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RENDERED: MAY 14, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000749-MR

JOHN CALVIN BUCKLEY, IV — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 10-CR-00930

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury convicted John Calvin Buckley, IV (Buckley) of First Degree Rape, First Degree Sodomy, Fourth Degree Assault; and Second Degree Unlawful Imprisonment. While the jury was deliberating, Buckley, who was out on bond, removed his electronic monitoring device and fled. He was captured approximately one year later in Wyoming and, after being returned to Kentucky, Buckley pled guilty to First Degree Bail Jumping and Tampering with a Prisoner Monitoring Device. The trial court sentenced Buckley to a total of 34 years' imprisonment. On appeal, Buckley raises four issues: (1) the Commonwealth failed to prove forcible compulsion; (2) the Commonwealth improperly introduced prior and unrelated bad acts; (3) the trial court improperly kept Buckley from challenging the victim's credibility; and (4) the trial court erroneously failed to remove two jurors for cause. Having reviewed the record and the arguments of the parties, we affirm.

I. BACKGROUND.

Buckley, who is from Colorado, served in the military as a U.S. Army Ranger and was on active duty from 1999 to 2006. As such, he was deployed to both Afghanistan and Iraq, receiving a Purple Heart for a shoulder wound and a Bronze Star. After his discharge from the Army, Buckley moved to Lexington, Kentucky to receive treatment for his shoulder.

While in Lexington, Buckley had relationships with two women, fathering three children with them. In 2008, Buckley met the victim, Jane,[1] and they began a relationship that lasted until the events in question. The two differed regarding the nature of that relationship; however, the following facts are not in dispute. During the course of the relationship, Buckley returned to Iraq as a private contractor, and Jane sent him photographs of her posing in various states of undress. When Buckley returned to Lexington, the two continued their relationship until March 2010, when they "broke up" for approximately one week. During the time period when they were not together, Jane had sexual relations with one of Buckley's friends, "Chicago Ben."

On May 28, 2010, Buckley learned that Jane had had sexual relations with Chicago Ben. Beginning late in the evening of May 28 and continuing through the early morning hours of May 29 the two exchanged multiple text messages regarding the state of their relationship, and Jane made numerous phone calls to Buckley. The text messages from Buckley consisted primarily of

[1] The parties refer to the victim in this matter as JR in order to protect her identity. As is our practice, we have chosen a pseudonym to refer to the victim.

accusations that Jane had cheated and lied, with him referring to her as a "bitch" and a "whore." Buckley also threatened to post nude photos of Jane on the internet. For her part, Jane's messages stated that she and Buckley were not a couple when she had sex with Chicago Ben, which meant that she had not cheated. She asked Buckley to come to her residence to talk about the relationship, which he would not do. In response to Buckley's threat that he was going to post the photos on the internet, Jane threatened to commit suicide and asked Buckley to bring her a gun.

At approximately 10:30 the morning of May 29, Buckley called Jane and agreed to meet with her at his residence, the first floor apartment in a duplex. Buckley met Jane on the front porch and, because she was crying, the two went inside. They then engaged in oral, vaginal, and anal sex. Buckley testified that these activities were consensual and typical of their sexual relationship, with the exception of the anal sex, which he said was accidental. Jane testified that they were not consensual acts and that she had been forcibly compelled to participate. Approximately five minutes of their sexual activities that morning were captured on videotape.

Approximately one hour after their sexual activity ended, Jane left Buckley's residence, went home, and called 911. Officers responded and transported Jane to the hospital, where she was examined by a Sexual Assault Nurse Examiner, Susan Noel (Noel). Noel testified that her examination revealed bruising on the left side of Jane's neck consistent with a bite and

suction and bruising on the right side of her neck consistent with choking. Noel also found evidence of damage in and around Jane's anus.

Based on information obtained from Jane and Noel, the Emergency Response Unit (ERU) was dispatched to Buckley's residence where they executed arrest and search warrants. During a search of the residence, officers found a number of weapons, photographs, and several videos. A grand jury indicted Buckley for rape, sodomy, assault, and unlawful imprisonment. Following a three day trial, a jury convicted Buckley on all charges. We set forth additional background information as necessary below.

II. ANALYSIS.

A. Forcible Compulsion.

Buckley timely moved for a directed verdict on the rape and sodomy charges. In support of his motion, Buckley argued, in pertinent part, that the Commonwealth failed to prove forcible compulsion. The Commonwealth argued that it had met its burden based on implied and express threats, as well as actual physical injury. The court denied Buckley's motion, finding that there was sufficient evidence to submit the case to the jury.

> On a 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 purposes 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 at 187 (Ky. 1991).

Buckley argues that the trial court erred when it denied his motion for a directed verdict on the rape and sodomy charges because there was no evidence of either physical force or the threat of physical force. Because Buckley's version of events and Jane's vary greatly, we feel compelled to set forth in some detail below both of their versions as well as summaries of the video from the morning in question and two other videos played for the jury.

1. Buckley's Version.

According to Buckley, after he and Jane went into his apartment, they had a lengthy discussion about their relationship. Jane asked him repeatedly why he did not love her and asked him not to post any photographs of her on the internet. Buckley pointed out to Jane that, if she loved him, she would not have had sex with Chicago Ben. However, he refused to "engage" in a discussion about the photographs and asked her to leave several times. Because Jane continued to lie about her relationship with Chicago Ben and refused to leave, Buckley became agitated. At some point in the discussion, the topic of sex was broached, and Buckley told Jane that he was "horny," and she led him to the bedroom. As was customary, Jane got on her knees and began performing oral sex on Buckley. Buckley got out the video camera and videotaped Jane performing oral sex on him, during which he made disparaging comments about her, called her names, and slapped her on the face. According to Buckley, these actions, although "horrible," were not out of the ordinary for the two of them.

After several minutes of oral sex, Jane leaned over the side of the bed, and they began having vaginal sex. At some point, Jane's phone rang. She stated that it was her father calling, but she did not answer the phone. Shortly thereafter, Buckley penetrated Jane's anus causing her to scream and cry loudly. Buckley stated that this was accidental as neither he nor Jane enjoyed anal sex.

The videotaping stopped at that point. Buckley testified that he and Jane then got on the bed and engaged in vaginal sex in various positions. After they finished, Jane went to the bathroom and got back in bed with Buckley. They continued to discuss their relationship and the photographs, and Buckley took Jane's phone and looked at her call and text history to prove that she had been lying to him. Shortly thereafter, Jane left.

Buckley testified that he never threatened Jane, that he would have stopped if she had said stop, and that Jane was free to leave whenever she wanted. When the police arrived the next morning, Buckley was shocked to learn that Jane had accused him of rape.

As to the nature of their relationship, Buckley stated that it initially was only sexual. However, in the final three or four months, he began to care for Jane. We note that this description of the relationship is significantly different from Buckley's testimony before the grand jury wherein he said the relationship was never anything more than sexual.

2. Jane's Version.

Jane testified that she had not intended to go to Buckley's apartment that morning. However, she did so when he called her and told her that if she wanted to stop him from posting the photos online she had to meet with him and talk. When she arrived, she was upset and crying because of Buckley's threat to post the photos online. They went inside the apartment, and she followed Buckley into his bedroom.

Buckley, who was eating cereal, put the bowl down and picked up a video camera. When Jane asked him what he was doing, he said, "It doesn't matter. Get on your knees bitch." Jane testified that Buckley was extremely angry and, after he ordered her to get on her knees a second time, she complied. Jane testified that she was terrified that Buckley would hurt or possibly kill her because he had never spoken to her in that tone of voice or looked at her that way before.

While Jane was performing oral sex, Buckley asked her a number of questions and, when she did not respond to one question quickly enough, he slapped her on the face. After asking several more questions, Buckley told her to bend over the bed, which she did, and they began having vaginal intercourse. He gave Jane the video camera and told her to videotape her face, which she did. At one point, Buckley penetrated her anally and she screamed in pain. Buckley then took the video camera from Jane and stopped recording. According to Jane, after Buckley stopped recording he told her that if she did not "stop fucking crying and fucking shaking. . . [he was] only going to fuck

[her] in the ass." The two eventually got onto the bed and continued to have vaginal intercourse in various positions, during which Buckley choked Jane and bit her on the neck.

Jane admitted that she and Buckley had often called each other derogatory names in the past and that he had occasionally smacked her on the "behind" when they had sex. She also admitted that they had made videotapes of their sexual encounters in the past. However, those activities were playful while this was not.

Jane testified that the only other time she had seen Buckley as angry as he was that morning was when he got into a fight with five other men outside a bar. According to Jane, Buckley soundly beat all five of the men, inflicting significant physical damage on them.

When asked why she was crying on the video, Jane said it was because she was afraid and was being raped, not because Buckley had ended their relationship. Furthermore, she said that she did not want to engage in sexual relations with Buckley that morning, derived no pleasure from the encounter, and only participated out of fear. Finally, Jane noted that Buckley had a number of weapons, including a handgun that was in a small gun safe near the bed. According to Jane, Buckley had shown her how he could access the gun in several seconds, even when it was locked in the safe.

3. The Videotapes.

The jury saw three videotapes of Jane and Buckley's sexual encounters: the video discussed above, which was approximately five minutes long; and two

videotapes from other sexual encounters, which are approximately 10 and 27 seconds in length.

The two short videos show Buckley and Jane engaged in vaginal intercourse. In one, Buckley calls Jane a "porn star" and encourages her to call him "daddy." In the other, Buckley calls Jane a "whore" and she says, "I'm such a little whore." Jane is not crying in either video.

In the five minute video, while Jane is performing oral sex on Buckley, he calls her a "fucking skank," a "piece of shit," a "whore," and a "dumb bitch;" asks her if she enjoys the "taste" of another woman; slaps her on the side of the head when she does not respond quickly enough; orders her to perform "the right fucking way;" and tells her that he is going to let "all kinds of guys fuck" her. Buckley then orders Jane to disrobe and bend over the bed and they begin having vaginal intercourse. Shortly thereafter, Buckley gives the camera to Jane and orders her to videotape her face, telling her to "do the fucking camera right or I will smack you." Buckley asks Jane what she is going to do from then on, she says that she will do whatever he wants, and he then continues to berate her. When Buckley anally penetrates Jane, she screams and begins to cry loudly. Buckley asks her what is wrong with her then he mocks her crying, tells her to get up on the bed, and stops the recording.

4. The Trial Court Did Not Err When It Denied Buckley's Motions For Directed Verdict.

"A person is guilty of rape in the first degree when . . . [h]e engages in sexual intercourse with another person by forcible compulsion . . . ." Kentucky Revised Statute (KRS) 510.040(1)(a). "A person is guilty of sodomy in the first

degree when . . . [h]e engages in deviate sexual intercourse with another person by forcible compulsion . . . ." KRS 510.070(1)(a). "'Deviate sexual intercourse' means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another . . . ." KRS 510.010(1).

> Forcible compulsion' means physical 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.

KRS 510.010(2).

Buckley argues that the Commonwealth did not prove forcible compulsion because there was no evidence he used physical force or that he made express or implied threats of physical force to compel Jane to engage in sexual activity. We disagree.

Buckley states that the Commonwealth relied on two pieces of evidence from the five minute video to prove actual forcible compulsion: Buckley's slapping of Jane at the beginning of the video and her scream at the end. According to Buckley the slap did not show forcible compulsion because: he slapped her for failing to answer a question quickly enough not because she refused to engage in sexual activity; he slapped her after sexual contact had begun; and both Buckley and Jane testified that slapping was part of their normal sexual activity. Buckley likewise argues that the scream was not evidence of forcible compulsion because it resulted from the act of accidental anal penetration. It was not from the use of force to compel sexual intercourse or anal sodomy.

As to express threats, Buckley points to four statements the Commonwealth relied on: (1) his statement that he would "let all kinds of people fuck" Jane; (2) his statement that Jane would have to do whatever he wanted "from now on;" (3) his statement that, if Jane did not hold the camera correctly he would smack her; and (4) his statement that if she did not stop shaking and crying he would have anal sex with her. According to Buckley, these statements, while distasteful, were not immediate threats of death or injury. Therefore, they did not rise to the level of a threat sufficient to meet the statutory requirement.

As to implied threats, Buckley states that the Commonwealth's reliance on his threats to post photos of Jane online, his experience as an Army Ranger and his possession of several guns, and Jane's knowledge of his potential for violence, is misplaced. According to Buckley, threatening to post photos online could not possibly be an implied threat of physical harm. Furthermore, he argues that his experience as an Army Ranger and possession of guns is irrelevant because he did not mention his military experience, or use or threaten to use any weapon that morning. Finally, he argues that the fight Buckley observed was too remote in time to have had any impact on Jane's emotional state.

Buckley might be correct that the trial court erred in denying his motion for directed verdict if we view each of the preceding actions in isolation and in the light most favorable to Buckley. However, that is not our standard of review. We must look at the evidence as a whole and view it in the light most

favorable to the Commonwealth. *Benham,* 816 S.W.2d at 187. Doing so, we conclude that there was more than sufficient evidence to submit the rape and sodomy charges to the jury under the theory of implied threat, if not under the actual physical harm or express threat theories.

When determining whether Jane submitted to sexual intercourse and sodomy "'because of an implied threat which placed her in fear of immediate death or physical injury, a subjective rather than an objective standard must be applied.'" *James v. Commonwealth,* 360 S.w.3d 189, 194 (Ky. 2012) *quoting Salsman v. Commonwealth,* 565 S.W.2d 641 (Ky. App. 1978).

Jane is slightly more than five feet tall and weighed approximately 100 pounds. Buckley is six feet two inches tall and weighed approximately 200 pounds. Jane testified that she had only seen Buckley as angry as he was that morning the night he severely beat five men. Although they had previously engaged in playful rough sex and name calling, Buckley had never treated her the way he did that morning, and he had never slapped her in the face. The tone of Buckley's voice on the five minute video is significantly different from his tone of voice on the two shorter videos. Furthermore, in the five minute video, Jane can be heard crying, sobbing, and, at the end, screaming, clearly different reactions from what she displayed on the shorter videos. Buckley can be seen in the five minute video pulling Jane's hair, and Jane testified that Buckley choked her and bit her, which was not a normal part of their sexual activity. Finally, although there were no guns visibly present, Jane testified

that Buckley kept a pistol in a gun safe near his bed and that he could open the safe and access the gun within seconds.

We agree with the trial court that a reasonable jury, faced with that evidence, could have concluded that the sexual intercourse and oral and anal sodomy were the result of forcible compulsion. Therefore, we discern no error in the trial court's denial of Buckley's motion for a directed verdict.

B. Kentucky Rule of Evidence (KRE) 404(b) Evidence.

KRE 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with his character. It may be admissible if offered for some other reason:

> such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or . . . [i]f [it is] so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

KRE 404(b)(1) and (2).

The Commonwealth filed notice that Jane would be testifying that Buckley had told her about a number of fights he had been involved in; that Buckley bragged about his military training and combat missions; that he kept several loaded guns in his closet; and that he kept a handgun in a gun safe by his bed. Over Buckley's objection, the trial court held that Jane could testify about what Buckley told her about his military experience; could testify about his guns; and could testify about any fights she had actually witnessed.

Buckley argues that admission of the preceding, along with admission of the video of his arrest, constitutes reversible error.

We review a trial court's evidentiary ruling for abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). "The test for an abuse of discretion 'is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* (Footnote omitted).

In order to determine if KRE 404(b) evidence is admissible the trial court should use a three prong test: (1) Is the evidence relevant? (2) Does it have probative value? (3) Is its probative value substantially outweighed by its prejudicial effect? *Bell v. Commonwealth*, 875 S.W.2d 882, 891 (Ky. 1994)

Buckley argues that the trial court erroneously admitted the following evidence to prove Buckley's bad character: (1) testimony about the guns he owned, with the guns also being introduced into evidence; (2) the video of the ERU officers arresting Buckley at his home; (3) evidence that Buckley had been in a fight outside of a bar six months previously; and (4) Jane's feelings about Buckley's military service. The Commonwealth argues that most of the complained of evidence would not fall within the purview of KRE 404(b). We address each of Buckley's arguments separately below.

1. The Guns.

Buckley states that evidence of his ownership of guns was inadmissible under KRE 404(b); however, his argument is primarily that the evidence was

inadmissible because it was not relevant. Thus, we address this issue from that standpoint.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. As noted above, forcible compulsion is judged from the subjective perspective of the victim. Therefore, evidence that makes it more or less probable that the victim was afraid of bodily injury or death is relevant. Jane testified that she was terrified of Buckley that morning. The fact that Buckley had guns in the house, and a handgun within easy reach, was relevant to Jane's state of mind, a fact of consequence to the determination of the action. Therefore, we discern no abuse of discretion in the trial court's admission of Jane's testimony about the guns.

However, we are concerned about the introduction of the guns into evidence. Jane testified that she knew of the existence of the guns and was fearful, in part, because of that knowledge. We do not see how the introduction of the guns into evidence added anything to that testimony. Therefore, admission of the guns into evidence was error. However, their introduction into evidence was harmless because "there is no reasonable possibility that it contributed to the conviction." *Anderson v. Commonwealth*, 231 S.W.3d 117, 122 (Ky. 2007).

2. The Video of the ERU Officers Arresting Buckley.

This issue is not preserved; therefore, we review it for palpable error and reverse only "upon a determination that manifest injustice has resulted." Kentucky Rule of Criminal Procedure (RCr) 10.26. Manifest injustice occurs and "[e]rror can be found [palpable] only if it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005) (citation omitted).

The ERU video was introduced through Lt. Holland of the Lexington Police Department. Lt. Holland explained that the ERU is dispatched to make arrests and conduct searches when there is a potentially dangerous situation. Based on Jane's statements to police that Buckley had a number of weapons in his apartment, the police determined to effectuate his arrest and the search with the ERU. The video shows the police breaking into Buckley's apartment, arresting him, handcuffing him, and searching his bedroom. During his arrest and the search of his apartment, Buckley appears to be calm and cooperative.

As with his argument regarding his possession of guns, Buckley places this argument in the KRE 404(b) part of his brief. However, the argument is really a KRE 401 relevancy argument. That being noted, we agree with Buckley that introduction of Lt. Holland's testimony about the use of the ERU and the ERU video was erroneous. However, we cannot say that the error was palpable. As noted above, during the video, Buckley appears to be calm and cooperative, a demeanor that somewhat undercuts Jane's testimony that she had reason to fear Buckley. Thus, the ERU video may have benefitted Buckley

as much as it harmed him. Furthermore, in light of the contents of the five minute video as discussed above, we cannot say that exclusion of the ERU video would have altered the result.

3. The Bar Fight.

As noted above, Jane testified that she had seen Buckley fight and severely injure five men outside of a bar several months earlier. Buckley appropriately argues that this evidence is subject to scrutiny under KRE 404(b).

As noted above, whether a victim was forcibly compelled is to be viewed subjectively. Thus, the victim's knowledge of the perpetrator's violent nature is relevant and probative to whether her testimony that she felt forcibly compelled is credible. Here, Jane's testimony about the fight is particularly relevant and probative because she indicated that she had only seen Buckley as mad as he was that morning on one other occasion - the night of the bar fight. Furthermore, Jane's testimony about the bar fight was relevant to her testimony that Buckley's treatment of her that morning was significantly different than it had been during previous sexual encounters. We recognize Buckley's argument that the fight was too remote in time to have been admissible; however, that goes to the weight to be given to Jane's testimony, not its admissibility.

4. Jane's Feelings About Buckley's Military Background.

Buckley states that:

> [Jane] testified about Mr. Buckley's military experience. She explained to the jury that he had been an Army Ranger, that he

> received substantially more training than regular soldiers, and that he had served in Iraq and Afghanistan. [Jane] told the jury that Mr. Buckly enjoyed talking about what he did while deployed and how skilled and trained he was. She met Mr. Buckley about a year after he left the service.

As with Buckley's arguments regarding the admission of his possession of guns and the ERU evidence, we fail to see how the preceding constitutes KRE 404(b) evidence. There may be a question of relevancy, but the preceding is not evidence of "crimes, wrongs, or acts" as discussed in KRE 404(b).

As to relevancy, we find that this testimony was relevant to Jane's state of mind, *i.e.* whether her fear of Buckley was credible. Furthermore, Buckley testified, at least in part, about his military service during his grand jury testimony, and evidence about Buckley's military service may have benefitted him. Therefore, we discern no abuse of discretion in the court's admission of Jane's testimony as outlined above.

C. The Court Did Not Impermissibly Prevent Buckley From Challenging Jane's Credibility.

Buckley complains about the exclusion of three pieces of evidence he sought to introduce in order to contest Jane's credibility: a segment of the videos from which the 10 second and 27 second segments were taken showing Buckley, Jane, and another woman engaged in sexual activity; testimony of "Chicago Ben" about his relationship with Jane; and a photograph of Jane's brother holding a gun. We address each in turn.

1. The Video.

We note that, at a pre-trial hearing, Buckley advised the court he intended to introduce video "snippets" of his other sexual activity with Jane.

Buckley indicated that the snippets would be sufficient to give the jury a view of his and Jane's normal sexual activity, and the parties agreed which snippets to play. The day of trial, Buckley moved for leave to admit additional video which showed him, Jane, and another woman engaged in sexual activity. The court denied that motion. Buckley now argues that he should have been permitted to admit that video, presumably to show that what occurred in the five minute video was not aberrant.[2]

KRE 412, the "rape shield law," states that evidence of a victim's other sexual conduct is generally not admissible in proceedings involving sexual misconduct. However, KRE 412(b)(1)(B) provides that, in a criminal case, if it is otherwise admissible, "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct" may be admissible "to prove consent."

The sexual encounter between Buckley and Jane on the morning in question involved only two people. Whether they engaged in simultaneous sexual relations with another woman is not relevant to whether Jane consented to have sexual relations with Buckley that morning. Therefore, the videotape in question was not otherwise admissible and the trial court did not abuse its discretion in excluding it.

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[2] Buckley refers in his brief to another segment of videotape wherein Jane states that she would engage in sex with other men at Buckley's request. However, that segment of videotape is part of the videotape from which one of the short snippets was taken. As noted, the parties agreed at a pre-trial conference that the snippets were sufficient for the defense's purposes. Unlike with the segment depicting Buckley, Jane, and another woman, Buckley did not make any independent motion to introduce the aforementioned segment. Therefore, we will not address its admissibility.

2. Chicago Ben.

Buckley moved prior to trial to admit testimony from Chicago Ben that he and Jane had a six to eight week sexual relationship and that they had engaged in sex the afternoon Buckley raped Jane. According to Buckley, this testimony would have refuted Jane's testimony that she and Chicago Ben had only had sex one or two times over a one week period. It would also have belied the extent to which she claimed she had been traumatized.

As noted above, KRE 412(b)(a)(B) permits evidence of other sexual behavior to prove a victim's consent. However, KRE 412(a)(1) and (2) prohibit the introduction of evidence "to prove that any alleged victim engaged in other sexual behavior . . . [or] to prove any alleged victim's sexual predisposition." Initially, we note that Jane admitted she had a sexual relationship with Chicago Ben and that relationship precipitated the events that took place on May 28-29. To that extent, the relationship was relevant. However, we fail to see how the details of Jane's sexual relationship with Chicago Ben prove that she consented to the sexual encounter with Buckley on the morning of May 29. Absent a tendency to prove that consent, the evidence simply is not admissible. Therefore, we discern no error in the court's denial of Buckley's motion to admit more extensive evidence regarding Jane's sexual relationship with Chicago Ben.

3. The Photo of Jane's Brother Holding a Gun.

During her testimony, Jane was asked whether she had considered grabbing one of Buckley's guns in order to stop the assault. She stated that

she had never fired a gun; would not know how to fire one; had never been around guns because her father would not permit them in the house; and that she did not know if her brother had a gun. Buckley then asked permission to show Jane a photograph of her brother holding a gun. The Commonwealth objected and the court sustained that objection.

Buckley argues that

> This picture would have impeached [Jane's] testimony by demonstrating that she and her family were not as adverse to guns as she had suggested. This would have enabled Mr. Buckley to then argue she was not scared of guns. This would have contradicted that part of the prosecution's forcible compulsion case.

The trial court did not abuse its discretion by excluding the photograph from evidence for at least three reasons. First, Buckley has not pointed us to where in the record Jane said she was generically afraid of guns. Therefore, any evidence that tended to prove she wasn't generically afraid of guns would be irrelevant. Second, there is no indication when the photograph was taken, if Jane had been present when the photograph was taken, or if she had seen the photograph or the gun. Therefore, there was no foundation for the photograph's admission. Finally, the issue was whether Jane was afraid of Buckley, in part because he owned guns, not whether Jane was generically afraid of guns. Therefore, Jane's familiarity with guns and/or generic fear of guns was irrelevant. For the foregoing reasons, we discern no error in the court's denial of Buckley's motion to introduce a photograph of Jane's brother holding a gun.

D. Failure to Remove Jurors for Cause.

> This Court has long recognized that '[a] determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.

Pendleton v. Commonwealth, 83 S.W.3d 522, 527 (Ky. 2002) (citations omitted). When ruling on a motion to strike a juror for cause, the trial court must determine whether "there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence . . . ." RCr 9.36. The court must make that determination "based on the entirety of [the juror's] responses" and assess "both the content of all of the juror's responses, as well his demeanor and candor." *Little v. Commonwealth*, 422 S.W.3d 238, 242 (Ky. 2013), *reh'g denied* (Mar. 20, 2014) (internal citations omitted).

Buckley raises issues with regard to two jurors, Nos. 3004 and 3046. We address each juror separately below.

1. Juror No. 3004.

During *voir dire,* 14 potential jurors, who either had personal experience with sexual assault or rape or knew of someone who had been sexually assaulted or raped, were questioned individually at the bench. Juror No. 3004, who was one of the 14, stated that her niece had been raped in the 1990s. The perpetrator, who died of AIDS, was never prosecuted. Juror No. 3004's niece contracted AIDS and died two or three years after the rape. When questioned, Juror No. 3004 stated that those events still "stick with her;" however, she said

she could "probably put [them] aside" and base any decision on the evidence she heard at trial.

Following questioning of the 14 jurors at the bench, the parties agreed to dismiss five of them for cause. Buckley then moved to dismiss the remaining nine jurors, including juror No. 3004, for cause. In his motion to remove juror No. 3004, Buckley noted her statement that the events surrounding her niece's rape and death "stick with her," and he argued she could not put that aside to render an unbiased decision. The Commonwealth noted that the facts were "terrible" but that Juror No. 3004 stated those facts would not have an impact on her ability to render a fair decision. The court, noting that Juror No. 3004 was "remarkably calm" when discussing the situation with her niece, found that she could be fair and overruled Buckley's motion to strike. The court granted Buckley's motion to strike with regard to one of the other nine jurors, but overruled his motions regarding the rest. The court later removed one of the remaining eight for a different reason, leaving seven potential jurors that Buckley had sought to remove for cause. Buckley then used peremptory strikes to remove four of those seven potential jurors. He did not use peremptory strikes to remove juror No. 3004 or the other two potential jurors he had challenged. Of those three, only juror No. 3004 sat on the jury.

Buckley now argues that the trial court abused its discretion when it failed to remove juror No. 3004, and that he preserved this issue by moving to strike juror No. 3004 for cause.

This is not the way the typical failure to strike a juror for cause case unfolds. In the typical case, the defendant moves to strike a juror for cause, loses that motion, and then uses a peremptory strike to remove the juror. In those cases, we have held that the defendant must use all of his peremptory strikes and identify which juror he would have removed through a peremptory strike but for the court's failure to grant his motion to remove for cause. If a defendant fails to identify which juror he would have otherwise removed, he fails to preserve the issue, and we will not reverse the trial court even if the court abused its discretion. *See Ordway v. Commonwealth*, 391 S.W.3d 762, 781 (Ky. 2013).

Although this case differs from the typical, the same logic applies. If juror No. 3004 was as tainted as Buckley now argues, he could have used a peremptory challenge to remove her. He then could have identified one of the other potential jurors he would have removed through peremptory challenge, thereby preserving this issue. However, for whatever reason, Buckley chose not to remove juror No. 3004. In his brief, Buckley states he used his peremptory strikes on another juror "for reasons he determined to be necessary" and, but for exhaustion of his peremptory strikes, would have removed juror No. 3004. This is mere speculation by Buckley that is not supported by the record. Because Buckley did not follow the procedure set forth in *Ordway* for preserving an issue regarding the failure to strike a juror for cause, he did not properly preserve this issue for review.

Buckley has requested that, if not preserved, we review this issue for palpable error. We do so below following our summary of the issue regarding juror No. 3046.

2. Juror No. 3046.

At an early point in *voir dire,* the Commonwealth mentioned Buckley's military service and asked if anyone would be influenced to treat him differently because of that service. Approximately two hours later, juror No. 3027 approached the bench. He advised the court and the parties that, during a preceding recess, juror No. 3046[3] had made comments "under his breath" indicating that he did not know what the military had to do with the case and that the events in question had taken place two years earlier.[4] Buckley's counsel stated that he had never experienced a juror ignoring the admonition not to discuss the case that early in the proceedings; therefore, he was not sure how to proceed. The court stated that the parties could agree to strike juror No. 3046 for cause; Buckley could move to strike the juror for cause; or Buckley could use a peremptory challenge to strike the juror.

Although it is unclear, it appears that Buckley preferred getting an agreement from the Commonwealth to strike juror No. 3046 for cause. The Commonwealth did not agree and suggested the court bring the juror up to the

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[3] Juror No. 3027 did not identify the juror by number but the parties and the judge agreed that it was juror No. 3046, who had stated that he was retired from the military.

[4] Juror 3027 stated that juror No. 3046 had also made a third comment, but juror 3027 did not say what that comment was. However, juror No. 3027 stated the comments would not have any impact on his ability to decide the matter.

bench to be privately admonished to refrain from "thinking out loud." The judge then stated that he might bring that juror up to the bench "later" and told the parties to continue with *voir dire*. The judge did not bring juror No. 3046 to the bench for a private admonition and neither party asked the judge to do so. Furthermore, Buckley never clearly made a motion to strike juror No. 3046 for cause, and he did not use a peremptory challenge to strike that juror.

Buckley now argues that the trial court should have stricken juror No. 3046 for cause. As with juror No. 3004, Buckley argues that he preserved this issue by moving to strike juror No. 3046 for cause. We disagree for three reasons.

First, it is not clear from the record that Buckley ever actually moved to strike juror No. 3046 for cause. It appears from the video that he did state that the parties should agree to strike that juror for cause; however, that is not the same as moving independently to strike a juror for cause.

Second, even if we deem that Buckley's statement amounted to an independent motion to strike for cause, Buckley never obtained a clear ruling from the trial court on any such motion. Buckley had the duty "to insist upon a ruling, and failure to do so is a waiver." *Brown v. Commonwealth*, 890 S.W.2d 286, 290 (Ky. 1994).

Third, as with juror No. 3004, Buckley did not use a peremptory challenge to strike juror No. 3046. Therefore, as we discussed with regard to juror No. 3004, Buckley's failure to do so resulted in a failure to preserve the issue.

As with juror No. 3004, Buckley has asked us to review this issue, if unpreserved, for palpable error. We do so below.

3. Palpable Error.

A palpable error is one that, although not properly preserved, "affects the substantial rights of a party" and "relief may be granted upon a determination that manifest injustice has resulted" from the error. RCr 10.26. To successfully obtain a reversal based on palpable error, a criminal defendant must show that, absent the error, there was a "probability of a different result or [the] error [was] so fundamental as to threaten [the] defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), *as modified* (May 23, 2006).

Buckley argues that the trial court's failure to strike juror No. 3004 constituted palpable error, we disagree. As we noted above, the trial court has the discretion to determine whether to strike a juror for cause. *Pendleton*, 83 S.W.3d at 527. In making that determination, the court must consider all of the juror's responses as well as her demeanor and candor. *Little*, 422 S.W.3d at 242. Certainly, there was some cause for concern regarding juror No. 3004 based on her background. However, as the majority noted in *Little*, "this Court has consistently held that the mere fact that a juror or her family member has been the victim of a crime similar to the one charged against the defendant does not, in and of itself, justify that juror's excusal." *Id.* at 242. In such cases, the court should consider other factors such as "the similarity between the crimes, the length of time since the prospective juror's experience, and the

degree of trauma the prospective juror suffered." *Id. quoting Brown v. Commonwealth,* 313 S.W.3d 577, 598 (Ky.2010).

Here, there is little in the record regarding the similarity between the rape of juror No. 3004's niece, which occurred at least twelve years earlier, and the crimes with which Buckley was charged. Furthermore, the only evidence in the record regarding the trauma suffered by juror No. 3004 as a result of her niece's rape is the judge's comment that she seemed "remarkably calm" when discussing that event. These factors support the judge's determination that juror No. 3004 was being honest when she said that she could render a fair decision despite her background. Therefore, we cannot conclude that the trial court abused its discretion or committed palpable error in failing to excuse juror No. 3004 for cause.

As to juror No. 3046, the comments he made "under his breath" do not show any particular bias against Buckley. In fact, the comments, particularly the juror's questioning why this case was being tried two years after the event, appear to be favorable to Buckley. Furthermore, as the judge noted, juror No. 3046 was "retired military," which would as likely be favorable to Buckley as not. Finally, as to this juror, we note that Buckley's argument is that this juror "could not have participated in a fair and impartial way" given the Commonwealth's use of Buckley's military background to prove forcible compulsion. However, other than making this conclusory statement, Buckley has failed to show how juror No. 3046's presence on the jury altered the

outcome of his trial. This is insufficient to establish error, let alone palpable error.

Finally, although we have determined that the trial court did not err in this case, we once again caution the trial courts that "when there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken. The trial court should err on the side of caution by striking the doubtful juror; that is, if a juror falls within a gray area, [she] should be stricken." *Ordway*, 391 S.W.3d at 780.

III. CONCLUSION.

For the foregoing reasons, we affirm.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Samuel N. Potter
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway,
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General