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RENDERED: FEBRUARY 15, 2018
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2016-SC-000485-MR

FERNANDO SIFUENTES — APPELLANT

V.

ON APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
NO. 14-CR-00066

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Fernando Sifuentes appeals as a matter of right from the judgment of the Shelby Circuit Court and 20-year sentence for one count of first-degree rape, one count of first-degree sodomy, and one count of incest stemming from the abuse of his niece, B.M. Sifuentes raises a number of grounds for relief, two of which have merit and require reversal. The first is a *Batson*[1] violation resulting from a peremptory strike made by the Commonwealth. The second is duplicitous jury instructions on rape and sodomy, which violate the unanimity

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

requirement for jury verdicts. We will further address any remaining issues which may arise again on remand.

I. BACKGROUND.

B.M. lived in a mobile home in Shelbyville, Kentucky with her parents and sister, as well as several other relatives, including Sifuentes, B.M.'s paternal uncle. B.M. testified that when she was in third grade, Sifuentes began engaging in sexual behaviors, first by touching her inappropriately over her clothes, then under her clothes, until progressing to sexual intercourse, and finally sodomy when B.M. was in fifth grade. She stated that the abuse occurred "once or twice a week" during this time, and that Sifuentes would seek out time alone with her, such as when her mother would go to the store, when her parents were out, or at night.

B.M. testified that she felt "nasty" and "ashamed for letting it happen," but that Sifuentes told her "it could cause problems" with the family if she ever told anyone, and B.M. was afraid to upset her father. After a while, even though she knew the behavior was wrong, B.M. felt "normal" because it happened so often. The abuse stopped when Sifuentes returned to Mexico, but resumed when he returned to Kentucky, when B.M was in sixth grade.

After B.M.'s sister read about the sexual abuse in B.M.'s diary, and confronted her, B.M. told her mother. Her mother sent her to counseling immediately. B.M. received psychological treatment at Our Lady of Peace Hospital in Louisville for a week, and was also treated at Seven Counties Services. In 2012, B.M. disclosed the abuse to a school counselor, at which

point the police began an investigation. In March 2012, B.M. was interviewed by a forensic investigator at the Family and Children's Place in Louisville. During the pendency of this investigation, B.M. and her family were referred to Catholic Charities regarding the U-Visa process.[2] Although B.M. and her family began the appropriate filings, they did not complete the application process.

In 2014, Sifuentes was indicted as follows: three counts of first-degree rape, two counts of first-degree sodomy, and one-count of incest, for offenses that occurred between 2006-2009. The Commonwealth thereafter amended the indictment to one count of first-degree rape, one count of first-degree sodomy, and one count of incest. The jury was instructed on these offenses, as well as an additional incest instruction for a victim under 12, now a Class A felony under KRS[3] 520.010, as amended June 12, 2006. The jury convicted Sifuentes of all charges, and recommended a sentence of 20 years on each count, to be served concurrently, for a total of 20 years' imprisonment, which the trial court imposed. This appeal follows as a matter of right.

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[2] "The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity." U.S. CITIZEN AND IMMIGRATION SERVICES, https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last accessed Nov. 16, 2017). "A U–Visa enables victims of certain crimes, including domestic violence, to reside lawfully in the United States for a period of four years, which may be extended upon certification by a law enforcement official that the individual's continued presence in the United States is necessary to assist in the investigation or prosecution of criminal activity." *Romero–Perez v. Commonwealth*, 492 S.W.3d 902, 903 n.1 (Ky. App. 2016) (citing 8 U.S.C. §§ 1101(a)(15)(U)(iii)(2014), 1184(p)(6)(2015)).

[3] Kentucky Revised Statutes.

II. ANALYSIS.

A. The Trial Court Abused its Discretion in Overruling Sifuentes's *Batson* Challenge.

First, Sifuentes, an undocumented Mexican immigrant, argues that the trial court abused its discretion in overruling his *Batson* challenge and allowing the Commonwealth to exercise a peremptory strike on Mr. Jimenez, the only Latino on the venire panel of 31. Defense counsel objected under *Batson*, and the trial court overruled the objection, finding that the Commonwealth had proffered an appropriate, race-neutral reason for striking Mr. Jimenez. We review the trial court's ruling 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).

In *Batson,* the United States Supreme Court outlined a three-step process for evaluating claims that prospective jurors were stricken on the basis of race, in violation of the Equal Protection Clause.

> First, the defendant must make a prima facie showing of racial bias for the peremptory challenge. Second, if the requisite showing has been made, the burden shifts to the Commonwealth to articulate clear and reasonably specific race-neutral reasons for its use of a peremptory challenge. While the reasons need not rise to the level justifying a challenge for cause, self-serving explanations based on intuition or disclaimer of discriminatory motive are insufficient. Finally, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination. A judge

> cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable, and second, not a pretext. These two requirements are necessary to demonstrate clear and reasonably specific legitimate reasons.

Gamble v. Commonwealth, 68 S.W.3d 367, 371 (Ky. 2002) (internal quotations and citations omitted). "Unless the trial court's findings of fact are clearly erroneous, they must be accepted." *Stanford v. Commonwealth*, 793 S.W.2d 112, 114 (Ky. 1990).

For the first prong of the *Batson* test, this Court has found that "once the Commonwealth has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate issue of discrimination, the preliminary issue of whether the defendant has made a prima facie showing is moot." *Gamble*, 68 S.W.3d at 371 (citing *Commonwealth v. Snodgrass*, 831 S.W.2d 176 (Ky. 1992)) (holding that where the sole reason for objection was the striking of the only black man selected from the jury pool, "*Batson* requires more than a simple numerical calculation. Numbers alone cannot form the only basis for a prima facie showing[]"). In the instant case, the Commonwealth offered a race-neutral explanation for striking, and the trial court ruled on the issue, thus making the issue of whether Sifuentes made a prima facie showing moot.

With respect to the second prong of the *Batson* test, the Commonwealth met its burden to articulate a race-neutral reason for its use of the peremptory

challenge. The Commonwealth stated that Mr. Jimenez looked "belligerent" and "hostile" when he looked at the Commonwealth's counsel table.[4] "The issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991). In this case, the Commonwealth's stated reason for striking Mr. Jimenez was that he seemed hostile when he looked at the counsel table. "On its face, this reason is race-neutral because it could apply with equal force to a juror of any race. Thus, the second *Batson* step is met." *Mash v. Commonwealth*, 376 S.W.3d 548, 555 (Ky. 2012).

The "final step under the test requires the trial court to assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class." *Johnson v. Commonwealth*, 450 S.W.3d 696, 706 (Ky. 2014), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015).

> Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition,

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[4] Sifuentes argues that Mr. Jimenez was stricken in part because of his black leather jacket, without explanation for why this particular black leather jacket was so offensive. The Commonwealth asserts that the reference to Mr. Jimenez's outerwear was merely a description for the court as to what this specific juror was wearing. Regardless, we will consider the articulated reason for striking to be the "hostile" or "belligerent" expression the Commonwealth perceived, and not the black leather jacket.

> race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province[.]

Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207–08, 170 L. Ed. 2d 175 (2008) (internal quotations and citations omitted). Although the reason stated need not rise to the level justifying a challenge for cause, "self-serving explanations based on intuition or disclaimer of discriminatory motive are insufficient." *Stanford*, 793 S.W.2d at 114 (quoting *Batson*, 476 U.S. at 98, 106 S. Ct. at 1724). The trial court plays a pivotal role in evaluating *Batson* challenges, especially in this third step.

> The trial court's ultimate decision on a *Batson* challenge is akin to a finding of fact, which must be afforded great deference by an appellate court. Deference, of course, does not mean that the appellate court is powerless to provide independent review, but the ultimate burden of showing unlawful discrimination rests with the challenger.

Johnson, 450 S.W.3d. at 702 (internal quotations and citations omitted).

Although an observation of a juror's body language or demeanor may properly prompt a peremptory challenge, to avoid a *Batson* violation, counsel must state with reasonable specificity how that particular body language forms the basis of the challenge. *Id.* at 705. "[A] trial lawyer's instinct or gut feeling

can be the legitimate basis for a race-neutral reason to strike a juror of a protected class, but there must be some articulable, case-related reason attached to it." *Id.* "Although a prosecutor theoretically could fabricate a demeanor-based pretext for a racially-motivated peremptory strike, the third step in *Batson* alleviates this concern by permitting the court to determine whether it believes the prosecutor's reasons." *Mash,* 376 S.W.3d at 556 (citing *Thomas v. Commonwealth,* 153 S.W.3d 772, 778 (Ky. 2004)). "The third step of the *Batson* test is where "the persuasiveness of the justification becomes relevant." *Mash,* 376 S.W.3d at 556 (citing *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)).

This Court has upheld demeanor-based strikes under *Batson* when: (1) additional reasons were given in conjunction with the demeanor-based reasons, or (2) the demeanor-based reason was expounded upon with specificity. *See, e.g., Mash,* 376 S.W.3d at 548 (holding that the prosecutor articulated a clear change in demeanor from the stricken juror after a specific line of questioning related to race and brought up the *Batson* challenge proactively); *Thomas,* 153 S.W.3d at 777 (holding that the prosecutor articulated a race-neutral reason when he struck two black jurors based on their demeanor and facial expressions, but in conjunction with their responsiveness during voir dire); *Stanford,* 793 S.W.2d at 114 (holding that the prosecutor may consider a juror's "flashy manner of dress" – a handkerchief flowing out of his suit with a red shirt – in addition to his size and perceived slowness in exercising a peremptory challenge).

However, we have consistently found *Batson* violations when only the appearance or demeanor of a perspective juror is the given reason. *See, e.g., Johnson*, 450 S.W.3d at 703–06 (holding that a prosecutor's concerns about African-American prospective juror's age, personal knowledge of one of the jurors from years ago, and the prosecutor's "instinct" or "gut feeling" that the juror would be "too much of a wild card" to be a good juror, without more, was not a race-neutral reason for exercise of a peremptory strike); *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000) (holding a *Batson* violation occurred when the prosecutor offered only the reason that the stricken juror appeared "inattentive or bored, in light of the fact that no questions were directed toward the juror during voir dire[]").

While the Commonwealth permissibly commented on the demeanor of Mr. Jimenez, it did not offer any explanation as to why Mr. Jimenez's perceived hostility would make him unfit to serve as a juror. In fact, the Commonwealth had no interaction with or chance to question Mr. Jimenez before striking him. Even if the Commonwealth perceived a less than friendly face from Mr. Jimenez, the proffered reason for striking fell far short of that required under *Batson*. Indeed, when proffered reasons are so vague, the "vagueness alone could fairly point toward a conclusion that they are merely pretextual." *Johnson*, 450 S.W.3d at 704.

Since the Commonwealth did not offer an explanation that was sufficient to circumvent the *Batson* challenge, the trial court's acceptance of the explanations proffered by the Commonwealth was unsupported by sound legal

principles, and constituted an abuse of its discretion. Accordingly, we are compelled to reverse Sifuentes's conviction and sentence on this basis alone.

B. The Trial Court Erred in Allowing Duplicitous Instructions on Rape And Sodomy, Which Violated the Unanimity Requirement for Jury Verdicts.

Sifuentes argues that the jury instructions on both the rape and sodomy charges were duplicative and resulted in non-unanimous verdicts. We agree.

Regarding the Jury Instruction on First-Degree Rape, Jury Instruction No. 4 reads:

> You will find the defendant guilty of First-Degree Rape, under this Instruction if and only if, you believe from the evidence beyond a reasonable doubt, all of the following:
>
> A. That in Shelby County, Kentucky, between January 2006 and March 12, 2009 and before the finding of the Indictment herein, the defendant FERNANDO M. SIFUENTES engaged in sexual intercourse with B.M., DOB 3/13/1998;
>
> AND
>
> B. That at the time of such intercourse B.M. was less than 12 years of age.

The Jury Instruction on First-Degree Sodomy, Jury Instruction No. 5 similarly reads:

> You will find the defendant guilty of First-Degree Sodomy, under this Instruction if and only if, you believe from the evidence beyond a reasonable doubt, all of the following:
>
> C. That in Shelby County, Kentucky, between January 2006 and March 12, 2009 and before the finding of the Indictment herein, the defendant FERNANDO M. SIFUENTES engaged in deviate sexual intercourse with B.M., DOB 3/13/1998;

AND

D. That at the time of such intercourse B.M. was less than 12 years of age.

However, the jury was not presented with any specific act or a specific date of either rape or sodomy instance upon which to base a conviction. B.M.'s testimony as to a three-year time frame in which dozens of instances of inappropriate sexual behavior are alleged to have occurred does not support one count of each crime. 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). On retrial, we direct the trial court to instruct the jury with specificity as to each act that is being charged for each count of the indictment in order to avoid an unanimity problem.

C. The Jury Instructions on the Incest Count Were Proper.

Sifuentes alleges the trial court allowed duplicitous jury instructions on the incest count. In the original indictment, Sifuentes was charged with one count of incest:

> Count 6 – That on or between 2006 – 2009, in Shelby County, Kentucky, the above named defendant, FERNANDO SIFUENTES, committed the offense of INCEST when he had sexual intercourse or deviate sexual intercourse with a person whom he knew to be an ancestor, descendant, uncle, aunt, brother, or sister AND the victim was less than twelve (12) years of age.

Prior to trial, the Commonwealth amended the incest charge to include the time frame, "between January 2006 and March 12, 2009" to account for a statutory amendment. Effective July 12, 2006, the General Assembly amended KRS 530.020 to categorize incest based on the victim's age; prior to this amendment, the statute classified incest as a Class C felony regardless of the victim's age. Therefore, any conduct between January 2006 and July 11, 2006 would be classified as a Class C felony, and any conduct from July 12, 2006 to March 12, 2009 would be a Class A felony, since B.M. was under 12 years of age.

The Jury Instruction on Incest Under Age of 12, Jury Instruction No. 6 reads:

> You will find the Defendant guilty of Incest under the age of 12, under this Instruction if and only if, you believe from the evidence beyond a reasonable doubt, all of the following:
>
> A. That in Shelby County, Kentucky between July 12, 2006 and March 12, 2009, and before the finding of the Indictment herein, the defendant FERNANDO M. SIFUENTES engaged in deviate sexual intercourse with B.M., DOB 3/13/1998;
>
> AND
>
> B. That B.M. was his niece;
>
> AND
>
> C. That he knew B.M. was his niece;
>
> AND
>
> D. That at the time of such intercourse, B.M. was less than 12 years of age.

Jury Instruction No. 7 reads:

> If you did not find the Defendant guilty under Instruction No. 6, you will find the Defendant guilty of Incest under the age of 12, under this Instruction if and only if, you believe from the evidence beyond a reasonable doubt, all of the following:
>
> B. That in Shelby County, Kentucky between January, 2006 and July 11, 2006, and before the finding of the Indictment herein, the defendant FERNANDO M. SIFUENTES engaged in deviate sexual intercourse with B.M., DOB 3/13/1998;
>
> AND
>
> B. That B.M. was his niece;
>
> AND
>
> C. That he knew B.M. was his niece;

As this Court specifically instructed in *Rodriguez v. Commonwealth*, 396 S.W.3d 916, 920 (Ky. 2013), regarding this statutory amendment to incest, the jury must be instructed on both instructions for incest if the conduct occurred both before and after July 12, 2006, and the defendant cannot be convicted of both classifications. Such instruction does not violate unanimity since

> [I]f the jury's conviction was based upon acts that occurred before the statutory amendment's effective date of July 12, 2006, then it could only convict Appellant of Class C felony incest under the prior version of KRS 530.020. If the jury's conviction was based upon acts that occurred on or after [victim's] twelfth birthday (July 20, 2009) it could only convict Appellant of Class B felony incest. Only if the conviction was for a time after KRS 530.020 was amended (post July 12, 2006), but before [victim's] twelfth birthday, would the event have constituted Class A felony incest.

Id.

Since the jury instructions in the case at bar instructed on the specific dates to which each classification of the felony applied, and are in the alternative of each other, the jury was properly instructed. The jury explicitly convicted Sifuentes of Class A incest, and thus did not violate his right to a unanimous verdict.

D. The Trial Court Did Not Abuse its Discretion in Denying Sifuentes's Motion to Exclude the KRE 404(B) Evidence.

Sifuentes presents two grounds for arguing that the trial court abused its discretion in allowing the Commonwealth to admit evidence under KRE[5] 404(b): notice and relevance. Since we are remanding, the issue of notice is unlikely to arise again; however, we will address relevance. The Commonwealth's "Motion For Admission of Evidence Pursuant to KRE 404(b)" sought admission of "testimony of a course of conduct of sexual crimes against the victim during the periods covered in the indictment."

In general, under KRE 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, this evidence may be admissible "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1). "As an exception to this general rule, [] in sex crimes evidence of prior acts of the same nature committed upon the same person is competent

[5] Kentucky Rules of Evidence.

for the purpose of showing corroboration and to show design, disposition, or intent on the part of the accused." *Russell v. Commonwealth*, 482 S.W.2d 584, 588 (Ky. 1972), *overruled on other grounds by Pendleton v. Commonwealth*, 685 S.W.2d 549 (Ky. 1985). This Court has "definitively held" that "evidence of similar acts perpetrated against the same victim are almost always admissible[.]" *Harp v. Commonwealth*, 266 S.W.3d 813, 822–23 (Ky. 2008) [(holding that any prejudice the defendant suffered was not sufficient to overcome this "general rule regarding admissibility of similar acts perpetrated against the same victim") (internal quotations and footnote omitted).

In its KRE 404(b) motion, the Commonwealth stated its intention to "introduce evidence pertaining to one specific incident for each count of the indictment, but wishes to allow the victim to testify that these were not the only incidents during that period." The Commonwealth may still charge Sifuentes with one count each of first-degree rape, first-degree sodomy, and incest with a date range between 2006 – 2009 without violating the bar on a duplicative indictment – when two separate charges are made in a single count. *See* Anderson v. Commonwealth, 63 S.W.3d 135, 140–41 (Ky. 2001). However, the Commonwealth cannot indict Sifuentes under a continuing course of conduct since prosecuting multiple sexual offenses committed against a vulnerable victim was not codified as a "continuing course of conduct" crime until 2016.[6] Although the Commonwealth may introduce evidence of prior acts

[6] We note that "the passage of 2016 Ky. Acts ch. 83, § 1, effective April 9, 2016, now codified as KRS 501.100, the legislature, as suggested by this Court on a number of occasions, *see e.g., Ruiz v. Commonwealth*, 471 S.W.3d 675, [684 (Ky. 2015)

perpetrated against B.M. by Sifuentes, on retrial, the Commonwealth must first establish all elements of each of the charged acts before introducing collateral acts. *See Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992) ("[u]nless the collateral act has some direct relationship to the charged act, the inference that the charged act occurred is necessarily founded on nothing more than the defendant's character and predisposition as revealed by the collateral act[]").

E. Sifuentes Was Not Subjected to Double Jeopardy on the Charges of Rape and Class A Incest.

Sifuentes argues that his conviction for first-degree rape and Class A incest violated the constitutional and statutory prohibition against double jeopardy. He asserts that under the jury instructions, if the jury found him guilty of Class A incest, it necessarily found him guilty of first-degree rape because the rape count does not require proof of a separate element. Though this alleged error is unpreserved, "double jeopardy violations are treated as an exception to the general rules of preservation." *Brooks v. Commonwealth*, 217 S.W.3d 219, 221 (Ky. 2007). "[D]ouble jeopardy violations can be addressed as palpable error because the nature of such errors is to create manifest

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(Hughes, J., dissenting in part and concurring in part, and Cunningham, J., dissenting)], addressed a persistent problem in prosecuting multiple sexual offenses committed against a young child victim, when evidence differentiating one illegal act from another is difficult to obtain, by permitting the multiple crimes to be charged as a single 'continuing course of conduct' crime." *Elam v. Commonwealth*, 500 S.W.3d 818, 826, n.8 (Ky. 2016). However, KRS 501.100 does not apply to this case as Sifuentes is charged for crimes occurring between 2006 – 2009.

injustice." *Cardine v. Commonwealth.*, 283 S.W.3d 641, 652 (Ky. 2009). Accordingly, we will review Sifuentes's double jeopardy claim for palpable error. RCr[7] 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*, 493 S.W.3d at 820 (internal quotations and citations omitted).

The Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" Section 13 of the Kentucky Constitution is virtually identical and affords the same prohibition against convicting or charging a person twice for the same offense. 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 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*,

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[7] Kentucky Rules of Criminal Procedure.

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.

First-degree rape requires: (1) sexual intercourse; (2) by forcible compulsion or incapability to consent due to physical helplessness or age under 12. KRS 510.040. KRS 530.020(1) defines incest as "sexual intercourse or deviate sexual intercourse, as defined in KRS 510.010, with a person whom he or she knows to be an ancestor, descendant, uncle, aunt, brother, or sister. The relationships referred to herein include blood relationships of either the whole or half blood without regard to legitimacy, relationship of parent and child by adoption, relationship of stepparent and stepchild, and relationship of step-grandparent and step-grandchild."

We have specifically held "[t]he crimes of rape and incest each require proof of a fact that the other does not. Specifically, rape requires proof of age, whereas incest does not; incest requires proof of relationship, whereas rape does not." *Johnson v. Commonwealth*, 292 S.W.3d 889, 896–97 (Ky. 2009); KRS 530.020; KRS 510.040. Sifuentes argues that because the jury explicitly found him guilty of Class A incest, age was a required element. We disagree. Age is not an element of incest, rather a classification of the felony: incest is a Class A felony if: (1) committed on a victim less than twelve (12) years of age; or (2) the victim receives serious physical injury. KRS 530.020(2)(c). Whether B.M. was under 12 years of age was pertinent to the classification of incest, not whether Sifuentes was guilty of incest. Accordingly, no constitutional or statutory double jeopardy violation occurred with these charges.

F. B.M.'s Testimony Did Not Constitute Improper Victim Impact Evidence.

Sifuentes argues that the trial court abused its discretion in allowing B.M. to testify to her psychological trauma caused by the abuse, which he asserts constituted improper victim impact evidence. This issue is unpreserved, and thus reviewed for palpable error.

This Court has held it permissible to introduce evidence during the guilt phase regarding background information about the victim, most commonly in murder prosecutions, including physical condition. *See, e.g., Ernst v. Commonwealth,* 160 S.W.3d 744, 763 (Ky. 2005) (holding it permissible for the victim's family to describe the elderly victim's physical limitations, including that she was drawing disability payments, which the Court found to be "especially relevant" since the defendant claimed that the victim attacked him with a vase); *Wheeler v. Commonwealth,* 121 S.W.3d 173, 181 (Ky. 2003) (holding no prejudicial error for the Commonwealth's witness to testify that victim was pregnant); and *Campbell v. Commonwealth,* 788 S.W.2d 260, 263 (Ky. 1990) (holding no error in allowing the victim's friend to testify that victim was a teacher, lifted weights and jogged six miles per day).

"[A] certain amount of background evidence regarding the victim is relevant to understanding the nature of the crime." *Bussell v. Commonwealth,* 882 S.W.2d 111, 113 (Ky. 1994). The prosecution can introduce evidence in the guilt phase identifying a victim as a living person rather than a simple statistic. *McQueen v. Commonwealth,* 669 S.W.2d 519, 523 (Ky. 1984). Although background evidence regarding the victim is relevant to understanding the nature of the crime, "[v]ictim impact evidence differs from

victim background evidence, in that the former is 'generally intended to arouse sympathy for the families of the victims, which, although relevant to the issue of penalty, is largely irrelevant to the issue of guilt or innocence.'" *Ernst*, 160 S.W.3d at 763 (quoting *Bennett v. Commonwealth*, 978 S.W.2d 322, 325–26 (Ky. 1998)). "Such evidence does not unduly prejudice a defendant 'as long as the victim is not glorified or enlarged.'" *Ernst*, 160 S.W.3d at 763 (quoting *Bowling v. Commonwealth*, 942 S.W.2d 293, 302–03 (Ky. 1997)).

In this case, the Commonwealth sought to admit evidence of B.M.'s certified medical records. Defense counsel objected first on hearsay grounds; then on grounds that B.M.'s psychological state could not be admitted without expert testimony, was not relevant and improperly bolstered her credibility. The trial court ruled that the medical records would not be admitted, but that B.M. would be allowed to testify personally to her psychological problems and treatment.

B.M. testified on direct examination that her mother took her to counseling after she disclosed the sexual abuse, and that she stayed at Our Lady of Peace for about a week, where she was prescribed antidepressants for depression and anxiety. B.M. further testified that after she disclosed the abuse, "everything came back," and she suffered flashbacks; she also began to cut herself. She returned to Our Lady of Peace, and was recommended for referral to Lincoln Trail for more intensive treatment, which she could not attend since she did not have insurance. She was then referred to Seven

Counties Services, where she was treated for a year, including ten days of inpatient treatment.

We have held that "evidence that [the victim] visited a rape crisis center for treatment was relevant to prove that she was sexually assaulted[]" and "became even more relevant when Appellant denied that the assault occurred." *Dickerson v. Commonwealth*, 174 S.W.3d 451, 472 (Ky. 2005); *see also Blount v. Commonwealth*, 392 S.W.3d 393, 397 n.3 (Ky. 2013) (clarifying that "behavior or conduct that is within the understanding of ordinary personal experience remains admissible when it is probative of a fact in issue," such as "evidence of a child's emotional distress following an alleged sexual assault was admissible to prove that a traumatic event (such as the alleged assault) had in fact occurred[]"). That B.M. needed psychological counseling is relevant to her allegations that a traumatic event occurred, especially since Sifuentes denied the abuse occurred. Furthermore, B.M.'s testimony was not "overly emotional, condemnatory, accusative, or demanding vindication." *Foley v. Commonwealth*, 953 S.W.2d 924, 937 (Ky. 1997). B.M.'s testimony was relevant and did not rise to the level of an impermissible victim impact statement. Accordingly, we conclude that this testimony was permissible victim background evidence.

G. The Trial Court Did Not Abuse its Discretion in Denying Sifuentes's Motion to Strike A Non-Responsive Answer to a Defense Question by B.M.'s Mother.

Sifuentes argues that the trial court should have stricken a response from B.M.'s mother as nonresponsive, and that it constituted inadmissible

hearsay and bolstering. Sifuentes takes issue with the following colloquy on cross examination of B.M.'s mother, testifying through an interpreter:

> (After being asked if she consulted extensively with the Commonwealth's attorney to sign off on a form from Catholic Charities for a U-Visa)
>
> No, that's not true. I haven't done anything by them because I just didn't want to follow up. When I found out that he [Sifuentes] returned back to Mexico, I wasn't planning on doing anything. But I would look at my husband, he would look for him every day, and he would come home every day saying I didn't see him, I didn't find him, but the day I find him I'm going to do this to him. Or I'm going to do that to him. I thought he's going to find him one day, they going to find him, he's going to beat him up, he's going to go to jail, what am I going to do here by myself?

Defense counsel then asked to approach, and the trial court directed him to let B.M.'s mother finish. She continued:

> I totally rely on him, I totally depend on him, all I ever wanted to do was protect him. We've already been hurt plenty in order for me now to lose my husband just because of that too. I'm a Christian person and I leave everything to God, but I know that I can protect myself and my family.

At the bench, defense counsel moved to strike the entire response as nonresponsive, which the trial court denied. Sifuentes contends that this testimony improperly vouched for B.M.'s credibility since it indicated that B.M.'s parents believed her allegations of abuse, so much so that B.M.'s father was willing to inflict harm on his own brother.

Although bolstering and vouching are distinct legal concepts, Sifuentes seems to argue that both occurred. "Bolstering generally has to do with enhancing the validity of evidence or testimony by putting on other consistent

evidence or testimony while vouching has to do with one witness, or a party's attorney, making assurances that another witness has been truthful." *Farra v. Commonwealth*, No. 2013-SC-000505-MR, 2015 WL 3631603, at *10 (Ky. June 11, 2015). Generally, "a witness's credibility may not be bolstered until it has been attacked." *Miller ex rel. Monticello Banking Co. v. Marymount Med. Ctr.*, 125 S.W.3d 274, 283 (Ky. 2004). A witness does not have to explicitly vouch for another witness's credibility in order for the testimony to be improper, implicit vouching is improper as well. *Bell v. Commonwealth*, 245 S.W.3d 738, 744–45 (Ky. 2008), *overruled on other grounds by Harp*, 266 S.W.3d at 813.

This Court has consistently recognized that testimony that a sexual abuse victim is truthful or believable is highly prejudicial hearsay evidence that improperly bolsters the credibility of the victim. *See Chavies v. Commonwealth*, 374 S.W.3d 313, 322 (Ky. 2012) (finding error in allowing witnesses to testify that the victim disclosed the abuse to them and that she was "very trustworthy and believable[]"); *Alford v. Commonwealth*, 338 S.W.3d 240, 246 (Ky. 2011) (finding palpable error in the combination of extensive hearsay testimony by the Detective and the victim's examining doctor about what the victim had told them about her abuse); *Bussey v. Commonwealth*, 797 S.W.2d 483, 484–85 (Ky. 1990) (reversible error where four law enforcement officials were permitted to repeat what alleged sexual abuse victim told them).

However, in the instant case, B.M.'s mother did not testify to the existence of abuse, that she believed abuse occurred, or even that B.M. was credible. Thus, her testimony did not rise to the level of vouching or bolstering.

Moreover, her testimony was elicited on cross-examination to go to Sifuentes's primary defense: B.M. fabricated this abuse in order to obtain a U-Visa for her family. Defense counsel referred to B.M. lying to obtain a U-Visa several times throughout trial, including in opening statements. KRE 801A(2) allows a witness to testify to prior consistent statements when that testimony is "[c]onsistent 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[.]" B.M.'s mother's testimony did not speak to whether the abuse occurred, but rather addressed when and why B.M. and her family decided to pursue the U-Visa: when Sifuentes returned from Mexico, and B.M. needed to obtain additional counseling, which the visa could help expedite. She also testified that the family had not received the U-Visa. B.M.'s mother's testimony rebuts the defense's allegations of fabrication and is an admissible prior consistent statement.

III. CONCLUSION.

In conclusion, we find that the use of a peremptory challenge to remove Mr. Jimenez as a juror violated *Batson,* and requires reversal of Sifuentes's judgment of conviction and sentence. Likewise, reversal is required due to the duplicitous jury instructions on rape and sodomy which violated the unanimity requirement. This case is reversed and remanded.

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

KELLER, J., DISSENTING: I respectfully dissent from the majority opinion. I believe this case, once again, delves further into a court-made conundrum regarding the unanimity of our juries in criminal cases. I also respectfully dissent as to the majority's position regarding the *Batson* challenge presented by the defendant. I will address each issue below.

Recently, the Court began creating an unusual distinction regarding unanimous jury verdicts 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.

I would also point out that, while much of our case law focuses on Section 7 of our Constitution in relation to the right to a unanimous verdict, the plain language of our state Constitution has no requirement for unanimity. Instead, it merely states:

> The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

However, the Court itself has enveloped within the right to a jury trial the right to a unanimous verdict in criminal cases and thereby created an expansive interpretation of this constitutional provision. Based on the legislative history, this Court interpreted "ancient mode of trial" as including the right to a twelve-person jury that reaches a unanimous verdict. *See Commonwealth v. Simmons*, 394 S.W.3d 903, 905-11 (Ky. 2013)

Rather than being directly required by our Constitution, Criminal Rule of Procedure (RCr) 9.82 and Kentucky Revised Statute (KRS) 29A.280(3) specifically require that a verdict be unanimous.[8] Neither does the Federal Constitution protect the right to a unanimous verdict in cases under state law. *See Johnson v. Louisiana*, 406 U.S. 356 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972). Thus, although our Court has made many of its unanimity holdings as incident to Section 7 of the Kentucky Constitution, it is not directly encompassed within the constitutional provision. Additionally, the exact meaning of what a "unanimous verdict" entails has hardly been consistent in our case law. The exact definition of "unanimous" provides little guidance; Black's Law Dictionary merely defines it as either "[a]greeing in opinion; being in complete accord" or "[a]rrived at by the consent of all."

And yet, we have expanded and expanded this constitutional provision beyond its original intention. There is no requirement in Section 7, RCr 9.82, or KRS 29A.280 that all findings of fact be unanimous or that particular facts must be agreed upon. Instead, the rule merely requires that the verdict itself must be unanimous. But, our Court has been remiss in making this distinction. Thus, to understand what is required for a "unanimous verdict,"

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[8] RCr 9.82, in its entirety, states:

(1) The verdict shall be unanimous. It shall be returned by the jury in open court.
(2) If there are two or more defendants, the jury at any time during its deliberation may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

KRS 29A.280(3) states that "[a] unanimous verdict is required in all criminal trials by jury."

and exactly what a defendant's rights are with respect to such, we must trace back this Court's history on determining issues about unanimity.

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).

Yet beginning within the past fifteen years, this Court has felt the need to create new precedent regarding unanimous verdict cases, and almost *always* within the realm of child sexual abuse cases. It is unclear why the Court has felt it necessary to broaden the scope of the meaning of a unanimous verdict to the point that it has become untenable for the practicing bench and bar. Prior to these cases, a unanimous verdict meant just that: a unanimous *verdict*. Not a unanimous finding of individual facts nor a unanimous finding even as to the method of the crime or particular involvement of the defendant. 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*, this Court addressed a situation strikingly similar to this case. In *Johnson*, 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 specifically referred. *Id.* at 442. This Court specifically 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 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., for over two years 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*, presenting an issue practically identical to the issue in this case. 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 for 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.

Why is there a difference between these two treatments? More importantly, why is the distinction logical, following our precedent? I would cite to Justice Cunningham's dissent in *Johnson v. Commonwealth*, a case which I will discuss more in depth. 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 v. Commonwealth*, 405 S.W.3d 439, 460 (Ky. 2013) (Cunningham, J., concurring in part and dissenting in part). This review problem, in turn, violates a defendant's due process right to a meaningful review of his conviction. 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, in particular. 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. Thus, his due process rights are implicated by this lack of meaningful review. However, this does not necessarily mean that his verdict was not unanimous.

Unfortunately, this Court's precedent went one step further and, I believe, truly violated the principals supporting all these prior unanimity cases. In *Johnson v. Commonwealth*, 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. As Justice Cunningham stated, "[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 analysis.

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? 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, but post *Johnson*, there has been an often-insurmountable hurdle created in many 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 impress upon prosecutors the need 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 maintained, even while reliving through testimony what may be some of the worst moments of their life. Our precedent has required them to not only relive

those moments, but also to be sure to notice the room, the clothes the abuser was wearing, the weather of the day, etc. Additionally, that detail must be unique for each circumstance. It is conceivable that, due to the stress or post-traumatic stress of reliving these events, those details may never be recalled. In such cases, must the Commonwealth abandon all prosecution? 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.

For all these reasons, I believe that now is our opportunity to overrule *Johnson v. Commonwealth* and the successive line of cases holding the instructions at issue are reversible error. I would reiterate our prior holdings that, when 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 hope that this issue becomes less prevalent due to the General Assembly's recent passing of legislation allowing prosecution for a continuing course of conduct, our recent string of case law quells these hopes and brings me back to an uncertain present. This error must be corrected, and I believe now is the time.

In a more succinct dissent, I would also hold that the trial judge's overruling of the *Batson* challenge at issue here was not reversible error. The majority opinion has applied the wrong standard to this analysis. While the trial court's ultimate decision is evaluated under an abuse of discretion standard, *see Commonwealth v. Snodgrass*, 831 S.W.2d 176, 180 (Ky. 1992),

the trial court's findings are first evaluated for clear error. *See Mash v. Commonwealth*, 376 S.W.3d 548, 555 (Ky. 2012). Thus, the trial court's judgment regarding the credibility of the prosecutor's explanation and demeanor of the defendant must be reviewed for clear error. *See id.* The majority opinion, instead, questions the credibility of the trial court's findings, holding that it abused its discretion in believing the prosecutor's explanation.

The trial court's decision here is owed due deference. In *Mash*, this Court did not have a sufficient record to review the factual claims behind the peremptory strike. *Id.* There, as here, the "case turn[ed] on the prosecutor's credibility. '[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.'" *Id.* at 556 (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). The United States Supreme Court has recognized that "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Hernandez*, 500 U.S. at 365. The Court also emphasized that, under the federal rules, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 369.

As in *Mash* and *Hernandez*, the trial court relied upon the credibility of the prosecutor's evaluation of the potential juror's demeanor. The proffered reason for the strike was race-neutral. There was no evidence in the record to refute the prosecutor's explanation. The record does not show the juror in question, as recognized by the majority opinion. Without more, the majority opinion seems to question the sufficiency of the prosecutor's explanation. I

believe the correct approach is to lend deference to the trial court's validly-placed finding that the prosecutor's explanation was neutral and sufficient. Without more, I would be reluctant to discern any clear error in the trial court's findings. As such, I believe the record is insufficient to overturn the trial court's decision and order a new trial. I would affirm the trial court's findings on this issue.

For the foregoing reasons, I would affirm, on all issues, the judgment of the Shelby Circuit Court.

Cunningham and Wright, JJ., join.

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