

RENDERED: AUGUST 16, 2018
TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2016-SC-000414-MR

DATE 9/6/18 Kim Radman, DC

RONALD LEE KING

APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
NO. 15-CR-00393

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION OF THE COURT BY JUSTICE VANMETER

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Ronald King appeals as a matter of right from his conviction by jury and life sentence arising from charges of two counts of first-degree sodomy, and two counts of first-degree sexual abuse. Because the jury instructions on the sexual abuse counts violated the unanimity requirement, we reverse and remand King's sexual abuse convictions. On remand, we also direct the trial court to address the sentencing error in imposing a term of years to run consecutively with a term of life imprisonment. We otherwise affirm King's sodomy conviction and the trial court's evidentiary rulings.

I. PROCEDURAL AND FACTUAL BACKGROUND.

A.S. is a minor child, born in 2005. A.S.'s parents are heroin addicts who were frequently absent or incarcerated, so A.S. and her older brother lived

with their biological grandmother, Hope King, and her husband, Ronald King, who A.S. knew as "Pawpaw." The family lived in several locations throughout A.S.'s life: the "brown trailer" on Sioux Trail in Elsmere until A.S. was six or seven; the house on Garvey Avenue in Elsmere; and then a trailer on Amber Drive in Latonia. The Amber Drive trailer burned in a fire on May 2014, after which King no longer lived in the home, and A.S. and her brother lived with their grandmother in Crescent Springs. Hope worked full-time, and King was unemployed; he watched A.S. when Hope was at work or at the store and was alone with her often.

In 2014, King was incarcerated for arson for the burning of the Amber Drive trailer, after which A.S. was interviewed at the Child Advocacy Center ("CAC"). During that 2014 CAC interview, A.S. was asked if anyone had touched her where they should not, or if she was afraid of anyone. At that time, A.S. answered no, but she later testified that she had not disclosed King's abuse because he had threatened to hurt her if she told anyone and she was afraid of him.

In January 2015, A.S. disclosed to her school counselor what King had done to her, and an investigation began, including a second interview at the CAC in 2015. At trial, and during the 2015 CAC interview, A.S. testified that King had started touching her genitals when the family lived in the brown trailer, when she was four, and had also showed her magazines with photographs of people with no clothing. She testified that King had forced her

to touch his genitals as well, which she described as two spheres and a cylinder.

A.S. testified that the abuse continued when the family moved to Garvey Avenue, most often occurring when Hope was not at home. She testified that the abuse at the Garvey Avenue home included: King touching A.S.'s genitals when she was naked; King continuing to show A.S. pornographic magazines or videos; and King placing A.S. on the ironing board wearing only a shirt, and moving his mouth around on her genitals, continuing until Hope and A.S.'s brother returned home. No evidence was presented that King continued the abuse in the trailer on Amber Drive.

At the conclusion of the Commonwealth's case, the trial court dismissed one of the two counts of first-degree sodomy at the Commonwealth's request. The jury found King guilty of first-degree sodomy, and both counts of first-degree sexual abuse. The jury recommended a sentence of life imprisonment on the sodomy count, and ten years for each of the sexual abuse counts, to run consecutively for a total sentence of life. The trial court sentenced King accordingly. This appeal follows as a matter of right.

II. ANALYSIS.

King's appeal presents five allegations of error: (A) the trial court erred in allowing duplicitous instructions on sexual abuse, which violated the unanimity requirement for jury verdicts; (B) the jury instructions on the Garvey Avenue sexual abuse subjected King to double jeopardy; (C) the trial court erred in refusing to allow defense counsel to impeach A.S.'s testimony

regarding the 2015 CAC interview and in allowing improper bolstering of A.S.; (D) the trial court erred in admitting a recorded phone call as an adoptive admission; and (E) King's sentence violates KRS¹ 532.110 and KRS 532.080.

We will address each of these issues in turn.

A. The Trial Court Erred in Allowing Duplicitous Instructions on Sexual Abuse, Which Violated the Unanimity Requirement for Jury Verdicts.

King first argues that the jury instructions on the two counts of first-degree sexual abuse were duplicative and rendered non-unanimous verdicts. This issue is unpreserved, and thus reviewed for palpable error. RCr² 10.26 dictates:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

"RCr 10.26 authorizes us to reverse the trial court only upon a finding of manifest injustice. This occurs when the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be shocking or jurisprudentially intolerable." *Roe v. Commonwealth*, 493 S.W.3d 814, 820 (Ky. 2015) (internal quotations and citations omitted).

A.S. testified that King committed multiple acts of sexual abuse on multiple occasions at both the Garvey and Sioux Trail (brown trailer) addresses. The jury instructions differentiated one count of first-degree sexual

¹ Kentucky Revised Statutes.

² Kentucky Rules of Criminal Procedure.

abuse for each residence but did not indicate which specific acts within each residence the count related.

Regarding the Garvey Avenue sexual abuse, Jury Instruction No. 5 reads:

You will find the Defendant, Ronald King, guilty of Sexual Abuse in the First Degree under this Instruction and under Count One of the Indictment, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Kenton County on or between May 2010 and March 2013 and before the finding of the Indictment herein, he subjected A.S. to sexual contact³ at 414 Garvey Avenue;

AND,

B. That at the time of such contact, A.S. was less than twelve years of age.

The brown trailer sexual abuse, Jury Instruction No. 7, reads:

You will find the Defendant, Ronald King, guilty of Sexual Abuse in the First Degree under this Instruction and under Count Three of the Indictment and under this Instruction, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Kenton County on or between May 2010 and March 2013 and before the finding of the Indictment herein, he subjected A.S. to sexual contact at 119 Sioux Trail (the brown trailer);

AND,

B. That at the time of such contact, A.S. was less than twelve years of age.

King argues that under these two instructions on first-degree sexual abuse, the jury was presented with multiple instances of sexual abuse for each instruction, but that King was only charged with one count each. King argues that this instruction violates Section 7 of the Kentucky Constitution's

³ Jury Instruction No. 4 defines "Sexual Contact" 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."

requirement for a unanimous verdict. Under Instruction No. 5, A.S. testified to three separate instances of inappropriate sexual contact, one that constituted sodomy, and two that constituted sexual abuse: that King touched her private with his hand when they were in her granny's bedroom, and that King touched her bottom with his hands during the oral sodomy on the ironing board. Under instruction No. 7, A.S. testified to two episodes of inappropriate touching that occurred in the brown trailer: that King touched her private area and that he made her touch his private area.⁴

This Court has clarified that “such a scenario—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.” *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013).

Both of the counts of first-degree sexual abuse were presented to the jury with nearly identical instructions and covered the same date range. As described above, when a trial court fails to adequately distinguish one instruction from another, as is the case with these coupled instructions, a unanimous-verdict violation arises. As this Court discussed in *Jenkins*, the instructions were “duplicitous,” i.e., not deceitful, but rather double, alleging either of two crimes in a single instruction. *Jenkins v. Commonwealth*, 496 S.W.3d 435, 448 (Ky. 2016). We held:

⁴ On direct examination, A.S. clarified that her “private” referred to her vagina, and other “private places” included her bottom and chest.

Duplicitous instructions, however, do not provide the same guarantee that all the jurors agreed as to the offense. Rather, a duplicitous instruction “allow[s] the jury to convict [the defendant] of one crime based on two separate and distinct criminal acts that violated the same criminal statute.” [*Kingrey*,] 396 S.W.3d at 831. In that situation, we held, the “multiple theories” analysis is inapplicable, and the duplicitous instruction “violates the requirement of a unanimous verdict,” regardless of whether sufficient evidence existed of both criminal acts. *Id.*

In both cases, we held that the constitutional violation amounted to so manifest an injustice as to call for relief under RCr 10.26, the palpable error rule. Extending that conclusion in *Martin v. Commonwealth*, 456 S.W.3d 1, 9–10 (Ky. 2015), we held that “all unanimous-verdict violations constitute palpable error resulting in manifest injustice.”

Given the proof of two sodomies in this case, the sodomy instruction quoted above, which allowed the jury to convict on the basis of either, as though they presented merely alternative theories of a single offense, breached the rule of *Johnson and Kingrey*. Under *Martin*, furthermore, the breach must be deemed a palpable error. In light of this authority, Jenkins’s sodomy conviction, however well justified it may appear factually, must be reversed.

Id. at 448–49.

The Commonwealth concedes that these instructions allow for a non-unanimous verdict. Although ample evidence exists that King subjected A.S. to sexual abuse, we must agree with the Commonwealth and conclude that King is entitled to relief from his first-degree sexual abuse convictions. As in *Jenkins*, the “jury instruction addressing that charge ran afoul of the rule articulated in *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013) and *Kingrey v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013) which disallows so-called duplicitous instructions.” 496 S.W.3d at 447.

For nearly two decades, this Court has addressed variations of erroneous jury instructions which we have called the “unanimous verdict” issue. One variant of the issue is represented in *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008). In *Harp*, the jury was given seven identical instructions upon which it returned seven indistinguishable guilty verdicts. We reversed because, with no identifying characteristics requiring the jury to differentiate the specific act constituting each crime, we had no assurance that the jury was in unanimous agreement on each charge, and we determined that unanimity on each verdict could not be presumed. *Id.* at 819–20.

This Court unanimously agreed in *Harp* that multiple undifferentiated jury instructions violated the unanimous verdict requirement. Justice Scott posted a lone dissent, agreeing on the error but regarding it as harmless: “[T]he error was clearly harmless in this instance. I concede, however, that I, too, am displeased at the frequency with which our trial courts fail to differentiate multiple instructions from each other.” 266 S.W.3d at 826 (Scott, J., dissenting).

The second variant of the “unanimous verdict” problem was represented in *Johnson v. Commonwealth*, 405 S.W.3d at 449, and *Kingrey v Commonwealth*, 396 S.W.3d. at 831. It arises when a single jury instruction, based on evidence of two or more separate instances of criminal conduct, authorizes the jury to convict the defendant of only one crime. This kind of error is often referred to as the “multiple acts” error, or as we called it in *Johnson* citing an extensive array of federal litigation on the subject, the

“duplicious instruction” error. As noted in *Johnson*, the federal cases more frequently identify the problem as a “duplicious indictment” which spawns trial error when the duplicity is not corrected by proper jury instructions. 405 S.W.3d at 453–54; see *United States v. Kakos*, 483 F.3d 441, 445 (6th Cir. 2007).

This variant of the unanimous verdict problem is the error found in the instant case: each charge of sexual abuse contained in the jury instructions was based upon multiple, separate acts of sexual abuse mentioned in the evidence, and so it cannot be determined that all twelve jurors agreed upon the criminal acts for which King was convicted. Moreover, no specific jury instruction existed telling the jury that it could not convict King unless it unanimously agreed on the particular act he committed.

This court recognizes and has consistently maintained that the jurors may reach a unanimous verdict even though they may not all agree upon the means or method by which a defendant has committed the criminal act. *Conrad v. Commonwealth*, 534 S.W.3d 779, 784 (Ky. 2017) (quoting *Miller v. Commonwealth*, 77 S.W.3d 566, 574 (Ky. 2002)) (A “conviction of the same offense under either of two alternative theories does not deprive a defendant of his right to a unanimous verdict if there is evidence to support a conviction under either theory.”). Nor is the jury required to agree upon the defendant’s mental state in cases where alternative mental states authorize conviction for the same criminal act. *Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ky. 1978) (“We hold that a verdict cannot be successfully attacked upon the ground that

the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.”). Neither *Harp*, *Johnson*, nor their progeny changes that.

However, we have also held consistently with virtually every other American jurisdiction to address the matter, that juror unanimity means that jurors must agree upon the specific instance of criminal behavior committed by the defendant but they need not agree upon his means or method of committing the act or causing the prohibited result. The list appended to this opinion cites consistent rulings from the following states: Alabama, Alaska, Arizona, California, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Dakota (citing *Harp*), Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.⁵

⁵ *R.A.S. v. State*, 718 So. 2d 117, 122 (Ala. 1998); *Jackson v. State*, 342 P.3d 1254, 1257 (Alaska App. 2014); *State v. Klokic*, 196 P.3d 844, 847 (Ariz. App. 2008); *People v. Covarrubias*, 378 P.3d 615, 648–49 (Cal. 2016); *Jones v. United States*, 127 A.3d 1173, 1192 (D.C. 2015); *State v. Arceo*, 928 P.2d 843, 874–75 (Haw. 1996); *State v. Severson*, 215 P.3d 414, 431 (Idaho 2009); *People v. Cardamone*, 885 N.E.2d 1159, 1188 (Ill. App. 2008); *Baker v. State*, 948 N.E.2d 1169, 1177 (Ind. 2011); *State v. Moyer*, 410 P.3d 71, 87 (Kan. 2017); *State v. Fortune*, 34 A.3d 1115, 1122–23 (Me. 2011); *State v. Cooksey*, 738 A.2d 298, 311 (Md. Spec. App. 1999) (rev’d in part, aff’d in part by *Cooksey v. State*, 752 A.2d 606, 620 (Md. 2000)); *Commonwealth v. Shea*, 7 N.E.3d 1028, 1035–36 (Mass. 2014); *People v. Martin*, 721 N.W.2d 815, 851–52 (Mich. App. 2006); *State v. Ayala-Leyva*, 848 N.W.2d 546, 553 (Minn. App. 2014); *Mallow v. State*, 439 S.W.3d 764, 769 (Mo. 2014); *State v. Ghostbear*, 338 P.3d 25, 28 (Mont. 2014); *State v. Fortier*, 780 A.2d 1243, 1249–50 (N.H. 2001); *State v. Cagno*, 49 A.3d 388, 405 (N.J. 2012); *State v. Godoy*, 284 P.3d 410, 414 (N.M. App. 2012); *State v. Martinez*, 865 N.W.2d 391, 397–98 (N.D. 2015); *State v. Gardner*, 889 N.E.2d 995, 1011 (Ohio 2008); *James v. State*, 637 P.2d 862, 865 (Okla. 1981) (overruled on other

Our decisions identifying these instructional errors as violations of the unanimous jury principle are not jurisprudential outliers, nor are they recent. Moreover, both types of instructional error are easily avoided. As the cases cited below illustrate, the *Harp*-type, multiple undifferentiated instruction error is avoided by simply differentiating each individual jury instruction by incorporating into each instruction whatever distinguishing feature was presented in the evidence.

The error of duplicitous instruction can be avoided by the trial court in three ways: (1) the jury instruction can simply identify which of the particular criminal acts included in the evidence the jury is asked to consider; (2) the verdict form can identify the particular act upon which the jury determined guilt; or (3) a special instruction, as held by some courts, informing the jury that, in order to convict, all twelve jurors must agree that the defendant committed the same act.

An instruction clarifying the unanimity requirement would have cured the error of the duplicitous instructions. *E.g.* *State v. Marcum*, 480 N.W.2d 545, 551 (Wis. App. 1992); *Ngo v. State*, 175 S.W.3d 738, 749 (Tex. Crim. App. 2005).

grounds by *Kinchion v. State*, 81 P.3d 681, 687 (Okla. Crim. App. 2003)); *State v. Ashkins*, 357 P.3d 490, 500–01 (Or. 2015); *State v. Brende*, 835 N.W.2d 131, 137–39 (S.D. 2013); *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999); *Cosio v. State*, 353 S.W.3d 766, 772–73 (Tex. Crim. App. 2011); *State v. Saunders*, 992 P.2d 951, 966 (Utah 1999); *State v. Nicholas*, 151 A.3d 799, 805–06 (Vt. 2016); *State v. Carson*, 357 P.3d 1064, 1070 (Wash. 2015); *State v. Gustafson*, 350 N.W.2d 653, 663 (Wis. 1984); and *Woyak v. State*, 226 P.3d 841, 854 (Wyo. 2010).

Dissenting opinions in our recent cases have suggested that this line of analysis is a product of our recent invention. However, more than thirty years ago, in *Hampton v. Commonwealth*, this Court held that, despite the difficulty of providing specificity among twelve counts of child sexual abuse wherein “the trial testimony regarding dates was quite naturally confused and somewhat uncertain,” nevertheless, convictions could be upheld when the evidence was “ample to separately identify the various offenses charged.” 666 S.W.2d 737, 740 (Ky. 1984). Later, in *Garrett v. Commonwealth*, we affirmed convictions on a total of seven counts of sexual crimes because the evidence was “ample to separately identify the various offenses charged.” 48 S.W.3d 6, 10 (Ky. 2001).

In 2002, this Court decided *Miller*, a case in which prosecutorial zeal had outstripped its capacity to differentiate individual crimes. The defendant was charged with 150 counts of child rape and 75 counts of child sodomy. 77 S.W.3d at 573. Neither the jury instructions nor the verdict forms distinguished between the respective incidents of rape and sodomy; they also failed to particularize individual charges in any manner. *Id.* This Court held:

Whether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charged in a single indictment, *the Commonwealth must introduce evidence sufficient to prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense.*

77 S.W.3d at 576 (emphasis added). The *Miller* Court concluded that the defendant was entitled to a directed verdict at retrial “with respect to those

counts unsupported by sufficient evidence to distinguish them as separate offenses.” *Id.* at 577.

In *Miller*, this Court drew upon the experience of neighboring Missouri jurisprudence, citing *State v. Rudd*, 759 S.W.2d 625, 630 (Mo. App. 1988): “[I]f multiple offenses are submitted against a single defendant, the different offenses submitted should be distinguished. *As much is inherent in the well-established rule that the giving of distinctive instructions is the proper method of submitting multiple offenses.*” 77 S.W.3d at 576 (emphasis added).⁶ The issue in Missouri is also not of recent vintage. More than 60 years ago, in *State v. Oswald*, 306 S.W.2d 559, 563 (Mo. 1957), the Missouri Supreme Court addressed precisely the same issue we address today, and which we previously addressed in *Johnson, Kingrey, Ruiz v. Commonwealth*, 471 S.W.3d 675, 680 (Ky. 2015), and other cases.⁷

We find it worth noting that federal jurisprudence aligns with our analysis of undifferentiated and duplicitous jury instructions. While unanimity of state court juries has not been held to be a requirement of the United States Constitution, *see Johnson v. Louisiana*, 406 U.S. 356, 359–60 (1972), Congress

⁶ Like this Court, the Missouri Supreme Court continues to recognize the unanimous verdict problem we again address today. *See Mallow v. State*, 439 S.W.3d 764, 769 (Mo. 2014).

⁷ *See also United States v. Campbell*, 279 F.3d 392, 398 (6th Cir. 2002); and *Kakos*, 483 F.3d at 443 (Although *Campbell* and *Kakos* dealt directly with a duplicitous indictment, *Kakos* notes: “[T]he harm from a duplicitous indictment is inextricably intertwined with the jury instructions actually given.” *Id.* at 445. “Duplicity raises the concern that [the defendant] could have been convicted without a unanimous verdict. . . . Because a substantial right is at issue, we review the jury instructions for plain error[.]” *Id.*)

requires unanimity of juries in federal criminal cases and has so provided in Federal Rule of Criminal Procedure (FRCRP) 31(a): “The jury must return its verdict to a judge in open court. The verdict must be unanimous.”

Dissenting opinions in recent cases dispute that the problem is a violation of juror unanimity, and instead cite it as simply a matter that hinders appellate review of the verdict because it is not possible to determine from the verdict what criminal act the defendant committed. *Ruiz*, 471 S.W.3d at 686 (Cunningham, J., dissenting) (“It is [an appellate] review problem. . . . Not knowing for which crime you are convicted deprives one of any effective means to appeal.”); *see also Sifuentes v. Commonwealth*, 2016-SC-000485-MR, 2018 WL 898228, at *11-16 (Ky. Feb. 15, 2018) (Keller, J., dissenting).

Of course, being deprived of an effective appeal is also an error of constitutional magnitude. Kentucky Constitution, Section 115 (“In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court”). So, as noted in *Miller* in 2002, “[w]hether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict,” and now, deprivation of an effective appeal, a problem still exists. 77 S.W.3d at 576. The violation of an essential right, whatever we call it, is one that our duty does not let us ignore.

And, upon closer look, we must ask this: if an appellate review problem is at issue because neither the appellate court nor the defendant can determine from the verdict what criminal act he was convicted of, then how can we expect the jury presented with the same multiplicity of identical instructions and

verdict forms to know what crime it is convicting the defendant of? If the defendant and the appellate court cannot sort it out, then neither can the jury. As we said in *Hampton* over thirty years ago, all that is required is some evidence “ample to separately identify the various offenses charged.” 666 S.W.2d at 740. With unmistakable clarity we said in *Ruiz* that any differentiation in the instructions, however slight, would suffice as long as it is based upon evidence distinguishing each crime from the others. *See* 471 S.W.3d at 679. If the Commonwealth has no evidence that can distinguish one crime from the others, then its evidence is insufficient to convict. If the Commonwealth has differentiating evidence, then differentiated instructions are easy. No justification exists for identical instructions as in *Harp* or duplicitous instructions as in this case.

While a few prosecutors and victim advocates may lament that we have constructed insurmountable barriers to the prosecution of child abusers, we think such is unfounded based on our collective experiences as trial judges, appellate judges, prosecutors, and criminal defense advocates. Every child who is competent to testify to the abuse he or she suffered can relate some distinction between abusive acts, however trivial, minute, or obscure. The same facts that enable a prosecutor to determine the number of crimes to charge are the same facts that can be used to differentiate the charges in the jury instructions. As stated in *Harp*, Justice Scott’s frustration with the failure of trial courts to do so was not misplaced. 266 S.W.3d at 826 (Scott, J., dissenting).

We concede that this Court has taken a minority view by regarding this instructional error, in certain instances, as structural error beyond the reach of harmless error or palpable error analysis. Most jurisdictions appear to apply harmless and palpable error analysis to these types of errors. Such analysis, in our view, would have to be conducted under the constitutional “beyond a reasonable doubt” standard rather than the less exacting standard of *Kotteakos v. United States*, 328 U.S. 750 (1946).

Perhaps the analysis of the problem as a “unanimous verdict” issue is not the best approach. But this Court did not invent that analysis, and, as the above cited cases illustrate, we are not alone in it. By whatever legal yardstick the issue is measured, the fact remains that multiple, indistinguishable jury instructions and similarly undifferentiated verdict forms can allow for convictions based upon insufficient evidence; they can allow multiple convictions for the same act; they can impede the right of appellate review; and they can cause convictions for criminal acts by a less-than-unanimous jury. This Court would egregiously err to renounce our jurisprudence in this matter and pretend that this problem does not exist.

While reversing these convictions will not alter King’s total sentence, reversal is mandated for these two counts of sexual abuse and the two corresponding ten-year sentences because the pertinent jury instructions were “duplicitous” in violation of the Kentucky Constitution’s unanimous verdict

requirement.⁸ We remand to the trial court with directions to enter a new judgment in accordance with our decision to vacate King’s two first-degree sexual abuse convictions.

B. The Jury Instructions for Sexual Abuse at Garvey Avenue and for Sodomy Did Not Subject King to Double Jeopardy.

Second, King argues that the jury instructions for sexual abuse at Garvey Avenue and for sodomy subjected him to double jeopardy. King contends that the jury instructions did not properly differentiate the acts identified as sexual abuse from the acts identified as sodomy, so if the jury found him guilty of sodomy, it necessarily found him guilty of sexual abuse because one cannot engage in deviate sexual intercourse without engaging in sexual contact. Since we are reversing King’s convictions for first-degree sexual abuse, and remanding to the trial court, his double jeopardy argument is now moot. However, we will briefly address double jeopardy as it pertains to first-degree sexual abuse and first-degree sodomy to reiterate that no double jeopardy occurred and to affirm King’s sodomy conviction.

The Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution guarantee that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb[.]” In order to determine whether a double jeopardy violation has occurred, the *Blockburger* same-elements test is employed: “whether the act or transaction complained of

⁸ We note that this will not alter the duration of King’s sentence since we affirm his first-degree sodomy charge, for which he was sentenced to life imprisonment.

constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not. Put differently, is one offense included within another?" *Commonwealth v. Burge*, 947 S.W.2d 805, 811 (Ky. 1996) (internal citation omitted) (adopting the test set forth in *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)). Furthermore, we must also conduct an analysis under Kentucky's statutory codification of the *Blockburger* test, KRS 505.020 et seq. See *Kiper v. Commonwealth*, 399 S.W.3d 736, 741 (Ky. 2012) (while *Blockburger* test will most often be controlling analysis, it is not the exclusive method for evaluating potential double jeopardy violation). KRS 505.020 states:

(1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:

(a) One offense is included in the other, as defined in subsection (2); or

(b) Inconsistent findings of fact are required to establish the commission of the offenses; or

(c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

(2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or

(d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

As this Court has observed, regarding double jeopardy with first-degree sodomy and first-degree sexual abuse:

First-degree sexual abuse is properly classified as a lesser included offense of first-degree sodomy. *Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993). The distinction between the two offenses is the body part touched for purposes of sexual gratification. Sexual abuse requires “sexual contact,” KRS 510.110, which means “touching of the sexual or other intimate parts of a person,” KRS 510.010(7). Sodomy, on the other hand, requires “deviate sexual intercourse,” KRS 510.070, which means “any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another,” KRS 510.010(1). The additional element in a sodomy offense is the specific sexual or intimate parts involved, namely, the mouth or anus.

Mash v. Commonwealth, 376 S.W.3d 548, 559 (Ky. 2012).

Whether King’s convictions for sodomy and sexual abuse violate double jeopardy depends on whether the sexual abuse was incidental to the sodomy or a separate criminal act. *Hampton v. Commonwealth*, 666 S.W.2d 737 (Ky. 1984) (holding that separate acts of sexual gratification constituted separate offenses of first-degree sodomy and first-degree sexual abuse, even arising from single transaction); *Benet v. Commonwealth*, 253 S.W.3d 528, 536 (Ky. 2008) (holding the argument that a person could not commit sodomy without also

committing the offense of sexual abuse ignored that touching the victim's genitals through his clothes "is an entirely separate act and offense than his orally sodomizing the victim[]"); *Banks v. Commonwealth*, 313 S.W.3d 567, 576 (Ky. 2010) (holding that "the acts of rubbing and touching, which comprise the first-degree sexual abuse convictions, and the separate and unrelated acts of sodomy, which comprise the first-degree sodomy convictions" did not violate double jeopardy).

We must conclude that King committed two separate criminal acts: King forcing A.S. to touch his genitals/forcibly touching her genitals constituted sexual abuse, which was not incidental to the genital to oral contact between King and A.S. that constituted sodomy. Each act was unrelated to the other and each done for sexual gratification. Whether they occurred close in time, or even simultaneously, is irrelevant. *Hampton*, 666 S.W.2d at 739.

Furthermore, King does not challenge that the Commonwealth presented the jury with one act of sodomy. No constitutional or statutory double jeopardy violation occurred with these charges.

C. The Trial Court Did Not Err in the Method of Impeachment of A.S.'s Testimony, Nor in Admitting the 2015 CAC Interview.

A.S. was interviewed on two separate and unrelated occasions at the CAC, once in 2014 following the trailer fire, and again in 2015 related to her report of sexual abuse by King. King argues that these interviews were erroneously admitted for three reasons: first, that defense counsel was not permitted to impeach A.S.'s prior inconsistent statements in a proper manner;

second, that the trial court erred in allowing the Commonwealth to introduce the recording of A.S.'s 2015 interview, thus bolstering A.S.'s testimony; and third, that both A.S.'s and the interviewer's statements during that 2015 interview were admitted as hearsay, thus denying his right to confrontation. These arguments are all preserved, with the exception of King's argument that the 2015 CAC interviewer's comments were hearsay, which we will review for palpable error.⁹ We review the trial court's evidentiary rulings for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). An abuse of discretion occurs if the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

i. Memory Refreshed.

First, King argues that the trial court erred to his substantial prejudice by not allowing his defense attorney to refresh A.S.'s memory during cross-examination for purposes of impeachment. However, a careful review of this portion of A.S.'s testimony shows that the trial court did allow defense counsel to ask A.S. on cross-examination about prior recorded statements, and then impeach A.S.'s testimony with the recorded 2014 CAC interview; thus, King's actual argument is that he was not able to "immediately" impeach A.S.'s testimony.

⁹ King's defense counsel argued that the introduction of A.S.'s testimony was impermissible hearsay and in violation of his confrontation right but did not address the interviewer's comments.

During A.S.'s testimony, she testified to a single incident of sodomy, when King put his mouth on her vagina in the basement of the Garvey Avenue House. During cross-examination, King's counsel questioned A.S. about the 2014 CAC interview, when she was asked if King had kissed her "where you pee" one time or more than one time, and A.S. had responded once. On the stand, A.S. insisted she had told the CAC interviewer that this had happened twice. Defense counsel asked A.S. if watching the recording of her prior interview would help refresh her memory, to which A.S. said no.

At the bench, over the Commonwealth's initial objection, the trial court allowed defense counsel to impeach A.S. with her prior statement. The trial court was concerned that the term "refresh your recollection" had confused the child and allowed defense counsel to play a portion of the 2015 CAC interview for A.S., outside of the presence of the jury. After the jury returned, defense counsel then elicited from A.S. that the sodomy had occurred one time. After this, the trial court permitted defense counsel to cross-examine A.S. about prior inconsistent statements if they arose, but did not allow defense counsel to play the recordings for A.S. contemporaneously, in an apparent effort to ease the trauma for A.S.

Defense counsel then asked A.S. about the 2015 CAC interview, when A.S. had been asked if anything else happened at the Garvey Avenue address besides King kissing her privates, and A.S. had told the interviewer no. A.S. responded that she had told the interviewer "yes." Defense counsel rephrased the question, and A.S. then agreed she had told the interviewer nothing else

had happened in the basement of the Garvey Avenue house.¹⁰ Defense counsel next asked A.S. if, during the 2015 CAC interview, she said she thought she had told her grandmother, Hope, about the abuse, but that Hope must not remember because it was such a long time ago. A.S. responded no. The trial court sustained an objection to defense counsel's request to again play part of the interview recording to refresh A.S.'s memory.

Defense counsel then asked A.S. about the 2014 CAC interviews following the trailer fire, when she had been asked if she understood good touch/bad touch and safety rules related to her body and if anyone had touched her private places. A.S. disagreed, and defense counsel asked the child if hearing the interview recording would help her remember what she had said. The trial court denied this request, deciding it would "deal with that a different way." After an extended discussion at the bench outside the presence of the jury, the trial court allowed defense counsel to play a large portion of the 2014 CAC tape recording for the jury both for context and content, excluding any mention of the cause of the fire or that King was later arrested for arson. Defense counsel played a portion of the tape to impeach A.S.'s testimony that she had not denied that anyone had touched her improperly. The jury also heard enough of the interview to show that A.S. was being interviewed at that time about the fire, rather than following any allegations of sexual abuse.

¹⁰ On redirect, the Commonwealth elicited from A.S. that she had told the interviewer in the 2015 CAC interview that King had made her touch his privates, and touched her privates with his hand, both in her grandparents' bedroom and in the brown trailer.

Defense counsel did not ask to play any portion of the 2015 interview. A.S. was then excused as a witness.

Due to scheduling constraints and the late hour of the afternoon, the trial court decided to allow the examining physician to testify immediately following A.S. After the examining physician was finished, roughly fifteen minutes later, and a short break, defense counsel was permitted to play the impeaching recording, less than one hour after A.S. had finished testifying.

KRE¹¹ 801A(a)(1) allows for impeachment of a witness's prior statements, providing in relevant part:

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

- (1) Inconsistent with the declarant's testimony;
- (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
- (3) One of identification of a person made after perceiving the person.

KRE 613 provides:

(a) Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the

¹¹ Kentucky Rules of Evidence.

trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

Furthermore, “[t]he trial judge has broad discretion in designating the order of trial so as to protect the various rights of competing interests. And we will not disturb an action of the trial court in conducting a trial, unless clearly erroneous or arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Davis v. Commonwealth*, 365 S.W.3d 920, 922 (Ky. 2012) (internal quotations and citation omitted)

King asserts that the trial court erred in not allowing defense counsel to follow the usual course of impeachment: playing the relevant portion of the recording outside the presence of the jury; asking if A.S.’s memory had been refreshed; and proceeding with cross. He relies on *Brock v. Commonwealth*, 947 S.W.2d 24 (Ky. 1997) to argue that the trial court should have allowed defense counsel to impeach A.S. by playing portions of the interview to A.S. contemporaneous with her trial testimony. However, *Brock* actually addresses a trial court’s denial of admission of the recollection-refreshing recording even though the KRE 613 foundational requirements had been established. 947 S.W.2d at 27, 31. Furthermore, KRE 613 requires a written statement be shown to the witness; it does not address a recorded statement.

King was clearly able to impeach any inconsistencies in A.S.’s trial testimony by playing the 2014 CAC interview. In fact, King does not dispute that his counsel was able to verbally confront A.S. with the content of her prior statements during cross-examination. The decision to spare A.S. the replaying

of her CAC interview, and to avoid confusing the young child with the usual course of impeachment was well within the trial court's discretion. King does not allege how the short delay between the child leaving the stand and the playing of the video deprived him of the ability to present a defense, especially since the jury heard large portions of the 2014 interview tape, including that A.S. told the interviewer no one had touched her inappropriately.¹² King had ample opportunity to impeach A.S.'s testimony; the trial court did not err in choosing to allow King to impeach A.S. in a manner more suited for a ten-year-old child.

ii. Admission of the 2015 CAC Interview.

Next, King argues that the trial court erred in allowing the Commonwealth to play the 2015 CAC interview as an improper admission of prior consistent statements, absent an express or implied charge against A.S. of recent fabrication or improper influence. KRE 801A(a)(2). He further argues that this constituted improper bolstering or vouching.

The morning after defense counsel played a large portion of the 2014 CAC interview for the jury, the Commonwealth asked to play portions of the 2015 CAC interview. The Commonwealth argued that this recording was

¹² King also asserts that the trial court's refusal to allow defense counsel to attempt to refresh A.S.'s recollection contemporaneously and the Commonwealth's subsequent attempt to distinguish between the two CAC interviews highlighted the fire and violated the trial court's ruling that the arson could not be raised. After a careful review of A.S.'s testimony, we do not agree that the fire or King's subsequent arrest and conviction for arson were inappropriately raised to the jury. The Commonwealth gave the necessary context for the 2014 interview and moved on without mentioning King's involvement.

admissible under KRE 801A(a)(2) to show A.S.'s consistency since her credibility had been called into question. Defense counsel objected, arguing that she had not attacked A.S.'s credibility, but had limited her cross-examination to the 2014 interview, asking only a few questions related to the 2015 interview. The trial court ruled that a majority of the 2015 interview could be played for the jury since much of A.S.'s cross-examination had concerned inconsistencies between the 2014 CAC interview and the 2015 CAC interview/current testimony.

During trial, defense counsel questioned A.S. regarding several specific portions of the 2015 CAC interview. She first asked A.S. if it was accurate that she had told the interviewer the abuse started when she was four years old in the brown trailer.¹³ Defense counsel then cross-examined A.S. about particular statements she made during the 2015 interview that, when removed from the context of the entire interview, suggest that A.S. had previously reported that no other sexual abuse occurred at the Garvey Avenue home besides a single act of sodomy. During the 2015 interview, the interviewer asked A.S. if anything else had happened at the Garvey Avenue address besides "kissing on the private," to which A.S. had answered "no." In context A.S.'s "no" clearly meant that nothing else had happened that exact day in the

¹³ This portion of the interview shows A.S. describing different acts of sexual abuse King had committed, stating that the abuse started back when the family lived in the brown trailer. The interviewer then asked about what specific acts had occurred in the brown trailer, to which the child responded that she could not remember because she had only been four.

basement. In earlier parts of the interview, A.S. described in detail other acts of sexual abuse perpetrated by King at the Garvey Avenue address in addition to the sodomy in the basement: in the back room of the house, King made A.S. take her clothes off and touched her privates with his hands; he touched her bottom and moved his hand around; he kissed her on the mouth; he touched her “where she peed” with his hand more than one time and moved his hand around; he showed her his privates and asked her to touch him.

King argues, in the alternative, that even if the questions about the 2014 CAC interview did impeach A.S.’s testimony with prior inconsistencies, this did not open the door to allow the 2015 CAC interview to be played for the jury. King argues that his defense strategy is distinguishable from *Chames v. Commonwealth*, since defense counsel did not raise inconsistencies between the 2015 interview and A.S.’s trial testimony, nor focus his entire defense on inconsistencies between the prior interview and trial testimony. 405 S.W.3d 519, 524 (Ky. App. 2012) (holding that a detective could properly testify that the child victim made some consistent statements in her testimony with those made in her interview by the Center to show that the victim had been consistent since the defendant’s defense throughout trial focused on the child’s inconsistencies and inability to remember or recite specific details regarding the alleged crimes); *see also Smith v. Commonwealth*, 920 S.W.2d 514, 516–17 (Ky. 1995) (holding that a detective’s extensive testimony, which reiterated that to which the child victim had already testified, lacked probative value and “was

unnecessary because no dispute existed as to what [the child] alleged since she had adequately stated it in the courtroom and in front of the jury[.]”).

Despite King’s assertion that defense counsel did not attack A.S.’s credibility, review of the record clearly shows that defense counsel pursued a line of questioning that implied A.S. had not previously disclosed any sexual abuse by King, and that her testimony about the abuse at the Garvey Avenue address had changed. Defense counsel also implored the jury to consider the inconsistencies in A.S.’s testimony during opening statement. The trial court did not err in finding that A.S.’s credibility had been attacked sufficiently to allow the Commonwealth to introduce prior consistent statements pursuant to KRE 801A(a)(2).

King is correct that

It is improper to permit a witness to testify that another witness has made prior consistent statements, absent an express or implied charge against the declarant of recent fabrication or improper influence. Otherwise, the witness is simply vouching for the truthfulness of the declarant's statement, which we have held to be reversible error. We perceive no conceptual distinction between testimony that repeats the witness’s prior consistent statement verbatim and testimony that the witness previously made statements that were consistent with her trial testimony. Either way, the evidence is offered to prove that the declarant’s trial testimony is truthful because it is consistent with her prior statements. A witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony.

Tackett v. Commonwealth, 445 S.W.3d 20, 34–35 (Ky. 2014) (internal quotations and citations omitted). However, the instant case is not one in which the witness’s testimony was improperly vouched or bolstered for its

truthfulness. No additional testimony was admitted solely to corroborate A.S.'s prior testimony, nor was the 2015 CAC interview offered only to prove that A.S. must be telling the truth now since she was consistent. King sufficiently implied a recent fabrication to allow A.S.'s prior consistent statements to be admitted as a rebuttal. This case is somewhat unique in that these prior consistent statements were introduced via a recording of the 2015 CAC interview after the child had finished testifying; however, as discussed above, the decision of the trial court to spare the child contemporaneous impeachment was within its discretion. We find no error in playing portions of the 2015 CAC interview for the jury.

iii. Hearsay and Right to Confront.

Third, King argues that the trial court violated his right to confrontation pursuant to the Sixth Amendment of the United States Constitution, Section 11 of the Kentucky Constitution, and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) by playing the taped 2015 CAC interview for the jury after A.S. had been excused as a witness and without calling the interviewer as a witness. We disagree; in fact, defense counsel did extensively cross-examine A.S. on this 2015 CAC interview.

Out-of-court statements by witnesses that are testimonial are barred, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness; “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Crawford*, 541 U.S. at

68–69, 124 S. Ct. at 1374. Statements are “testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273–74, 165 L. Ed. 2d 224 (2006).

This Court recently addressed the same argument King puts forth in the unpublished case *Clay v. Commonwealth*:

The questions Cecil [the interviewer] posed to Sally [child victim] during the forensic interview provide nothing more than context for Sally’s answers. Her infrequent repetition of Sally’s answers is, likewise, not intended to prove the content of Sally’s statements, as Clay alleges, but is intended to confirm Sally’s statement while providing audible clarity. Just as in *Turner [v. Commonwealth]*, 248 S.W.3d 543, 546 (Ky. 2008)], Cecil’s statements were not hearsay because they were not offered to prove the truth of the matter asserted but to provide context to Sally’s more probative statements. Because Cecil’s statements on the recording were not admitted for a hearsay purpose, Clay had no right to confront the non-testifying interviewer. So Clay’s confrontation rights were not violated by the playing of Cecil’s statements.

The statements Sally made during the forensic interview, likewise, do not violate Clay’s rights under the Confrontation Clause. The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. That Sally’s answers during the interview are testimonial hearsay is clear. They are out-of-court statements offered to prove the truth of the matter asserted, and their utterance may be objectively viewed as taking place under circumstances indicating that their primary purpose was to prove past events with an eye towards criminal prosecution. But it is equally clear that Sally testified at trial and was subject to cross-examination where Clay confronted her. Because Sally was subject to confrontation by Clay at trial, his rights under the Confrontation Clause were not violated.

No. 2012-SC-000421-MR, 2014 WL 4160134, at *6 (Ky. Aug. 21, 2014).

King clearly was not denied his right to confront A.S. since defense counsel engaged in a lengthy cross-examination of the child, in fact concerning the 2015 CAC interview. Furthermore, on tape, the interviewer did not repeat A.S.'s statements about the abuse to show their veracity, but rather repeated A.S.'s statements phrased as questions to encourage A.S. to give more detail without asserting independent knowledge, a technique well-suited to interview child victims. This 2015 CAC interview was not excluded as hearsay, as discussed above, since the prior consistent statements were admitted under 801A(a)(2) after defense counsel attacked A.S.'s credibility. The trial court did not violate King's right to confrontation, and no palpable error occurred.

D. The Trial Court Erred by Admitting the Recorded Phone Call as an Adoptive Admission but the Error was Harmless.

King next argues that the trial court erred in admitting a recording of a phone call between Hope and King made while King was incarcerated on the aforementioned arson charge. Defense counsel objected to the admission of this phone call several times: first through a pretrial motion, and then through objections at trial, both at the initial evidentiary bench conference, and then twice more during Hope's testimony and the playing of the recorded phone call. Although the recording is hearsay, the trial court admitted the recording under the hearsay exception for adoptive admissions, KRE 801A(b)(2). The trial court reasoned that King's responses, including his silence, during the phone conversation manifested his admission that Hope's out-of-court statements were true.

“A trial court has broad discretion regarding the admissibility of evidence, and its decision in evidentiary matters will not be disturbed on appeal absent a clear abuse of that discretion.” *Dant v. Commonwealth*, 258 S.W.3d 12, 18 (Ky. 2008). Again, “[t]he test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *English*, 993 S.W.2d at 945. More specifically, a trial court has broad discretion in determining the facts regarding the admission of evidence as an adoptive admission through silence. *Moss v. Commonwealth*, 531 S.W.3d 479, 484 (Ky. 2017); *Dant*, 258 S.W.3d at 18.

KRE 801A(b)(2) states that “[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is . . . [a] statement of which the party has manifested an adoption or belief in its truth[.]” Such an adoption can be through silence. This Court has recently reiterated that

to qualify as an adoptive admission through silence under KRE 801A(b)(2), the defendant's silence must be a response to statements of another person, the declarant, that would normally evoke denial by the party if untrue. . . . Nevertheless, when reviewing an application of KRE 801A(b)(2), we remain mindful of Professor Lawson's warning that silence with respect to a statement will always have some ambiguity, which creates a need for cautious use of the concept and thoughtful consideration of the circumstances surrounding that silence.

Moss, 531 S.W.3d at 484 (internal quotations and citations omitted); *see also* Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.20[3][b] at 597 (5th ed. 2013)); and *Commonwealth v. Buford*, 197 S.W. 3d 66, 73–74 (Ky. 2006).

While the adoptive admission analysis often focuses on the silence or other conduct of the accused party, the Rule functions, not to admit the silence or other conduct of the accused party, but rather to remove the constraints of the hearsay rule that would otherwise bar admission of the out-of-court declarant's statement to be used as substantive evidence. *Trigg v. Commonwealth*, 460 S.W.3d 322, 331 (Ky. 2015). Here, the trial court admitted Hope's out-of-court statements during the phone call as substantive evidence that King admitted his guilt.

King primarily argues that his responses to Hope's out-of-court statements on the recording, including his silence, do not manifest his adoption of, or belief in, the truth Hope's statements. We agree that his responses are ambiguous, and we are mindful that "because of the powerful nature of such evidence, and the dubious reliability associated with it, trial judges should guard against any possible abuse and hold the admissibility of such evidence to exacting standards." *Trigg*, 460 S.W.3d at 332.

However, the evidence King challenges contains not only the hearsay statements of Hope, it also contains the hearsay statements of a second out-of-court declarant, A.S. This is hearsay within hearsay, or double hearsay: the first level of hearsay is Hope talking to King about his case; the second level of hearsay is Hope repeating to King what A.S. said. KRE 805 establishes that "hearsay included within hearsay" can be admitted into evidence only if each part of the out-of-court statements "conforms with an exception to the hearsay rule provided in these rules."

Upon recognition of this double hearsay issue, a fair analysis requires us to recognize that Hope's out-of-court statement does not accuse King; she merely informs King of what A.S. had said. If King's responses can be regarded as his admission to the truth of what Hope said, he has admitted nothing more than the non-controversial fact that A.S. accused him of vile crimes. While a proper application of KRE 801A(b)(2) would allow Hope's statement to be admitted as substantive evidence, it does not reach the double hearsay of A.S.'s accusation to admit them as substantive evidence. The hearsay rule would clearly prohibit the Commonwealth from calling Hope as a witness at trial to have her repeat the accusations A.S. had made out-of-court. For the same reason, the Commonwealth cannot introduce A.S.'s out-of-court accusations by using Hope's recorded statement as an evidentiary proxy for her live testimony. Even if King's responses provided, by way of KRE 801A(b)(2), an exception for admitting Hope's hearsay statement, no hearsay exception exists to qualify A.S.'s accusations as admissible evidence.

Nevertheless, the Commonwealth contends that any error in the admission of the recorded phone conversation was harmless, and we agree. We are satisfied that, given the other evidence presented during the trial, especially A.S.'s in-court testimony, the jury was not swayed by the improper hearsay. *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) ("A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error."). While A.S.'s personal appearance as a witness does not

remove the taint of hearsay from her out-of-court accusations, the probative impact of her in-court testimony was sufficiently compelling to overwhelm any prejudice generated by Hope's repetition of the accusations on the recorded phone call. We conclude that the trial court erred in admitting this phone call as an adoptive admission, but further conclude that the error was harmless.

E. King's Sentence Cannot Impose a Term of Years to Run Consecutively with a Term of Life Imprisonment.

This Court's reversal of King's two sexual abuse convictions renders moot King's last argument that his ten-year sentences for each sexual abuse count cannot run consecutively with his life sentence. King is correct that sentences for a term of years cannot run consecutively with a life sentence when part of the same action. *See Mabe v. Commonwealth*, 884 S.W.2d 668, 673 (Ky. 1994); KRS 532.110. Since this case is already remanded to the trial court to address these sexual abuse convictions, any error in running these sentences consecutively instead of concurrently will be cured.

III. CONCLUSION.

Based on the foregoing, we affirm King's sodomy conviction. We affirm the trial court's evidentiary rulings regarding impeachment of A.S.'s testimony and admission of the 2015 CAC interview. We further conclude that the trial court erred in the admitting the recorded phone call as an adoptive admission, but such an error was harmless.

Although we find sufficient evidence regarding the charges of sexual abuse, we hereby reverse the sexual abuse convictions because the pertinent

jury instructions were “duplicitous” in violation of the Kentucky Constitution's unanimous verdict requirement and remand the matter to the Kenton Circuit Court for additional proceedings consistent with this Opinion.

All sitting. Minton, C.J.; Hughes, VanMeter, Venters, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion, in which Cunningham and Wright, JJ., join.

KELLER, J., CONCURRING IN PART AND DISSENTING IN PART: I concur in the majority’s opinion in part, but dissent from the majority’s analysis of the alleged unanimity error. I dissent from this portion of the opinion for two reasons: (1) I believe this case, once again, delves further into a court-made conundrum regarding the unanimity of our juries in criminal cases and (2) the opinion, as many of these cases have done, continues to weaken the palpable error analysis.

As the majority stated, the jury was presented in this case with instructions for two counts of sexual abuse. One count specified sexual abuse occurring at the victim’s residence on Garvey Avenue and one count described abuse occurring at “the brown trailer” on Sioux Trail. A.S., the victim, spoke of several incidents at each of these residences that would qualify as “sexual abuse” under these instructions. The Commonwealth conceded that, under this Court’s more recent case law, this constitutes a unanimity violation. However, I continue to dissent from such a reading of the unanimity requirement. Additionally, the Court determined that the error was palpable,

as it was unpreserved. I also disagree with the palpable error precedent we are creating in holding that such an error is palpable.

THE EVOLUTION OF THE UNANIMITY PROBLEM

The Court began creating an unusual distinction regarding unanimous jury verdicts more recently in our precedent. Unlike the requirement of unanimous verdicts, this particular distinction regarding “duplicitous instructions” is neither ancient nor well-evolved in our jurisprudence. Early on, our understanding of what negated a unanimous verdict was much narrower than our current case law.

In *Wells v. Commonwealth*, in 1978, this Court recognized that multiple-theory instructions did not run afoul of the unanimous verdict requirement. Citing to a New York case, the Court quoted, “It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict *can not* [sic] *be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other ...*” *Wells v. Commonwealth*, 561 S.W.2d 85, 88 (Ky. 1978) (quoting *People v. Sullivan*, 65 N.E. 989, 990 (N.Y. 1903)) (emphasis added). The Court, upon this principle, held that “it was not necessary that all jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one.” *Wells*, 561 S.W.2d at 88. Instead, “[i]t was sufficient that each juror was

convinced beyond a reasonable doubt that the defendant had committed the crime ... as ... defined by statute.” *Id.* The Court went even further to establish this holding: “We hold that a verdict can not [*sic*] be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense.” *Id.*

For decades, the Court held steadfast to this constant: when both theories of a crime are supported by the evidence, multiple-theory instructions are sufficiently protective of the right to a unanimous verdict. *See Harris v. Commonwealth*, 793 S.W.2d 802 (Ky. 1990) (overruled on other grounds by *St. Clair v. Commonwealth*, 451 S.W.3d 597 (Ky. 2014); *Davis v. Commonwealth*, 967 S.W.2d 574 (Ky. 1998). In contrast, when one of the alternative theories is unsupported by the evidence, then these multiple-theory instructions become a unanimity issue. *See Boulder v. Commonwealth*, 619 S.W.2d 615 (Ky. 1980) (overruled on other grounds by *Dale v. Commonwealth*, 715 S.W.2d 227 (Ky. 1986); *Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky. 1981); *Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000) (overruled on other grounds by *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010); *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002).

In *Burnett*, this Court stated that “the Commonwealth has to show that it has met its burden of proof under all of the alternate theories presented by the instruction. Once that is shown, it becomes **irrelevant** which theory each

individual juror believed.” 31 S.W.3d at 883 (emphasis added). In *Caudill v. Commonwealth*, two defendants were each charged as principal or accomplice in the victim’s murder. 120 S.W.3d 635, 666 (Ky. 2003). The jury was permitted, if they could not agree which defendant was principal and which was accomplice, to find them guilty as “principal or accomplice.” *Id.* The Court specifically held that “[t]he unanimity requirement was not violated because both theories were supported by the evidence.” *Id.* (citing to *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 925 (Ky. 1986); *Ice v. Commonwealth*, 667 S.W.2d 671, 677 (Ky. 1984); *Wells*, 561 S.W.2d at 88).

In *Johnson v. Commonwealth*, the defendant was charged with one count of possession of drug paraphernalia, but the evidence proved that she had possession of multiple paraphernalia items. 105 S.W.3d 430, 442-43 (Ky. 2003). The jury instruction did not specify to which item it referred. *Id.* at 442. This Court explicitly stated that “[t]he fact that the Commonwealth presented evidence of several different items of paraphernalia, or **even that the jurors might have based their verdict on different items of paraphernalia**, does not jeopardize Appellant’s right to a unanimous verdict in the absence of a failure of proof as to one of the items of paraphernalia.” *Id.* at 443 (emphasis added).

However, the Court, in 2008, began a shift. In *Bell v. Commonwealth*, the victim, K.T., testified that the defendant began sexually abusing her when she was in second grade, for a period of three years. 245 S.W.3d 738, 740 (Ky. 2008) (overruled on issue of the curative power of closing argument as to

erroneous instructions by *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008)). Although K.T. testified that the abuse occurred “most nights,” the defendant was charged with only five counts of first-degree rape, with the lesser included offense of first-degree sexual abuse, and five counts of sodomy first-degree. *Id.* at 740-41. The jury instructions did not include any distinguishing characteristics for the counts. *Id.* at 743. Defendant was found guilty of five counts of sexual abuse first-degree and only one count of sodomy first-degree. *Id.* at 741.

The Court stated that “[w]hen the evidence is sufficient to support multiple counts of the same offense, the jury instructions must be tailored to the testimony in order to differentiate each count from the others.” *Id.* at 744. The Court found this reversible error as to only the sodomy instruction. *Id.* “Because the jury ultimately found Bell guilty of all five counts of sexual abuse, it can be rationally and fairly deduced that each juror believed Bell was guilty of the five distinct incidents identified by the Commonwealth.” *Id.* However, as to the sodomy charge, the Court shifted its prior language regarding a jury’s ability to believe different theories of the case: “it must be evident and clear from the instructions and verdict form that the jury agreed, not only that Bell committed one count of sodomy, but also *exactly* which incident they all believed occurred.” *Id.* (emphasis original). Now, here the issue was correctly reversed as Bell had no meaningful appellate review, as the facts leading to his convicted charge were unknown and he had no realistic knowledge upon which to base his appeal. *See id.* However, the Court’s language began the troubling

shift in our unanimity holdings: that the jury must all believe exactly the same set of facts leading to its conviction. I am not persuaded that this is what our Constitution requires, nor what was intended by our unanimity precedent.

In *Harp v. Commonwealth* that same year, this Court further refined this new line of thinking in unanimity cases. Defendant sexually abused his girlfriend's four-year-old daughter, B.B., from December 2003 to February 2006. *Harp*, 266 S.W.3d at 816-17. The jury was charged with instructions for seven counts of sexual abuse first-degree, one count of sodomy first-degree, and one count of indecent exposure. *Id.* at 817. The sexual abuse instructions were identical and factually undistinguished, all giving the same time period as described. *Id.* The Court held that "in a case involving multiple counts of the same offense, a trial court is obliged to include some sort of identifying characteristic in each instruction that will require the jury to determine whether it is satisfied from the evidence the existence of facts proving that each of the separately charged offenses occurred." *Id.* at 818. The Court also held that such error, if preserved, is reversible. *Id.* Yet, after this case was published, the Court continued to hold both that these kinds of undistinguished instructions in multiple count cases were error, see *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), while still finding the multiple-theory instructions, if both theories are supported by evidence, are adequate. See *Beaumont v. Commonwealth*, 295 S.W.3d 60 (Ky. 2009), *Jones v. Commonwealth*, 331 S.W.3d 249 (Ky. 2011).

The Court was again faced with an alleged unanimity error in *Applegate v. Commonwealth*. H.A. testified that her father sexually abused her for over seven years, beginning when she was five-years-old. *Applegate v. Commonwealth*, 299 S.W.3d 266, 268 (Ky. 2009). Although H.A. testified that this happened continually during this period, defendant was charged with only one count each of rape first-degree, sodomy first-degree, and incest. Justice Schroder wrote the majority opinion of the Court, emphasizing that “[i]t would be wholly unreasonable to expect a child of such tender years to remember specific dates, especially given the long time period over which the abuse occurred.” *Id.* at 270 (quoting *Farler v. Commonwealth*, 880 S.W.2d 882, 886 (Ky. App. 1994)). The Court acknowledged the ruling from *Bell* and *Harp* that “when an indictment charges a defendant with the same offense *multiple* times, the jury instructions must include language to factually distinguish one offense from another.” *Applegate*, 299 S.W.3d at 271 (citing *Harp*, 266 S.W.3d at 816). However, the Court cited to the same decision on the issue of one sodomy instruction, stating “[o]ur precedent does not support a conclusion that a trial court is required to include any identifying evidentiary detail in instructions in which a defendant is charged **with only one count of an offense.**” *Applegate*, 299 S.W.3d at 272 (quoting *Harp*, 266 S.W.3d at 821, n. 25) (emphasis added). Defendant’s convictions were upheld as he “was not charged with the same offense multiple times. Rather, he was charged with one count of rape, one count of sodomy, and one count of incest.” *Applegate*, 299 S.W.3d at 272.

Other jurisdictions also permit this distinction between multiple crimes evidence and alternative means evidence within the realm of sexual abuse cases. In *State v. Gustafson*, the defendant was charged with one count of sexually assaulting a minor. 350 N.W.2d 653, 663 (Wis. 1984). However, evidence at trial included “more than one act of sexual contact with” the victim. *Id.* The majority of the court “conclude[d] that these acts of sexual contact were simply alternative means of committing the *actus reus* element, i.e. the wrongful act of sexual contact, involved in the crime of second-degree sexual assault.” *Id.* Unanimity was only required if the acts are “conceptually distinct.” *Id.* (citing *State v. Lomagro*, 335 N.W.2d 583 (Wis. 1983)). Because both assaults fit the description of “sexual contact,” the court considered it “conceptually similar.” *Gustafson*, 350 N.W.2d at 663. Thus, a generalized instruction on unanimity was sufficient to protect the constitutionality of the verdict. *See id.*

The New Mexico Court of Appeals delved into a similar issue in a trafficking and possession case. *State v. Godoy*, 284 P.3d 410 (N.M. Ct. App. 2012). There, law enforcement found crack cocaine in defendant’s vehicle and a large portion of cocaine in the vehicle of an associate of the defendant. *Id.* at 412. The jury found defendant guilty of the lesser-included offense of possession on the trafficking charge. *Id.* Defendant argued that the lack of specificity regarding which portion of cocaine led to the conviction violated his right to unanimity. *Id.* at 412-13. The court, however, determined this

situation was simply an “alternative theory” case for which “jury unanimity is required only as to the verdict, not to any particular theory of guilt.” *Id.* at 413.

Jurors do not have “to agree upon a single means of commission’ because ‘different jurors may be persuaded by difference pieces of evidence, even when they agree upon the bottom line.’” *Id.* (quoting *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (internal quotation marks and citation omitted)). “[W]hen a single crime can be committed in various ways, jurors need not agree upon the mode of commission.” *Godoy*, 284 P.3d at 413 (quoting *Schad*, 501 U.S. at 649). The prosecution had two alternate theories of guilt, one based upon the cocaine in defendant’s car and one upon the cocaine in the associate’s vehicle. *Godoy*, 284 P.3d at 413. “[J]ury unanimity was required only on the overall verdict, not on either of the State’s alternative theories of trafficking or possession.” *Id.* “Here, the jury was unanimous in its finding of guilt, and it need not have agreed on either of the State’s alternative theories of Defendant’s possession of cocaine.” *Id.* at 414-15. Even if there was error, the court found no fundamental error resulting in “a miscarriage of justice.” *Id.* at 415.

“A jury must unanimously agree that the state has proved each element of an offense. But the jury is not ‘always required to agree on alternative ways in which a crime can be committed.’” *State v. Ayala-Leyva*, 848 N.W.2d 546, 553-54 (Minn. Ct. App. 2014) (internal citations omitted). “[A] jury need not unanimously decide ‘which of several possible sets of underlying brute facts make up a particular element,’ or ‘which of several possible means the

defendant used to commit an element of the crime.” *Id.* at 554 (quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999)). In that particular case before the court, the jury was presented with twenty different “overt acts” used to prove a conspiracy but the jury was not required to agree on a particular overt act. *Ayala-Leyva*, 848 N.W.2d at 554-55. “[E]ach overt act provided alternative means to prove the element in furtherance of the crime of conspiracy, and thus constituted a ‘brute fact’ to support an element of the offense[.]” *Id.* at 555. The jury did not need to unanimously decide on a particular overt act. Even if there was error, the court found no evidence affecting defendant’s substantial rights. *Id.*

In Ohio, the courts looked to unanimity in the context of statutory “sexual conduct.” *State v. Gardner*, 889 N.E.2d 995, 1005 (Ohio 2008). Because the statutory definition included both vaginal and anal intercourse, the court “concluded that jurors needed to find only that sexual conduct had occurred ... and[] because the statute did not require a specific finding as to the *type* of rape, the trial court did not err by refusing to instruct the jury that it must make that finding.” *Id.* (citing *State v. Thompson*, 514 N.E.2d 407 (Ohio 1987)). The court distinguished between “alternative means” and “multiple acts.” *Gardner*, 889 N.E.2d at 1005-06. “Unanimity is not required ... as to the means by which the crime was committed so long as substantial evidence supports each alternative means.” *Id.* at 1005. Multiple acts, however, involve “several acts [that] are alleged and any one of them could constitute the crime charged.” *Id.* at 1005-06.

“[W]hen a single crime can be committed in various ways, jurors are not required to unanimously agree upon the *mode* of commission.” *Id.* at 1008 (quoting *People v. Griffin*, 90 Cal.App.4th 741, 750 (Cal. App. 2001)). In *Gardner*, the court determined burglary was an “offense with multiple modes of commission.” *Gardner*, 889 N.E.2d at 1009. “There are different means of accomplishing this crime, but the different ways do not create separate and distinct offenses.” *Id.* The court specifically referenced modes of the commission of rape:

[W]e do not require all jurors to agree whether a defendant raped a victim orally, vaginally, or anally, because all three constitute ‘sexual conduct’ in violation of the rape statute. In such cases, there is no violation of the jury unanimity rule so long as all of the jurors agree that there was sufficient penetration to satisfy the ‘sexual conduct’ element of the crime.

Id. (citing *Thompson*, 514 N.E.2d 407). Like in our aforementioned case law, the jury may disagree on the *mode* of how a crime was committed but all agree the defendant committed the crime in question. All the jurors agree that each element of the crime was satisfied. The jury members agree that the prosecution proved each element beyond a reasonable doubt. So long as these fundamental elements are satisfied, unanimity is satisfied. Under this precedent, King’s conviction would be affirmed. He was charged and convicted of two counts of sexual abuse, first-degree. Even assuming *arguendo* that the jurors in the case at bar may have disagreed as to the *mode* of “sexual contact” under the definitions statute or the particular means with which a certain

element was met would not require reversal. All twelve agreed that each element was proven by the Commonwealth beyond a reasonable doubt.

Unfortunately, this Court's precedent went one step further and, I believe, truly violated the principles of the meaning of unanimity in our Constitution and the principles supporting all of these prior unanimity cases. In *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013) the Court specifically addressed a single instruction for one count of a crime when the evidence at trial presented proof of more than one instance that would, on its own, meet the requirements of the instruction. The Court held "that such a scenario—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." *Johnson*, 405 S.W.3d at 449. Justice Noble, in a well-reasoned and thoughtful opinion, compared the situation to the federally condemned problem of duplicitous instructions. *Id.* 453-54. In such instructions, "a duplicitous count includes in a single count what must be charged in multiple counts." *Id.* at 454. Federal courts reject such duplicitous indictments as "a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both ..." *Id.* (quoting *Johnson v. United States*, 398 A.2d 354, 369-70 (D.C. 1979) (quoting *United States v. Starks*, 515 F.2d 112, 116-17 (3d Cir. 1975))). While recognizing that the federal unanimity laws are not applicable to the states, the majority found the logic of these holdings persuasive as to

Kentucky's unanimity requirement. *Johnson*, 405 S.W.3d at 455. Justice Noble crafted a hypothetical to explain the difference:

An instruction that includes multiple crimes but directs only one conviction ... is like giving directions to a McDonald's on the east side of town to half a group of travelers, and directions to one on the west side of town to the other half, despite a rule that requires all the travelers to go to the same restaurant. Both groups arrive at a McDonald's, but not all the travelers are in the same place.

Id. According to the majority's logic, "[t]he unanimity requirement mandates that jurors end up in the same place." *Id.* While the jury "appear[s] to end up in the same place in order to convict[,] ... that appearance is illusory because we can never know whether the jurors are indeed in the same place." *Id.*

The hypothetical is persuasive. However, it misstates the circumstances of this kind of issue. It is not that the travelers are ending up in two different places. Instead, six travelers take the expressway and six travelers take country roads; nonetheless, the twelve travelers all meet at the exact same location in the end. Once again, we ask the wrong question. It is not whether the jurors all took the same path to reach the verdict; it is whether they ended at the same point unanimously. Unanimity as to *mode* is not required; it is unanimity of the *verdict* that is integral. As Justice Cunningham stated in his dissent in *Johnson*, "[w]e are requiring juries to be unanimous on matters that the unanimous verdict requirement never anticipated." *Id.* at 461. Our Constitution and our prior case law has never required that juries unanimously agree on a particular set of facts. In fact, our case law has held just the opposite. *See Wells*, 561 S.W.2d at 88. Rather, it is the unanimity of

the *verdict* that is integral to our constitutional analysis and it is the unanimity of the *verdict* that is a matter of due process. This requires a unanimous jury finding that the prosecution has proven each element of the offense. If a particular element could be proven in multiple ways, why should the jury be required to distinguish which alternative means it decides upon? Such distinction should only be required when it affects the defendant's substantial rights, either through his right to appeal, his ability to present a defense, notice of his charges, etc.

UNANIMITY VS. REVIEWABILITY

Why is there a difference between these two treatments, *i.e.* between the situation in *Applegate* in contrast to *Bell* and *Harp*? Between alternative means and multiple acts? Why should we require unanimity on *elements* and not on *facts*? Why did the decision in *Johnson* distinctly cross a line into new territory? I cite Justice Cunningham's dissent in *Johnson*. The unanimity issues as described in these sexual abuse cases are not, in actuality, unanimity issues. Instead, they are reviewability issues. In many of these cases where a defendant is found guilty of multiple counts without distinguishing characteristics, "the reviewing court cannot be certain which offense or offenses were committed—not whether the jury voted unanimously. So it is not a unanimity issue. It is a review problem." *Johnson*, 405 S.W.3d at 460 (Cunningham, J., concurring in part and dissenting in part). This important distinction draws the line for why our cases have been so conflicted and have created such an untenable position for prosecutions of sexual abuse

cases. We are simply asking the wrong question. The question is not whether the jury all agreed to the exact same act to reach its verdict. The question is, instead, are we able to adequately review that verdict? When only one offense has been charged, as in *Applegate*, it is easily reviewable as all the evidence was integral to prosecution of that one count. If there are multiple counts and the jury returns guilty verdicts on all, as in the sexual abuse counts in *Bell*, once again, reviewability is not an issue. However, when there are multiple counts and only some return guilty verdicts, like the sodomy counts in *Bell*, then reviewability becomes an integral issue. If the Court cannot determine what the defendant was convicted of, then that defendant has lost all means to any effective appeal. However, this does not necessarily mean that his verdict was non-unanimous. The majority implies that the distinction is meaningless, that what we call the problem is irrelevant. However, I would argue that it goes to the heart of the issue and determines whether the error is reversible or not. If a defendant loses the effective means of appeal, his due process rights have been violated and there is an error of constitutional magnitude that must be corrected. However, if reviewability is not affected, then I would hold that the error is not necessarily one affecting the due process rights of the defendant.

RE-EXAMINING THE PURPOSE BEHIND UNANIMITY

I question the practical distinction between one instruction on multiple instances, where each of these multiple instances is sufficiently proven, and a multiple-theory instruction. If we do not require a jury to unanimously decide whether a murder was intentional or wanton under old statutes, or a principal

or accomplice, or whether the murder weapon was a knife or a sword, etc., then why must all twelve jurors agree as to only one particular instance of abuse? Consider these two scenarios: (1) on a charge of murder, six jurors believe the defendant was the accomplice and six jurors believe the defendant was the principal actor but all agree that the defendant is criminally responsible for the victim's death; (2) on a charge of sodomy, six jurors believe defendant performed oral sex on the victim while six jurors believe the defendant forced the victim to perform oral sex on him, but all agree the defendant is criminal responsible for "sodomy." There is no practical difference between these scenarios. Instead, what this Court has created is a distinction without merit that severely incapacitates the ability to prosecute sexual abuse cases.

Not only is this distinction without legal basis, there are also numerous policy reasons for reinstating the analysis in our unanimity holdings prior to *Johnson*. This court-made distinction has been the downfall of numerous sex abuse cases. See e.g. *Kingrey v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013); *Martin v. Commonwealth*, 456 S.W.3d 1 (Ky. 2015); *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015); and *Jenkins v. Commonwealth*, 496 S.W.3d 435 (Ky. 2016). These holdings require prosecutors to force victims to testify to unique, identifying characteristics – each incident of abuse and violence against them must have some unique quality which they must remember to an extent beyond reproach upon cross-examination. Their credibility must be upheld with the jury, even while being forced to relive what may be some of the worst

moments of their life. This Court would require them not only to relive those moments, but also to be sure to notice the room, the clothes the abuser is wearing, the weather of the day, etc. But that detail must be unique for each circumstance. Additionally, I question whether these kinds of details will ever be subject to recall in some cases. In such cases, must the Commonwealth abandon all prosecution?

The majority states that this particular “lament” is unfounded and that “[e]very child that is competent to testify to the abuse they suffered can relate some distinction between abusive acts, however trivial, minute, or obscure.” First, I would state that such a broad and generalized statement cannot be accurately made without reservation. Second, even the cases cited by the majority opinion recognize that this lack of distinction is a real and concrete barrier faced in child abuse prosecutions.

Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover[,] because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the [prosecution’s] case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.

State v. Arceo, 928 P.2d 843, 868 (Haw. 1996) (quoting *State v. Brown*, 780 P.2d 880, 825-26 (Wash. App. 1989) (citation omitted)). An abused child, assertedly molested over a substantial period by a parent or other adult residing in [the] home, may have no practical way of

recollecting, reconstructing, distinguishing or identifying by ‘specific incidents or dates’ all or even any such incidents. (Indeed, even a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance.)

State v. Ashkins, 357 P.3d 490, 497 (Or. 2015) (quoting *People v. Jones*, 792 P.2d 643, 648 (Cal. 1990) (citation omitted)).

Yes, a defendant’s rights are paramount in a criminal trial. However, this Court has read into the unanimity requirement a new and different standard not guaranteed by our state Constitution. This is not an imagined barrier, as the majority opinion seems to imply. It is a real obstacle in these kinds of prosecutions. Given the history surrounding the evolution of this issue, and with great respect to my learned colleagues, I see no reason to persist in reading our laws this way.

For all these reasons, I believe now is our opportunity to overrule *Johnson v. Commonwealth* and the successive line of cases holding the instructions at issue are reversible error. The majority opinion states that it would “egregiously err” in “renounc[ing] our jurisprudence in this matter and pretend that this problem does not exist.” I, in sharp contrast, believe it to be egregious error to continue a legal fiction that serves no constitutional purpose absent creating insurmountable barriers to the efficient and effective prosecution of abusers. Other jurisdictions, as cited herein and by the majority, have developed tests and rules to examine how unanimity is affected in each situation. There is no reason our court should steadfastly hold to such a bright-line and rigid rule.

I would reiterate our prior holdings that where only one count has been charged, unanimity is not an issue. I would also clarify that reviewability is a distinct issue from non-unanimous verdicts. While I anticipate that this issue will become less prevalent due to the recent legislation passed by the General Assembly allowing prosecution for a continuing course of conduct, I am concerned that our current case law continues to be a source of confusion on this issue. This error must be corrected, and I believe now is the time.

Even if this Court chooses not to overrule this line of cases, I would encourage the Court to look to other jurisdictions' analysis of the issue in contrast to our treatment of unanimity. In most of these other jurisdictions, prosecutors are encouraged to elect the incident the jury is to consider *or* to give a generalized instruction on unanimity. I believe this handling could be helpful to practitioners and the bench in this Commonwealth. Additionally, other states look at the particular circumstances each time this issue is raised by a defendant. It is not simply that, *ipso facto*, unanimity error leads to reversing the conviction. Instead, it is an in-depth analysis which looks at the *rights* of the defendant and whether his right to a fair trial was impeded by the error. This leads me to our palpable error analysis.

WEAKENING THE PALPABLE ERROR ANALYSIS

The majority of this Court has determined that the error described here, an allegedly duplicitous instruction leading to a non-unanimous verdict, is palpable error. *See Johnson*, 405 S.W.3d at 457. The Court stated that "this type of error, which violates a defendant's right to a unanimous verdict and

also touches on the right to due process, is a fundamental error that is jurisprudentially intolerable.” *Id.* The Court determined the error was palpable and required reversal. *Id.* It seems the Court determined, as a bright-line rule, that the alleged error would always be considered palpable. I disagree with this assumption.

As Justice Cunningham stated in his dissent in *Johnson*: “We are watering down our palpable error standard with holdings such as this to the point that it behooves the defense lawyer not to object on jury instructions and just allow the trial court to walk—unwarned—onto the unanimity land mine.” *Id.* at 461. This Court has a long history of considering the palpable error standard to be an incredibly high bar. Even when the error was considered palpable and “affect[ed] the substantial rights of a party,” relief will only be granted “upon a determination that manifest injustice has resulted from the error.” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). “An error is ‘palpable,’ ... only if it is clear or plain under current law[.]” *Id.* (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006)). Even then:

An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’

Jones, 283 S.W.3d at 668 (quoting *Martin*, 207 S.W.3d at 4). Furthermore,

Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the

result would have been different, the error will be deemed nonprejudicial.

Martin, 207 S.W.3d at 3 (quoting *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000) (quoting *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986))). “[T]he required showing [for relief from a palpable error] is probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Martin*, 207 S.W.3d at 3.

“To discover manifest injustice, a reviewing court must plumb the depths of the proceeding ... to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.” *Id.* at 4. “When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.” *Id.* at 5. *See also McGuire v. Commonwealth*, 368 S.W.3d 100, 112 (Ky. 2012).

In *Johnson*, Justice Cunningham opined in his dissent that the error, at its worst, was not palpable error. *Johnson*, 405 S.W.3d at 462. He stated:

In the case before us—in its worst unanimity posture—six people believed Appellant committed first-degree criminal abuse on one date and six believed the offense was committed on a different date, both within the time period of the charge. Nevertheless, a unanimous jury found Appellant guilty of one count of first-degree criminal abuse. Surely, this is not ‘palpable error’ as we have traditionally envisioned.

Id. Similar to the case in *Johnson*, the worst-case scenario here presents a jury divided on which particular incident of abuse was referenced to find King guilty

of sexual abuse. I agree with Justice Cunningham that such a situation is not what the rules intended to prevent by the rule on palpable error.

It seems the majority of jurisdictions facing this particular issue follows what is known as the either/or rule. *State v. Nicholas*, 151 A.3d 799, 804-05 (Vt. 2016). The rule “requires either the election of a single act as a basis for the charged offense or an instruction requiring the jury to be unanimous in determining which act supports a conviction.” *Id.* Even given this majority rule, however, many courts have declined to reverse “for a failure to give a specific unanimity instruction in multiple-acts cases where the evidence concerning the alleged acts was not materially or conceptually distinct or the same blanket or generic defense was proffered with respect to all of the acts.” *Id.* at 805.

In *Nicholas*, the defendant presented one defense – the victim’s injuries were caused by accidents rather than his intentional abuse. *Id.* at 806. “[I]n light of defendant’s blanket defense to the charges against him, he was not prejudiced by the omission of a specific unanimity instruction, and thus there is no plain error.” *Id.* at 807. The issue becomes one of credibility: if the jury believed the defendant’s blanket defense, then they would not distinguish between specific acts. The jury either believes the defendant or the victim. Thus, when there is no distinction of defense between specific acts, there is no actual prejudice in the absence of a specific unanimity instruction or specificity in the jury instruction.

In Texas, the courts determined the instruction on one charge with evidence of multiple acts was in error. *Cosio v. State*, 353 S.W.3d 766, 774 (Tex. Crim. App. 2011). However, the “defense was essentially of the same character and strength across the board.” *Id.* at 777. “Had the jury believed [Cosio’s defense], they would have acquitted Cosio on all counts.” *Id.* at 777-78. Thus, based on the jury’s findings, “it is logical to suppose that the jury unanimously agreed that Cosio committed all of the separate instances of criminal conduct during each of the four incidents.” *Id.* at 778. Thus, there was no proof of actual harm and the court determined that “Cosio was [not] denied a fair and impartial trial.” *Id.*

The Indiana Supreme Court made a similar ruling. *Baker v. State*, 948 N.E.2d 1169, 1178-79 (Ind. 2011). “[T]he only issue was the credibility of the alleged victims. The only defense was to undermine the young woman’s credibility ...”. *Id.* at 1179. A finding of fundamental error requires a harm that “detrimentally affected” “the defendant’s right to a fair trial” and denied “procedural opportunities for the ascertainment of truth[.]” *Id.* Because the jury ultimately found the victims more credible than the defendant, the defendant failed to “demonstrate[] that the instruction error in this case so prejudiced him that he was denied a fair trial.” *Id.* Even without discussion on blanket defenses, many courts have determined that this particular error is not necessarily reversible.¹⁴

¹⁴ See *Godoy*, 284 P.3d at 415 (“Here the jury was unanimous in its finding of guilt, and it need not have agreed on either of the State’s alternative theories of Defendant’s possession of cocaine. Under fundamental error review, we conclude that

Here, King was a beneficiary of prosecutorial discretion. Rather than charging multiple counts of sexual abuse, and subjecting King to a much higher sentence, the prosecution charged one count of sexual abuse for each location. The court also wisely specified that location in the jury instructions. This advantageous arrangement is potentially why King chose to remain silent on the jury instruction issue and allow the process to take hold and then seek palpable error review. Although I agree that this is not what should be prevented under the palpable error rule, I also disagree that this even qualifies under current case law as palpable error.

First, I am disinclined to accept King's position that there would have been a different result. To prove this, it would have to be shown that some of the incidents testified about by the victim were insufficient to find guilt beyond a reasonable doubt. This is not the case. A.S. spoke in depth about the abuse to which she was subjected. Each incident was sufficient for the jury to find guilt. If this is the case, then even with separate counts or testimony about only one incident, the result would have been the same.

Second, I do not succumb to the belief that King's case was "shocking or jurisprudentially intolerable." This particular situation does not affront the

Defendant's conviction does not shock the conscience of the Court or amount to a miscarriage of justice."); *Gardner*, 889 N.E.2d at 1014 (In the absence of a specific unanimity instruction, "we find that Gardner's conviction in this case is not against the manifest weight of the evidence and that there is sufficient evidence to sustain it. Accordingly, we find no manifest injustice."); *Ashkins*, 357 P.3d at 502 ("[W]e conclude that there is little likelihood that, if it had been given the concurrence instruction that defendant requested, the jury would have reached a different result. Accordingly, we further conclude that, although the trial court erred in denying defendant's request for a jury concurrence instruction, the error was harmless.").

judicial system as a whole. I do not agree that this implicates King's due process rights under the law. Instead, he benefited from the choice to be indicted only on the specified two counts of sexual abuse. As this does not "threaten[] the integrity of the judicial process," I do not agree that the error here, if any, was palpable to warrant reversal of these particular convictions. King's defense to the entire case was the same: "I did not do it." Clearly, the jury determined the victim was more credible than the defendant here. There was no parsing of defenses for each particular act; King had one defense and the jury did not believe it. I do not subscribe to the notion that this situation is what our courts have traditionally referred to as palpable error. Palpable error is an error that is egregious and offends the judicial process. This is simply not the case here.

I agree with many other jurisdictions that a general unanimity instruction to juries would help to cure potential error, although I maintain this is not palpable error. However, it is important to note that the jury was instructed in Instruction No. 1 that "[t]he verdicts of the jury must be unanimous[.]" Although this may not be as specific as the majority would like for a unanimity instruction, I believe it is sufficient to, at the least, remove the palpable nature of any potential error here. For the foregoing reasons, I would also affirm the sexual abuse convictions.

Cunningham and Wright, JJ., join.

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