of the charged offenses. Therefore, consent was not an element to be considered.[5] We cannot conclude that Melloan's statement amounted to improper testimony concerning the ultimate issue of fact because the consensual nature of the act was not an issue of fact to be decided. *Mitchell v. Commonwealth*, 777 S.W.2d 930, 935 (Ky. 1989).

As for Stowers contention that the statement improperly bolstered Diane's testimony, it is well established that a witness may not vouch for the truthfulness of another witness. *Stringer v. Commonwealth*, 956 S.W.2d 883,

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[5] KRS 510.020(3)(a) provides that a "person is deemed incapable of consent when he or she is less than sixteen (16) years old."

888 (Ky. 1997) (*citing Hall v. Commonwealth*, 862 S.W.2d 321, 323 (Ky. 1993)). While a physician may give his or her opinion concerning medical diagnosis, experts are not permitted to offer an opinion as to the truthfulness of a witness's out-of-court statements based on the witness's demeanor. *See Hall*, 862 S.W.2d at 323. An example of this kind of improper bolstering is cited in *Hoff v. Commonwealth*, 394 S.W.3d 368 (Ky. 2011). In *Hoff*, a physician who treated the child victim of an alleged rape testified that he "had no reason not to believe" what the victim told him, reasoning that the child's explanation of the events was "within reasonable medical probability" of being an actual account of what had happened. *Id.* at 375. This Court determined that while the physician's testimony regarding his medical diagnosis was proper, his statement that he did not disbelieve the victim's story was improper bolstering culminating in palpable error. *Id.*

Unlike the *Hoff* witness's declaration, Melloan did not state that she believed Diane's account that Stowers raped her, but rather that in the course of her conversation with Diane in the E.R., she did not believe that Diane's pregnancy was the result of a consensual act with her boyfriend. In fact, Diane did not reveal that Stowers raped her until after Melloan asked about the boyfriend, and then if "anyone had [done] anything to [her] that they shouldn't have." The obvious inference of Melloan's challenged statement was that Diane was subjected to unwanted sexual intercourse. However, the statement does not rise to the level of the improper testimony in *Hoff* and was not palpable error. There was never a dispute that Stowers engaged in sexual intercourse

with Diane. The question of whether Diane consented, albeit an irrelevant one given her age, was never truly raised or challenged. Furthermore, Melloan did not comment on Diane's truthfulness, even in an implicit fashion. *Cf. Bell v. Commonwealth*, 245 S.W.3d 738, 744-45 (Ky. 2008) (*overruled on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008)) (a social worker's statement that a child's testimony seemed "spontaneous" and "unrehearsed" constituted implicit improper bolstering).

Finally, even if Melloan's one isolated statement could be deemed relevant to the "forcible compulsion" element of first-degree rape and improper bolstering of Diane's testimony, rendering its admission erroneous, it did not constitute palpable error. As noted, Melloan's brief statement regarding her "non-consensual" conclusion immediately followed questions pertaining to Diane's activities with her boyfriend and merely conveyed the nurse's conclusion that the pregnancy was not the result of consensual activity between the two teenagers. It did not relate directly to Stowers and, in short, did not affect his substantial rights and result in manifest injustice to him at trial. *See Barker*, 341 S.W.3d at 114.

III. The Commonwealth's Closing Argument Was Not Palpably Erroneous.

During the closing argument of the guilt phase of Stowers's trial, the prosecutor recounted how scared Diane was testifying before the court, stating that she was as scared on the stand as she was "going to the emergency room" and "going to Child Advocacy Center to be interviewed." The prosecutor then asked the jury to "put yourselves in the place of a twelve-year old child" adding

that "the fear must be unbelievable." Later, while discussing Diane's hospital treatment, the prosecutor asked the jury, "What was going through her head? Social workers, doctors, police workers—'What happened?' 'Tell us about this.' 'Tell us about that?'—as she was sitting there miscarrying." Stowers argues that the Commonwealth's closing argument improperly asked the jury to place themselves in the victim's position, constituted a prohibited "golden-rule argument" and resulted in substantial prejudice. Stowers asks this Court to analyze this unpreserved argument for palpable error under RCr 10.26.

A "golden-rule argument" is one in which a prosecutor asks the jurors to imagine themselves or a loved one in the position of the injured party or crime victim. BLACK'S LAW DICTIONARY (7th Ed. 1999); *see also Lycans v. Commonwealth*, 562 S.W.2d 303, 305-06 (Ky. 1978). This Court has held that a "golden-rule argument" that serves to "cajole or coerce a jury to reach a verdict" is erroneous. *Lycans*, 562 S.W.2d at 306. The argument is particularly prejudicial when it is "repeated and reiterated in colorful variety," whereas "[a]n isolated instance of improper argument, for example, will seldom be found prejudicial." *Stanley v. Ellegood*, 382 S.W.2d 572, 575 (Ky. 1964) (internal citations omitted). To that end, the prejudicial effect of a "golden-rule argument" must be assessed on a case-by-case basis. *Id.* at 575.

While counsel is afforded great leeway in making a closing argument, *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987), the prosecutor's first challenged statement to the jury is a classic example of the "golden-rule argument." The second comment, wherein the Commonwealth instructed the

jury to imagine "what was going through [Diane's] head" as she sat in the hospital fielding questions from police officers and doctors, implicitly invoked the "golden rule" in so far as it required the jury to place themselves in the victim's position in that moment in time. *See Dean v. Commonwealth*, 777 S.W.2d 900, 904 (Ky. 1989) (*overruled on other grounds by Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003)). Having determined that the prosecutor's remarks did indeed invoke the "golden-rule," we must now discern whether the comments prejudiced Stowers's substantial rights resulting in manifest injustice. In light of the evidence presented, we cannot say that the prosecutor's comments rose to the level of palpable error.

The challenged statements did not require the jury to imagine being subjected to the charged offenses, but rather to relate to the fear Diane experienced during her trip to the emergency room, and later during her interview with Ms. Hocker, as well as testifying before the court. In *Lycans v. Commonwealth*, the prosecutor made the following remark in his closing statement of a trial involving the brutal robbery of a store clerk: "They almost beat him to death and left his eye lying out on his cheek and left him laying there handcuffed, bleeding all over. Suppose that you run a store and somebody comes in on you and does that to you. What's it worth?" 562 S.W.2d at 305. Despite the erroneous nature of the statement, this Court concluded that the remarks did not significantly prejudice the defendant. *Id.* at 306. The *Lycans* statements, which graphically recalled the details of the crime itself, are clearly different from the prosecutor's request that the juror's

imagine Diane's fear in the aftermath of the alleged crimes. Furthermore, the prosecutor's delivery was far from "repeated and reiterated in colorful variety," as described in *Stanley v. Ellegood*, 382 S.W.2d at 575, but instead the bulk of the closing argument focused on the commission of the charged offenses and remained within the bounds of proper argument. The Commonwealth's evidence was substantial and largely uncontroverted. While the prosecutor's "golden-rule argument" was error we cannot say that it substantially affected Stowers's right to a fair trial.

CONCLUSION

For the reasons stated herein, we affirm the judgment of the Warren Circuit Court.

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

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