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RENDERED: AUGUST 25, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000714-MR

DAVID MAYES — APPELLANT

V.

ON APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL KENTON WINCHESTER, JUDGE
NO. 12-CR-00027

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A jury found David Mayes guilty of two counts of first-degree criminal abuse, two counts of first-degree rape, one count of first-degree sodomy, and one count of first-degree sexual abuse. The jury recommended a total sentence of twenty years' imprisonment. The trial court accepted the jury's recommendation. Mayes now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Having reviewed the record and the arguments of the parties, we reverse and remand.

I. BACKGROUND.

In 2010, the Appellant, David Mayes, began dating and soon thereafter moved in with Tonya and her three children: Greg, Tom, and Katie.[1] Mayes, Tonya, and the children lived at various locations in Whitley and Laurel

[1] To protect the victims' identities, the victims' mother is only referred to as "Tonya" and pseudonyms have been used for each of the victims.

counties – first near the Kentucky Fried Chicken in Laurel County, before moving to 17th Street and then to 15th Street, both in Whitley County. The Commonwealth's case against Mayes involves only the two Whitley County residences; however, there are evidentiary issues involving the Laurel County residence. We set forth additional facts as necessary below.

II. STANDARD OF REVIEW.

Because the issues presented require us to apply different standards of review, we set forth the appropriate standard as necessary when addressing each issue.

III. ANALYSIS.

Mayes argues, and the Commonwealth concedes, that the jury instructions on all counts lacked the required specificity to guarantee that Mayes received a unanimous jury verdict, as is his right under Kentucky's Constitution. *Johnson v. Commonwealth*, 405 S.W.3d 439, 448 (Ky. 2013) ("This state's courts . . . have long held that Section 7 of the Kentucky Constitution requires a unanimous verdict.") (internal citation omitted). As this Court has previously held, "[A] general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof" violates the requirement of a unanimous verdict. *Id.* at 449. The parties are in agreement that the trial court's jury instructions violated this requirement necessitating reversal; therefore, we do not address this issue further.

Although we are reversing and remanding this case, we must address issues Mayes raised regarding denial of his directed verdict motions. We also address those issues likely to reoccur on retrial. Mayes makes three challenges to the trial court proceedings that fall into those two categories: 1) he was entitled to a directed verdict on three counts; 2) evidence was admitted contrary to Kentucky Rule of Evidence (KRE) 404(b); and 3) an admonition should have been given based upon improper arguments by the Commonwealth during its opening and closing statements. Mayes raises a fourth issue: that the court erred in addressing a jury question during jury deliberations. We do not address this issue because both parties agreed at the time with the trial court's decision and this issue is not likely to reoccur on retrial. We address the remaining issues in turn.

A. Directed Verdict.

Mayes challenges the sufficiency of evidence for three of the charges of which he was convicted: two counts of Rape in the First Degree; and one count of Sexual Abuse in the First Degree.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 9 (1978). This Court has held that "a directed verdict is equivalent to an acquittal under the law of double jeopardy." *Walker v. Commonwealth*, 288 S.W.3d 729 (Ky. 2009). Consequently, if the directed verdicts that Mayes

challenges were in error, those convictions will be reversed and dismissed, and there will be no remand for a new trial on those charges.

Mayes's motion for directed verdict at trial was a general motion that challenged the sufficiency of *all* charges. Therefore, Mayes has failed to properly preserve his specific claims. *Johnson v. Commonwealth*, 292 S.W.3d 889, 899 (Ky. 2009) ("When a defendant has been charged with multiple crimes, a motion for directed verdict is not the proper procedure for challenging the sufficiency of the evidence on less than all the charges[.]"). Mayes agrees and requests that this Court review his challenges under the palpable error standard.

An unpreserved error may generally be reviewed on appeal if the error is "palpable" and if it "affects the substantial rights of a party." Kentucky Rule of Criminal Procedure (RCr) 10.26. Even then, relief is appropriate only "upon a determination that manifest injustice resulted from the error." *Id.* "For an error to rise to the level of palpable, it must be easily perceptible, plain, obvious and readily noticeable." *Doneghy v. Commonwealth,* 410 S.W.3d 95, 106 (Ky. 2013) (internal citation omitted). "When we engage in palpable error review, our focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Baumia v. Commonwealth*, 402 S.W.3d 530, 542 (Ky. 2013) (internal citation omitted).

We reverse the trial court's denial of a motion for directed verdict if, "under the evidence as a whole, it would be *clearly unreasonable* for a jury to

find guilt[.]" *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991) (emphasis added). Implicitly within this standard, we must also "presume the Commonwealth's proof is true [and] draw all reasonable inferences in favor of the Commonwealth." *Acosta v. Commonwealth,* 391 S.W.3d 809, 816 (Ky. 2013).

i. Two Counts of Rape in the First Degree.

"A person is guilty of rape when . . . [h]e engages in sexual intercourse with another person who is incapable of consent because [she] . . . [i]s less than twelve (12) years old." Kentucky Revised Statute (KRS) 510.040. "'Sexual intercourse' means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight[.]" KRS 510.010(8). As Mayes correctly notes, in order to sustain a conviction of first-degree rape, there must be proof of vaginal penetration. *Jones v. Commonwealth,* 833 S.W.2d 839, 841 (Ky. 1992). "A fact may be proved by circumstances no less than by words, and this rule is applied to the question of penetration just as it is in other questions of fact arising in criminal cases." *Williams v. Commonwealth,* 202 Ky. 664, 261 S.W. 18, 19 (1924).

At trial, the following exchange occurred during the Commonwealth's direct examination of Katie:

Commonwealth Attorney: And when he had intercourse with you, where were you?

Katie: In my mom and his bedroom.

Commonwealth Attorney:	Where were your brothers?
Katie:	Outside or in the living room, playing a game or something.
Commonwealth Attorney:	Now, when he did that, did you take your clothes off or did he just go over your clothes?
Katie:	Off.
Commonwealth Attorney:	And did he ask you to take your clothes off or did he take your clothes off?
Katie:	Asked me.
Commonwealth Attorney:	And when he put his penis inside you, can you tell the jury how you felt when he did that?
Katie:	Didn't like it.
Commonwealth Attorney:	Did it hurt?
Katie:	A little bit.

We note that Katie testified that the above activities took place more than ten times.

Although the Commonwealth's direct examination of Katie failed to procure her specific acknowledgment of vaginal penetration, based on the totality of Katie's testimony, it would not be clearly unreasonable for a jury to determine that vaginal penetration occurred; therefore, the trial court was not in error when it denied Mayes's motion for directed verdict regarding the two counts of Rape in the First Degree.

ii. One Count of Sexual Abuse in the First Degree.

"A person is guilty of sexual abuse in the first degree when . . . [h]e or she subjects another person to sexual contact who is incapable of consent because he or she . . . [i]s less than twelve (12) years old[.]" KRS 510.110. "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]" KRS 510.010(7). "An actual touching is required, but the contact need not be directly with the body." *Id.* Kentucky Crime Commission/LRC cmt. (1974).

In its direct examination of Katie, the Commonwealth posed its questions to Katie and she responded to those questions in terms of what Mayes "tried" to do rather than what Mayes actually did. This evidence was insufficient to withstand Mayes's motion for a directed verdict. Because sexual abuse requires an actual touching and not just an attempt to touch, the jury could not have reasonably found Mayes guilty based on Katie's testimony during direct examination alone.

However, the following testimony during cross-examination was sufficient to overcome Mayes's motion for a directed verdict:

Defense Counsel:	No touching occurred in Laurel County, correct?
Katie:	Correct.
Defense Counsel:	It was when you moved to 17th Street and 15th Street, those two addresses [in Corbin], where the bad touching occurred. Is that correct?

Katie:	Correct.
	. . . .
Defense Counsel:	Now you indicated to [the Commonwealth], okay, that on a couple of occasions, maybe more, [Mayes] had actually—I hate to put—to say this to you but I can't put it any[more] delicately than I can—did he put his finger or his penis in your vaginal area?
Katie:	Yes.

Presuming this testimony is true and drawing all reasonable inferences in favor of the Commonwealth, as we must, we hold that it was not clearly unreasonable for the jury to determine that Mayes touched Katie's vaginal area with his finger, if not his penis, on more than one occasion. Therefore, the trial court properly denied Mayes's motion for a directed verdict on the sexual abuse charge involving Katie.

B. Inadmissible Evidence.

Mayes argues that the trial court erroneously admitted improper evidence about three instances of prior crimes or bad acts. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible . . . [i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1).

Evidence of prior crimes or bad acts must be relevant "for some purpose other than to prove the criminal disposition of the accused . . . ." *Meece v.*

Commonwealth, 348 S.W.3d 627, 662 (Ky. 2011). In addition, evidence admissible under KRE 404(b) must also be relevant, probative, and not unduly prejudicial. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994); *see* KRE 401, 402, and 403.[2]

i. Katie's Testimony Regarding Pornography on Computer.

At trial, on direct examination, the following exchange occurred between the Commonwealth and Katie:

Commonwealth Attorney:	I want to talk with you about the problems you had with the Defendant. And I want you to tell the jury, when was the first time and what kind of problems did you have – to start out with? Tell the jury - I'm talking about when you lived out close to KFC.
Katie:	Really didn't have a problem.
Commonwealth Attorney:	Did he do anything, at that time, inappropriate with you?
Katie:	He showed me videos.
Commonwealth Attorney:	What kind of videos did he show you?
Katie:	People doing nasty stuff.
Commonwealth Attorney:	You say 'nasty stuff'. Would the people be undressed at that time?
Katie:	Um hmm.
Commonwealth Attorney:	Were these videos he would show on TV?

[2] We note that, while the Commonwealth failed to provide notice to Mayes that it intended to use the prior bad acts at trial - as required under KRE 404(c) - Mayes failed to raise a 404(b) or 404(c) objection before the trial court. Because we are reversing, we do not review for palpable error, rather, we determine admissibility on retrial.

Katie: Nuh uh, computer.

The introduction of Katie's testimony that Mayes showed her pornographic videos did not constitute error. Katie's testimony concerning the videos of people doing "nasty stuff" was admissible to prove Mayes's intent, preparation, scheme, or plan for the sexual abuse alleged by Katie. *See* KRE 404(b); *Gilbert v. Commonwealth*, 838 S.W.2d 376, 378 (Ky. 1991) (holding that evidence of defendant forcing victims to watch pornographic videos indicated a part of the overall scheme to aid defendant in engaging in sexual intercourse with victims). Accordingly, we hold that Katie's testimony was admissible under KRE 404(b)(1).

ii. Greg's Testimony of Being Forced to Stand in the Corner.

During Greg's cross-examination, Defense Counsel explored instances in which Mayes had placed his hands in the back of Greg and Tom's pants ("deep sea diving") and had forcefully struck Greg and Tom's genitals ("nut punching"). Defense Counsel engaged in the following exchange with Greg:

Defense Counsel: Besides . . . the alleged "deep sea diving" and the alleged "nut punch[ing]" once or twice a day, did he do anything else physical to you?

Greg: He'd make us stand in the corner for like hours at a time. My brother, Tom, one time, he made him stand in the corner, and David [Mayes] scared him so bad that he peed. And then David whooped him for peeing in the floor.

We note that the above statement occurred during Mayes's cross-examination of Greg. "Generally, a party is estopped from asserting an invited

error on appeal." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011) (citing *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006)). However, even if Mayes had not solicited this testimony, its introduction would be deemed admissible.

Each of the instances explored during Greg's cross-examination were indicative of a plan or common scheme of criminal abuse – a crime with which Mayes was charged. The testimony at issue here is no different. Greg's testimony that Mayes forced Greg and Tom to stand in the corner for hours at a time, that he scared Tom to the extent that Tom urinated on the floor, and that he then physically reprimanded Tom for doing so is indicative of a plan or common scheme of child abuse. *See* KRE 404(b)(1). This evidence was relevant to the charge of Child Abuse in the First Degree as it had a tendency to make the existence of Mayes's child abuse more probable than it would be without such evidence. *See* KRE 401. Lastly, because Greg's testimony identified Mayes as the perpetrator of the crimes with which he was charged, the probative value of this evidence substantially outweighed its prejudicial effect. *See* KRE 403. Therefore, we find that admitting Greg's testimony was not in error.

iii. Greg's Testimony that Mayes Entered the House, Against Court Order, While Wearing a Mask.

On direct examination, Greg testified that, during the time his family lived on 15th Street, Mayes and Greg's mother had been involved in a court proceeding and that the two were not to have contact with each other. Greg

testified that Mayes would enter the house through the basement while wearing a mask. The Commonwealth concedes that this evidence has very little probative value and that it is "unlikely that either party will attempt to introduce this evidence at Mayes's new trial." We agree that its likelihood of re-introduction is slim so we will not delve deeply into this issue. However, based on the record before us, this evidence should not have been admitted as it is lacking in relevancy to the crimes with which Mayes was charged.

C. Closing Arguments.

Mayes raises two issues related to allegedly improper statements by the Commonwealth during its closing argument. Although these two issues are unlikely to reoccur upon retrial, they do require brief analysis. We note that it is well-settled that opening statement and closing arguments are not evidence and prosecutors are given considerable leeway during both. *Stopher v. Commonwealth*, 57 S.W.3d 787, 805-06 (Ky. 2001). However, this leeway does have limits. *See, e.g., Commonwealth v. Mitchell*, 165 S.W.3d 129 (Ky. 2005).

Mayes argues that the Commonwealth made improper statements to the jury during its closing argument in two instances. First, the Commonwealth urged the jury to "be these children's champion by finding that they told the truth" and informed the jury that "[t]he Commonwealth is asking you to believe these children because this type of activity can never be tolerated in our country or our society." This statement is undoubtedly an improper argument. The jury should not be called upon, especially in the guilt stage of a trial, to champion any cause. "[W]e again caution the Commonwealth that it is not at

liberty to place upon the jury the burden of doing what is necessary to protect the community." *Id.* at 132.

Second, the Commonwealth stated that the victims had been "telling the same story for three years, publicly, to people who interviewed them, to me, and . . . to you." It appears that no recorded statements or interviews were introduced into evidence. Based on the evidence presented, the appropriateness of the Commonwealth's statement is questionable. However, because it is unlikely that this issue will reoccur upon retrial, we need not further address it.

IV. CONCLUSION.

For the preceding reasons, the judgment of the Whitley Circuit Court is hereby reversed. We remand this case to the trial court to proceed in accordance with this opinion.

All sitting. Minton, C.J., Hughes, Keller, Noble, Venters and Wright, JJ., concur. Cunningham, J., concurs in result only.

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