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RENDERED: JUNE 11, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000505-MR

DUSTIN DWAYNE FARRA — APPELLANT

V.

ON APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
NOS. 10-J-00050-005 AND 12-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

A jury found Dustin Dwayne Farra guilty of three counts of first degree sodomy involving his four-year-old nephew, Steven.[1] Following the jury verdict, the court sentenced Farra to thirty-five years' imprisonment on each count, with the terms to run concurrently for a total of thirty-five years. On appeal, Farra argues there was insufficient evidence to support the jury's verdict; the trial court erred when it did not exclude his confession, which was unlawfully obtained and not supported by corroborating evidence; the Commonwealth's witnesses vouched for and bolstered the victim; the Commonwealth's attorney engaged in flagrant misconduct; and the jury instructions deprived him of a unanimous verdict. For the following reasons, we affirm in part and reverse and remand in part.

[1] We have chosen a pseudonym to protect the identity of the victim.

I. BACKGROUND.

In 2011, Steven, who was then four-years old, lived with his mother (Andrea) and father. Steven often visited and spent the night with his paternal grandmother, Emily Farra (Emily), who lived in a two-bedroom trailer, with her husband, her mother, and Farra, who is her son. On August 1, 2011, Steven returned to his mother's and father's house after spending time at Emily's. Steven complained of being constipated, and his parents administered a suppository. When the suppository was inserted, Steven got an erection, which concerned his parents. Andrea testified that she asked Steven why he got an erection and he "acted uncomfortable." She then asked Steven if anyone had touched his penis or anus and told him that she loved him and no one would hurt him ever again. Andrea testified that she then contacted social services, after which she was contacted and interviewed by Trooper Glenn Reed from the Kentucky State Police.

On August 4, 2011, Andrea took Steven to the Whitehouse Clinic, where she reported her concerns that Steven had been sexually abused to Dr. Alycia Walty. Dr. Walty performed an examination, which revealed some ongoing constipation and a skin tag and non-specific redness around Steven's anus. Dr. Walty explained to Andrea, who she described as "very upset," that a "rape kit" could not be performed because too much time had elapsed between the alleged abuse and the examination. Following her examination, Dr. Walty recommended counseling for both Steven and Andrea and reported the suspected sexual abuse to social services.

As part of his investigation, Trooper Reed interviewed Andrea, obtained medical records, and requested that social services schedule a forensic interview of Steven at the Cumberland Valley Children's Advocacy Center. Tracy Miller, a forensic interviewer at the Advocacy Center, interviewed Steven on August 29, 2011 and September 19, 2011. Based on what he learned from his contact with Andrea and his observation of the forensic interviews, Trooper Reed enlisted the assistance of KSP Detective Joey Peters. On November 14, 2011, the two officers interviewed Farra at Jackson County High School where he was a student. During that interview, Farra confessed. The officers subsequently arrested Farra and a grand jury indicted him on four counts of first-degree sodomy. As noted above, a jury found Farra guilty of three of the four counts and the court entered a judgment consistent with the jury's verdict. Farra filed a motion for a new trial and a motion for a judgment of acquittal, both of which the court denied. We set forth additional facts as necessary below.

II. ANALYSIS.

As noted above, Farra raises a number of issues on appeal. We address each separately below.

A. The District Court Did Not Err in Transferring Farra's Case to Circuit Court.

On February 13, 2012, the district court conducted an evidentiary hearing to determine if Farra's case should be transferred to circuit court. Prior to taking any evidence, the judge stated that she had received a report from the juvenile detention center. That report indicated that Farra was "calm,

polite, and cooperative" and his behavior was "good" and met the expectations of the facility and staff.

The Commonwealth then called Trooper Reed, who testified that he had received a complaint from social services regarding allegations of sexual abuse. He then interviewed the victim's mother, and, after conducting further investigation, he and Detective Peters interviewed Farra at his school. Trooper Reed testified that, during the interview, Farra admitted that he: had put his penis in the victim's anus on two different occasions; had put his penis in the victim's mouth on one occasion; and may have put his finger in the victim's anus on one occasion. Farra also admitted that he had ejaculated in the victim's mouth. Trooper Reed also testified that he had observed two forensic interviews of the victim, and the victim's statements were consistent with Farra's. Following these interviews, Farra was charged with three counts of sodomy and one count of sexual abuse.

Farra then presented testimony from Darla Perdue (Perdue), a psychologist with the Department of Juvenile Justice (the Department), and Melissa Bundy (Bundy), a juvenile services clinician with the Department. Perdue testified that the Department provides a number of treatment modalities to juvenile sex offenders ranging from community based to residential. Because Farra was charged with sex offenses, any treatment would not automatically end at age 18, and he would have the benefit of a full three years of treatment.

Perdue also testified that, generally, a 17-year old is not as emotionally, intellectually, or socially developed as an adult and lacks the full complement of adult decision making abilities. When asked about the likelihood that Farra would re-offend, Perdue testified that she could not reach any conclusions about Farra specifically because she had not conducted an individual assessment of Farra. However, she stated that generally the recidivism rate for juvenile sex offenders is in the five to ten percent range. On cross-examination, Perdue admitted that certain risk factors may increase the odds of recidivism, including a significant age gap between the victim and the perpetrator, the number of offenses involved, and whether there was evidence of planning before the offenses.

Bundy testified she had been supervising Farra during his probation for unrelated burglary and theft charges. According to Bundy, Farra had been cooperative with the conditions of his probation; however, she noted she had only been supervising him for a few weeks before the sodomy and sexual abuse charges were brought.

Following the hearing, the district court judge found there was probable cause to believe Farra committed the charged offenses and those offenses made Farra's case subject to transfer to circuit court. The judge then recited the statutory factors she was required to consider before effectuating that transfer, stated that she had considered those factors, and found as follows:

> Given the seriousness of the alleged offense, given the alleged victim of the offense, his age, his relationship to the juvenile in question, given the age of this juvenile at the time that he committed this offense and his maturity, also given the juvenile's

prior record, the best interest of the community and for the protection of the public, all favor a transfer of this case to circuit court.

Farra argues the district court judge erred because there was not sufficient evidence of substance to support her decision and because she did not give sufficient reasons to support that decision. We disagree.

Whether to transfer a child to circuit court is left to the sound discretion of the juvenile court; however, that discretion is not unbridled, being constrained by KRS 640.010(2). *See Pevlor v. Com.*, 638 S.W.2d 272, 274 (Ky. 1982).[2] KRS 640.010(2) provides that, once the juvenile court has determined that probable cause exists that the offense was committed, it must consider the following eight factors before transferring a juvenile case to circuit court:

1. The seriousness of the alleged offense;

2. Whether the offense was against persons or property, with greater weight being given to offenses against persons;

3. The maturity of the child as determined by his environment;

4. The child's prior record;

5. The best interest of the child and community;

6. The prospects of adequate protection of the public;

7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system; and

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[2] In *Pevlor*, this Court stated that a juvenile court's discretion was constrained by KRS 208.170, which was the 1982 equivalent of KRS 640.010(2). The difference between the two statutes is that KRS 640.010(2) contains two factors that KRS 208.170 did not. The addition of those factors - "The best interest of the child and community" and "Evidence of a child's participation in a gang" - is irrelevant to our standard of review.

8. Evidence of a child's participation in a gang.

If, after a hearing, the district court finds two or more of the above factors favor transfer, then it may transfer the case to circuit court.

Farra concedes the offenses were serious; they were against a person, not property; and he had a prior record. Thus, he concedes that two or more of the KRS 640.010(2) factors favored transfer. Although that concession would seem to put an end to the issue, Farra argues that the evidence he presented regarding the other five applicable factors (the parties agree that gang membership is not an issue) outweighs those three factors. We disagree.

Initially, we note that there was evidence of substance from which the district court could have inferred the other factors weighed against Farra. As noted, Bundy testified Farra had been cooperative with probation, and the court had a report from the detention facility regarding Farra's overall good attitude and behavior. The court reasonably could have inferred from that evidence that Farra was mature. Furthermore, based on the testimony from Perdue, Farra had several risk factors for re-offending - he planned his abuse, he abused Steven on more than one occasion, and there is a significant age difference between Farra and Steven. The court could have inferred from that evidence that it was in Farra's and the community's best interest and it was necessary for the protection of the community for Farra to be tried in circuit court. The court could also have inferred that, although rehabilitation services would be available to Farra through the juvenile justice system, he would not necessarily benefit from those services.

Farra also argues the district court's transfer order was erroneous because the court simply recited the factors without setting forth in any detail its reasoning. In support of his position, Farra cites to *Harden v. Commonwealth*, 885 S.W.2d 323 (Ky. App. 1994). In *Harden*, the juvenile court found that transfer to circuit court was appropriate because of the nature and seriousness of the offense and the fact that the offense was committed against a person. The court did not mention the remaining factors. *Id.* at 325. The Court of Appeals found the juvenile court's order wanting because it "neglect[ed] to mention the remaining factors." *Id.* The Court went on to hold that:

> [T]he statement [in support of transfer] need not be formal or include conventional findings of fact . . .
>
> "But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review."

Id. quoting Kent v. United States, 383 U.S. 541, 561 (1966).

Harden is easily distinguished. Unlike the juvenile court judge in *Harden*, the district court judge herein specifically stated that she had considered all of the factors before making the determination to transfer. Furthermore, although the judge's order might have included more conventional findings of fact, it was not devoid of such findings. The judge specifically cited to Steven's and Farra's ages, which testimony indicated were factors that increase the rate of recidivism and, by implication, decrease the

likelihood of successful rehabilitation. Furthermore, the judge cited to the seriousness of the alleged offenses against a person, which no one disputed, and to Farra's prior record. As we held in *Osborne v. Commonwealth*, 43 S.W.3d 234, 239 (Ky. 2001), a transfer order that recites all of the factors and sets forth the factors that favor transfer "satisfie[s] the requirements of the statute." *Id.* The district court's order met those requirements; therefore, we discern no error in its determination to transfer Farra's case to circuit court and no fatal deficiency in its order effectuating that transfer.

B. The Circuit Court's Denial of Farra's Motion to Suppress Was Not Erroneous.

On November 14, 2011, Trooper Reed and Detective Peters interviewed Farra in the counselor's office at his high school. During the interview, Farra confessed to sexually abusing and sodomizing Steven. Prior to trial, Farra moved to suppress his confession.

At the suppression hearing, the officers testified that Trooper Reed advised Farra of his rights and obtained a signed acknowledgement that Farra knew and was waiving his rights. Detective Peters testified he advised Farra he was not under arrest and was free to leave at any time. According to the officers, Farra broke into tears during the interview and admitted he had sexually abused and sodomized Steven. After obtaining those admissions, Trooper Reed recorded a confession from Farra. At the beginning of the recording, Farra stated he had been advised of his rights. At the end of the recording, Farra stated that he knew he was not under arrest; he had been

advised he was free to leave; he had spoken of his own free will; and no threats or promises had been made.

Farra testified at the suppression hearing that he thought he was not free to leave and that Trooper Reed threatened him with arrest if he did not confess. Furthermore, Farra testified that he was afraid because one of the terms of his probation on the burglary and theft charges was to stay out of trouble in school. However, Farra admitted this was not the first time he had been questioned by the police; he had been advised of his rights; and he knew he had the right to remain silent.

The circuit court denied Farra's motion, stating that "the Commonwealth presented a reasonable police interview." However, the court did not directly address whether Farra was in custody.

On appeal, Farra argues the circuit court erred in not suppressing his confession because the interview was custodial; the officers did not properly advise him of his rights or obtain a valid waiver of those rights; the officers did not contact his parents when they took him into custody; and his confession was coerced. The Commonwealth argues Farra did not properly preserve the issues regarding custody and waiver, and the interview was voluntary and not coercive. We address each issue below.

First, we address the Commonwealth's argument regarding preservation. As the Commonwealth notes, there are two pages missing from Farra's motion to suppress. However, the record contains testimony regarding Farra's waiver

of his rights and whether Farra was in custody at the time. Therefore, the issues of custody and waiver were sufficiently raised before the trial court.

The Commonwealth also argues the circuit court did not specifically rule on the issues of waiver and custody, and Farra's failure to seek modification of the court's order under Kentucky Rule of Civil Procedure (CR) 52.04 bars review of those issues. We disagree.

CR 52.04 states that "[a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact . . . unless such failure is brought to the attention of the trial court . . . pursuant to Rule 52.02." The trial court's order denying Farra's motion was not a final judgment; therefore, CR 52.04 is not applicable. Furthermore, CR 52.01 provides that "[r]equests for findings are not necessary for purposes of review except as provided in Rule 52.04." Therefore, while it would have been better if Farra had sought additional findings from the trial court regarding the issues of custody and waiver, he was not required to do so in order to preserve those issues.

Second, we address whether Farra was in custody when the officers interrogated him, because the obligations to advise Farra of his rights and to notify his parents are directly tied to the issue of custody. We recently addressed custodial interrogation of a minor in *N.C. v. Commonwealth,* 396 S.W.3d 852 (Ky. 2013) *cert. denied sub nom. Kentucky v. N.C.,* 134 S. Ct. 303, 187 L. Ed. 2d 154 (2013). In *N.C.*, we cited to *J.D.B. v. North Carolina,* --- U.S. ---, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) for the proposition that "the

custody question must be answered by an objective inquiry: [under] the circumstances, would a reasonable person believe he could terminate the interrogation and leave?" *N.C.* 396 S.W.3d at 861. In making that determination, we look to "all relevant circumstances" and, in cases involving juveniles, the age of the minor "could carry increased weight." *Id.*

In *N.C.*, we held that the minor was in custody and should have been advised of his rights before he was subjected to interrogation. In determining N.C. was in custody, we noted that: he was questioned at school by the assistant principal and a school resource officer, in the assistant principal's office behind closed doors; neither the assistant principal nor the school resource officer advised N.C. he was free to leave; the assistant principal testified that he expected N.C. to stay; no one contacted N.C.'s mother prior to questioning; the assistant principal conducted the initial questioning, leading N.C. to believe he was being questioned about a school discipline matter, not a criminal matter; and, N.C. was not advised that he faced criminal charges until after he had confessed. *Id.* at 862. Under those circumstances, we held that "[n]o reasonable student, even the vast majority of seventeen year olds, would have believed that he was at liberty to remain silent, or to leave, or that he was even admitting to criminal responsibility . . . " *Id.*

Applying the all relevant circumstances test herein, we conclude that Farra was not in custody. Like N.C., Farra was called to the principal's office from class and interrogated at his high school. However, unlike in *N.C.,* no school officials participated in the interrogation. Furthermore, unlike in *N.C.*,

the interrogating officers advised Farra of his rights, obtained Farra's signature on a document indicating that his rights had been explained to him, and advised Farra that he was not under arrest. Based on his past experience with the criminal justice system and the fact that no school officials participated in Farra's questioning, there is little doubt that Farra knew that he was not being questioned about a school discipline matter. Furthermore, although disputed, there was evidence Farra had been advised he could leave whenever he wanted to do so.

In light of the preceding, and noting in particular Farra's admissions that he had been advised of his rights; he knew he was not under arrest; he knew he had the right to remain silent; and he was more than seventeen years of age, we hold that Farra was not in custody.

We next address whether the officers adequately advised Farra of his rights and whether Farra voluntarily waived those rights. Before beginning that analysis, we note that, because Farra was not in custody, the officers did not have an obligation to advise Farra of his rights or to obtain a waiver of those rights. *See N.C.* 396 S.W. 3d at 855. Nonetheless, we briefly address this issue.

Farra argues he did not actually waive his rights; he was not fully informed of his rights; and he was coerced into waiving his rights. As to whether he actually waived his rights, Farra notes that the waiver card contains a list of rights and two questions - "Do you understand each of these rights I have explained to you?" and "With these rights in mind, do you wish to

give a statement?" Next to each question is a blank line. Farra wrote "yes" and placed his initials next to the first question but left the second question blank. Despite leaving the line next to the second question blank, Farra submitted to the interview. Furthermore, at the end of the recorded interview, Farra stated that he had spoken to the officers of his own free will. Therefore, his argument that he did not actually waive his rights is without merit.

In support of his argument that he did not understand his rights, Farra states that, as a minor, he could not have understood the statement "[a]nything you say can and will be used against you" meant that his statements could be used in a criminal proceeding. However, as the trial court noted, Farra was "a 17 year old familiar with not obeying the law [or] the school. [Farra's] previous encounters with the law included everything from simple violations to abusing school personnel to retaliating against others involved in legal proceedings to more serious charges that could have placed [him in] an adult prison." Based on his extensive experience with the criminal justice system, Farra's argument that he would have been confused by the language on the waiver form is not persuasive.

As to coercion of the waiver of his rights, Farra points to his testimony that Trooper Reed threatened to send him to jail for the rest of his life if he did not confess, a threat that Farra also uses to support his claim that the officers coerced him to confess. The problem with this argument is that both officers testified that Trooper Reed explained Farra's rights to him and obtained Farra's signature on the waiver of rights card before they began questioning him and

before Farra began answering their questions. Thus this threat, to the extent it was made, came after Farra had already waived his rights and could not have coerced him into doing something he had already done.

Next we address Farra's argument that the officers should have contacted his parents. KRS 610.200(1) provides that an officer must notify a child's parent immediately upon taking the child into custody. Farra argues that the officers failed to do so and, because of that failure, his confession should have been suppressed. However, as set forth above, Farra was not in custody; therefore, the officers were not obligated to notify Farra's parents.

Finally, we address whether the officers coerced Farra into confessing. At the trial court level, the Commonwealth bears the burden of proving that a confession was voluntary. A trial court's conclusion that a confession was voluntary is conclusive if it is supported by substantial evidence. *Bailey v. Com.*, 194 S.W.3d 296, 300 (Ky. 2006).

As noted above, the trial court denied Farra's motion to suppress. In doing so, the trial court found that Farra is "a mature young man . . . [who] is [not] easily intimidated and is well aware of law enforcement and the court system . . . [Farra] appeared to be larger than the Trooper and substantially more stout than either officer . . . [and] was cooperative and had obviously been previously questioned by law enforcement officials." The court then noted the Court of Appeals holding in *Commonwealth v. Bell,* 365 S.W. 3d 216 (Ky. App. 2012) that schools are an inherently coercive environment. However, the court concluded *Bell* was not dispositive because of Farra's age and familiarity with

the justice system. Furthermore, the court concluded that Farra "was not a coerced little boy but a young man who [was] holding himself accountable for his activities or simply assuming he would be probated, again. . . . [T]he Commonwealth presented a reasonable police interview that resulted in a confession that was not coerced by the police. . . ."

In support of his argument that his confession was coerced, Farra cites to his testimony that Trooper Reed threatened him. He also argues that he was crying when Trooper Reed finally began recording his statement, which is indicative of coercion; the officers did not record nearly fifteen minutes of conversation, which is "highly suspicious;" the officers used the "classic Reid Technique;" the officers consciously chose to question him at school, an inherently coercive environment; he was only 17 years old at the time; and the officers did not contact his parents so that an adult could be with him when questioned. The Commonwealth argues there was nothing coercive about the interrogation and that Farra is asking this Court to engage in fact finding.

> This Court has succinctly summarized the relevant inquiry to determine voluntariness as follows: "(1) whether the police activity was 'objectively coercive'; (2) whether the coercion overbore the will of the defendant; and (3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession."

Bailey v. Com., 194 S.W.3d 296, 300-01 (Ky. 2006)(*citing Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999). Determining whether the trial court erred in finding that a confession was voluntary is a mixed question of law and fact. If the trial court's conclusion is supported by substantial evidence, it is conclusive. *Henson*, 20 S.W.3d at 469.

Farra is correct that he testified that Trooper Reed threatened him. However, in his recorded statement, Farra stated he had not been threatened. The trial court was free to believe, and apparently did believe, that no such threat was made and Farra's own statement was evidence of substance sufficient to support that finding.

Certainly, the trial court could have concluded that Farra's apparent tearful confession was the result of coercion. However, the court could, and did, conclude that was not the case. As Detective Peters stated, "At first [Farra] tried to deny - started to deny - it but I interjected and told him that I knew it had happened and I knew he really didn't want it to happen again and he started to cry and just came forward with it." There is nothing objectively coercive in Detective Peters's statement about the course of the interview. In fact, Detective Peters characterized the interview as "not difficult."

Farra's argument that the initial portion of the interview, which was not recorded, is "highly suspicious" is speculation. The trial court could have inferred the lack of a recording showed misconduct by the police; however, it also could have inferred otherwise. The trial judge was in the best position to judge the credibility of the officers and Farra and the credibility of their testimony about what occurred in that unrecorded time span. *Id.* The trial court chose to believe that nothing unduly coercive occurred, and we will not reverse on appeal the court's determination based on that choice.

As to the "classic Reid Technique," Farra did not put anything in the record before the trial court regarding this technique. Therefore, we need not address it.

As to Farra's remaining arguments, the trial court addressed Farra's age and the school environment in its order, implicitly finding neither to be indicative of coercion, a finding supported by the evidence. Furthermore, as we noted above, Farra was not in custody, and the police were not required to contact his parents.

Therefore, based on the preceding, we discern no error in the trial court's denial of Farra's motion to suppress.

C. The Trial Court Did Not Err When It Denied Farra's Motion For Directed Verdict.

At trial, Farra moved for a directed verdict arguing that his confession should not have been admitted into evidence because there was no corroborating evidence to support it. Furthermore, Farra argued that, absent his confession, there was not sufficient evidence to support conviction under any of the counts in the indictment. On appeal, Farra continues to make those arguments. The Commonwealth argues there was sufficient corroborating evidence to support use of Farra's confession.

"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).

Pursuant to Kentucky Rule of Criminal Procedure (RCr) 9.60, "A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed." As the United States Sixth Circuit Court of Appeals stated in *United States v. Ramirez*, "The purpose of this rule is to avoid errors in convictions based upon untrue confessions and to promote sound law enforcement by requiring police investigations to extend their efforts beyond the words of the accused. This rule also ensures that an appropriate investigation is done prior to prosecution." 635 F.3d 249, 256 (6th Cir. 2011) (citations omitted). The required proof "relates only to proof that a crime was committed, not to whether the defendant committed it." *Lofthouse v. Commonwealth*, 13 S.W.3d 236, 242 (Ky. 2000). Furthermore, the proof may be considered in conjunction with the confession to establish the commission of the crime. *Young v. Commonwealth*, 426 S.W.3d 577, 583 (Ky. 2014).

Other than Farra's confession, the Commonwealth presented the following evidence that Steven had been sexually abused. Andrea testified that Steven was constipated after returning home from visiting Emily's; therefore, she gave him a suppository. When Steven "acted funny" and got an erection while receiving the suppository, Andrea became concerned about her son and asked Steven if anyone had touched him on his penis or anus. After hearing Steven's response, Andrea hugged him and told him no one would ever hurt

him again. Following this, Andrea contacted social services and the local police and ultimately took Steven to be examined by Dr. Walty and to be interviewed by Tracy Miller.

Dr. Walty testified that she found no evidence of trauma but that constipation could be a sign of sexual abuse. Additionally, Miller testified that she only works with sexually abused children and that she conducted two forensic interviews with Steven. During those interviews Steven made disclosures, which Miller was not permitted to reveal to the jury. However, Miller testified that Steven was able to understand her and to communicate. Miller did not conduct any additional interviews, implying that Steven's statements had been consistent.

Trooper Reed testified that, after he was assigned this case on August 1, 2011, he contacted Andrea and someone with the department of social services to schedule a forensic interview. He then observed the two interviews Miller conducted and testified that Steven's statements were consistent. Trooper Reed then went with Detective Peters to interview Farra at Farra's high school.

The preceding evidence was sufficient other proof that Farra committed the offenses. Furthermore, the police did not simply rely on Farra's confession. Before questioning Farra, Trooper Reed conducted an appropriate investigation, which included contacting Andrea and scheduling two forensic interviews for Steven with Miller. Trooper Reed observed those interviews. Thus Trooper Reed's actions were consistent with the objectives of the rule. Finally, in conjunction with Farra's confession, wherein he admitted in detail to

sexually abusing and to orally and anally sodomizing Steven, the other proof was sufficient for a reasonable juror to find guilt. *Benham*, 816 S.W.2d at 187. Therefore, the trial court did not err when it denied Farra's motion for a directed verdict.

D. The Commonwealth Did Not Impermissibly Bolster or Vouch For Steven.

As part of the investigation into the allegations of sexual abuse, Steven underwent two forensic interviews with Tracy Miller at the Cumberland Valley Children's Advocacy Center. Prior to trial, Farra filed several motions in *limine* to exclude those forensic interviews; to prohibit Miller from offering any opinions about whether abuse occurred or who committed any abuse; and to prohibit the introduction of any "investigative hearsay." The court granted those motions.[3]

During trial, Trooper Reed testified that two forensic interviews were conducted to determine if Steven's statements were consistent. He stated that no further interviews were needed because Steven's statements were consistent. Farra did not object to this testimony. However, prior to Miller's testimony, Farra argued that Trooper Reed's testimony about consistency had been inappropriate, given the fact that Steven had been deemed incompetent to testify at trial. Farra then moved to exclude any testimony from Miller about the consistency of Steven's statements, arguing that such testimony would be

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[3] We note that there is no written order disposing of the motions in the record. However, the Commonwealth does not dispute Farra's assertion that the court granted his motions.

based on hearsay. The court overruled the motion noting that testimony about the consistency of Steven's statements was not hearsay.

Miller testified that she often conducts two or more interviews with young children, in pertinent part, to verify the consistency of any disclosures the child makes. Because Steven made disclosures to her during the first interview, Miller conducted a second, in which Steven again made disclosures. Based on those interviews, Miller did not feel the need to conduct a third interview. Neither Miller nor Trooper Reed testified about what Steven actually disclosed.

On appeal, Farra argues that the testimony from Trooper Reed and Miller about consistency impermissibly bolstered Steven. We disagree for seven reasons.

First, as the Commonwealth notes in its brief, Farra argued at trial that Trooper Reed's testimony and the anticipated testimony from Miller were based on impermissible hearsay. That is not the argument Farra makes here. "[A]n appellant preserves for appellate review only those issues fairly brought to the attention of the trial court." *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012).

Second, although Farra uses them interchangeably, bolstering and vouching are different conceptually. Bolstering generally has to do with enhancing the validity of evidence or testimony by putting on other consistent evidence or testimony while vouching has to do with one witness, or a party's attorney, making assurances that another witness has been truthful. Despite their differences, both have a seminal requirement, a witness to be vouched for

or evidence to be bolstered. Because Steven did not testify and there was no evidence produced regarding what allegations Steven made, there was no witness to be vouched for and no evidence to be bolstered.

Third, the cases cited by Farra are easily distinguished. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006) involved police officers testifying about what Brewer's codefendants and other suspects had said. No witness in this trial testified about what Steven said. *Young v. Commonwealth*, 50 S.W.3d 148, 166 (Ky. 2001) involved an officer testifying about the description he received from a witness who was unavailable to testify at trial. Like the witness in *Young*, Steven was unavailable to testify at trial; however, no one testified about what Steven said. In *Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky. 1995), a police officer testified that he took a woman into protective custody because she stated that Daniel had raped her. Again, no one at trial testified about what Steven said. In *Bussey v. Commonwealth*, 797 S.W.2d 483, 486 (Ky. 1990) the question before the jury was whether to believe the victim or the perpetrator and his brothers. A police officer testified that he believed the victim because "there had to have been some type of misconduct[,] or I would not have received a complaint." *Id.* at 485. Because Steven did not testify, this was not, like *Bussey*, a "he said, she said" case. Furthermore, no one directly testified as to Steven's credibility. In *Harp v. Commonwealth*, 266 S.W.3d 813, 824 (Ky. 2008) two witnesses arguably indirectly vouched for the credibility of the victim, who had testified at trial. Here, Steven did not testify, and no one told the jury what allegations Steven made or anything that Steven said. In

Bell v. Commonwealth, 245 S.W.3d 738, 740 (Ky. 2008), *as modified (Mar. 13, 2008) overruled by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008) the victim testified and two other witnesses vouched for her credibility. Again, Steven did not testify, no one directly vouched for his credibility, and no one testified about the allegations Steven made.

Fourth, as the Commonwealth notes, Trooper Reed only testified that Steven's two interviews were consistent with each other and that he took additional investigative steps thereafter. He did not testify whether he believed Steven, whether Steven's allegations were otherwise verified, or whether Steven's statements were consistent with Farra's confession.

Fifth, Miller testified she conducted more than one interview with young children, in part, to determine if the children were being consistent. She did not testify that she did so to determine if the children were being truthful.

Sixth, Miller testified that she believed two interviews with Steven were sufficient. However, she did not testify why she held that belief nor did she testify whether she found Steven to be truthful.

Finally, the jury could have inferred from the testimony of Trooper Reed and Miller that Steven was telling the truth about what Farra did to him. However, because there was no evidence about what Steven said, the jury could not have determined what allegations Steven made, or whether those allegations were consistent with Farra's confession.

Therefore, we conclude that the testimony of Trooper Reed and Miller did not constitute improper bolstering or vouching.

E. The Commonwealth's Cross-Examination of Farra Did Not Impede His Right to a Fair Trial.

Farra argues that the conduct of the Commonwealth's attorney was so flagrantly egregious that it acted to deprive him of a fair trial. This issue was not preserved at trial; therefore, we review it for palpable error or manifest injustice "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); RCr 10.26. To determine if the Commonwealth's conduct rose to that level, we consider four factors:

> (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.

Mayo v. Com., 322 S.W.3d 41, 56 (Ky. 2010).

Farra complains about the following portions of the Commonwealth's cross-examination:

> Commonwealth: You want us to believe today that you just made up all that stuff on the spur of the moment so you could go home?
>
> Farra: Yes, sir.
>
> Commonwealth: Doesn't make any sense to me.
>
> Farra; I'm sorry, sir.
>
> Commonwealth: In fact, I don't think anybody is going to go around admitting to those types of crimes, unless they did it, because they're that serious, aren't they?
>
> Farra: Yes, sir. They're serious.
>
> Commonwealth: You know they're serious crimes.
>
> Farra: Yes, sir.

Commonwealth: And, in fact, the person who admits to those types of crimes is labeled as a pervert, child molester.

Farra: Yes, sir.

Commonwealth: It's just like if you took a hot brand, and branded a big "P" on your forehead, that you'll wear around the rest of your life for those types of crimes, now you understood that back in 2011, didn't you?

Farra: Not to the full extent. No sir, I didn't know - I didn't understand everything to the - that I do now, if I knowed what I knowed now that I did then, I wouldn't have admitted to nothin'. I would have took my chances and let them bring me to jail, because I mean, I mean, in all honesty I . . .

. . .

Commonwealth: You told Trooper Reed and Detective Peters four separate times that you did something to [Steven].

Farra: Yes, sir.

Commonwealth: And you want us to believe today that you made that up on the spur of the moment so you could go home that day?

Farra: Yes, sir, I do.

Commonwealth: Doesn't make any sense to me.

Farra: I am sorry, sir, but it's the truth, sir. I mean, it kills my (inaudible) on it, you know, that I even admitted to doing something like that when I know good and well I didn't. And, I mean, I don't see, I mean if I wanted to ruin my life, sir, I wouldn't take it out on nobody innocent, especially an innocent child. I would not do that.

Commonwealth: One of the jurors today said he wasn't going to admit to anything he didn't do, and you admitted to it, and that's your voice on that tape.

Farra: Yes, sir.

Commonwealth: And the only thing you're trying to come up with today is to tell us that you wanted to go home that day and that's why you told all this.

Farra: Yes, sir, because Trooper Reed made the statement that I told him I did that, I'd get to go home, I wasn't going to jail.

According to Farra, the Commonwealth's questioning on cross-examination "was fraught with misconduct" such as including repeated statements of the attorney's personal opinion and citing to what a potential juror had said in *voir dire*. The Commonwealth, while admitting that some of the questions may have been objectionable, notes that similar statements made in closing argument would not rise to the level of flagrant misconduct. Furthermore, the Commonwealth notes that, as far as can be discerned from the record, the juror referred to by counsel had been peremptorily stricken by Farra's counsel. Finally, the Commonwealth argues that any error was not palpable. We agree with Farra that the Commonwealth's questions were improper; however, applying the four factor test from *Mayo*, we hold that their impropriety did not rise to the level of palpable error.

First, while we grant a prosecutor wide latitude in cross-examining witnesses, that latitude is not limitless. *See Caudill v. Commonwealth*, 374. S.W.3d 301, 309 (Ky. 2012). When the Commonwealth's attorney stated that Farra's reason for confessing "doesn't make sense to me," the prosecutor crossed that line. *Id.* at 311. (Prosecutor reciting his personal views of appropriate neighborly behavior crossed the line between questioning and testifying and was therefore improper.)

Second, a prosecutor "must stay within the record." *Id.* (*quoting Whitaker v. Commonwealth,* 298 Ky. 442, 183 S.W.2d 18 (1944)). The prosecutor's reference to what a potential juror said during *voir dire* went outside the evidentiary record and was also improper.

Having determined that the prosecutor's questioning of Farra was, in part, improper, we must determine if that impropriety rose to the level of flagrant misconduct and amounted to palpable error. The prosecutor's questions and comments were prejudicial to Farra, as are most questions and comments by a prosecutor during the course of trial. However, we do not believe that the prosecutor's questions and comments misled the jury, as Farra's motivation for confessing was a legitimate issue the jury was going to be charged with resolving. Therefore, the first *Mayo* factor does not weigh in favor of or against either party.

The prosecutor's cross-examination of Farra lasted approximately five minutes, with the now objected to portions taking up approximately two of those minutes. The trial took less than one day. Therefore, the prosecutor's statements were extensive within the course of cross-examination but isolated and minimal within the context of the entire trial. Therefore, the second *Mayo* factor does not weigh in favor of or against either party.

As to the third *Mayo* factor, the prosecutor's actions were not accidental but deliberate. The prosecutor did not accidentally state his incredulity about Farra's confession once, he repeated it several times. Furthermore, the

prosecutor used the example of the potential juror's comment in *voir dire* to buttress his incredulity. Therefore, this factor weighs in favor of Farra.

As to the fourth *Mayo* factor, the evidence against Farra was clearly significant. Farra confessed to the offenses and, in doing so, provided significant details regarding the events. Therefore, this factor strongly favors the Commonwealth.

In light of the above, we hold that, although the prosecutor's questioning of Farra was improper, it did not rise to the level of palpable error.

F. The Jury Instructions as to Two of the Charges Were Erroneous and Deprived Farra of a Unanimous Verdict.

The court instructed the jury on four counts of sodomy in the first degree. The first instruction involved Farra's insertion of his penis into Steven's mouth, the second and third instructions involved Farra's insertion of his penis into Steven's anus, and the fourth instruction involved Farra's insertion of his finger into Steven's anus. The jury found Farra guilty of the first three counts but acquitted him on the fourth count. On appeal, Farra argues that the instructions on counts two and three violated his right to a unanimous verdict on those counts. The instruction for count two reads as follows:

> You will find the Defendant guilty of First-Degree Sodomy under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about a period of time July 15 to August 4, 2011, and before the finding of the Indictment herein, he engaged in deviate sexual intercourse with [Steven] when he inserted his penis into the annus [sic] of [Steven];

AND

B. That at the time of such intercourse, [Steven] was less than 12 years of age.

The instruction for count three was exactly the same. Farra argues that these identical instructions deprived him of a unanimous verdict on counts one and two. The Commonwealth, although arguing that we should adopt the view of the dissent, concedes that, under this Court's holding in *Ordway v. Commonwealth*, 352 S.W.3d 584 (Ky. 2011), the giving of such instructions constitutes palpable error. However, the Commonwealth notes that the remedy is not reversal on all counts but reversal on only the defectively instructed counts. We agree with this latter argument by the Commonwealth.

In *Banks v. Commonwealth*, 313 S.W.3d 567 (Ky. 2010), Banks was charged with a number of counts of sodomy, incest, and sexual abuse of his two daughters. *Id.* at 569. The jury convicted Banks on a number of those counts. *Id.* at 570. On appeal, Banks argued that the instructions on the sodomy counts were not sufficiently differentiated, thereby violating his right to a unanimous verdict. *Id.* at 571-72. The Court determined that two of the sodomy instructions were potentially flawed. The first required the jury to find that Banks engaged in certain activity on a specific date, and the second required the jury to find that Banks engaged in the same activity within a date range that encompassed the specific date. The Court determined the first instruction was acceptable because it contained a specific date. However, the second instruction was faulty because the jury could have believed that the

activity that occurred on the specific date was the same activity referred to in the instructions containing the range of dates. Therefore, the Court reversed Banks's conviction under the second instruction but affirmed his conviction under the first instruction as well as his convictions under the unchallenged instructions.

The jury found Farra guilty on the charge of oral sodomy under an instruction that Farra has not challenged. Furthermore, only one incident of oral sodomy was placed before the jury. Therefore, the jury could not have been confused about which incident constituted oral sodomy, and we affirm that conviction. However, we reverse Farra's anal sodomy convictions under instructions two and three because the instructions were not sufficiently different to determine whether the jury verdict was unanimous under either instruction.

III. CONCLUSION.

For the foregoing reasons, we affirm Farra's conviction based on oral sodomy but reverse his convictions based on anal sodomy because the jury instructions on the charges of anal sodomy were fatally flawed. We remand for entry of a judgment and additional proceedings consistent with this opinion.

Minton, C.J., Abramson, Barber, Keller and Noble, JJ., concur. Venters, J., dissents by separate opinion in which Cunningham, J., joins.

VENTERS, J., DISSENTING: No "other proof" was presented to verify or corroborate Farra's out-of-court confession. His motion for a directed verdict should have been granted, and therefore, I respectfully dissent. RCr 9.60

provides that a confession not made in open court, "will not warrant a conviction unless accompanied by other proof that such an offense was committed." *Slaughter v. Commonwealth*, 744 S.W.2d 407, 410 (1987) ("The rule, in its effect, requires that the *corpus delecti* of the crime be proven by independent, corroborative evidence."). In plain language, a defendant cannot be convicted at trial solely on the basis of his uncorroborated, out-of-court statement. However, that is exactly what we sanction today.

I agree that not much in the way of corroboration is needed to satisfy the rule. Basically, anything will suffice if it has probative weight showing that the alleged crime actually occurred. But, *something*, however minimal, must be presented to show that the crime occurred. Here, there was nothing.

The "other proof" cited by the Commonwealth as proving the *corpus delecti* was that four-year-old Steven was constipated; there was redness around his anus; his penis became erect when his mother inserted a suppository into his rectum; and he "acted uncomfortable" when his mother asked him why he got an erection when the suppository was inserted. Those facts have no independent tendency at all to prove that the child was the victim of anal or oral sodomy. The Commonwealth's own witness, Dr. Walty, who examined the child after these allegations arose, testified as every normal parent well knows, that constipation in small children occurs for many reasons and that redness about the anus often accompanies constipation. Dr. Walty verified that Steven's erection was insignificant. According to their testimony,

Steven's parents had no other reasons to fear that he had been sexually molested.

Even if we are tempted to conclude that constipation and anal redness were "other proof" of *anal* sodomy, these conditions come nowhere close to corroborating oral sodomy. What possible tendency does such evidence have to prove the crime of *oral* sodomy? The fact is: Farra's conviction was based entirely upon his confession and cannot withstand proper scrutiny under RCr 9.60.

RCr 9.60 is our codification of the common law rule that has been a part of Anglo-American jurisprudence for centuries. Our opinion today so completely dilutes the quality of "other proof" required for corroborating a confession that we have, in effect, construed this rule out of existence. I respectfully suggest that if RCr 9.60 no longer has the confidence of the Court, and we find its application distasteful in cases of this nature, then the honorable course is to abolish the rule, rather than suffer its gradual demise, case-by-case, into oblivion, by pretending that it doesn't exist.

Cunningham, J., joins.

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