RENDERED: FEBRUARY 20, 2020
TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000468-MR
2018-SC-000469-MR

MICHAEL HOWARD — APPELLANT

V.

ON APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
NOS. 2016-CR-00339 & 2017-CR-00204

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE KELLER

AFFIRMING

Michael Howard was convicted by a Harlan County jury of multiple counts of first-degree unlawful transaction with a minor, first-degree attempted unlawful transaction with a minor, second-degree unlawful transaction with a minor, first-degree sodomy, and first-degree sexual abuse. He was sentenced to seventy (70) years in prison. This appeal followed as a matter of right. *See* Ky. Const. Section 110(2)(b). Having reviewed the record and the arguments of the parties, we affirm the judgment of the Harlan Circuit Court.

I. BACKGROUND

On May 15, 2016, Michael Howard reported a theft from his home in the Black Joe community of Harlan County, Kentucky. Deputy Winston Yeary

responded to take the report from Howard and his mother. Howard told Deputy Yeary that two boys he knew, B.H.[1] and J.E., came in his room through his bedroom window. They spoke for a few minutes, and then B.H. and J.E. left. Howard then discovered that $19 and his prescription Klonopin[2] pills were missing. Howard told Deputy Yeary that B.H. had lived with him for a few months a couple of years prior to the incident and had stayed the night a few times in the very recent past. Howard said he did not know J.E. personally and did not associate with him but knew who J.E. was.

Shortly after receiving the call regarding the theft from Howard's home, Deputy Yeary heard on the radio a complaint of two juvenile males who were causing a disturbance. Deputy Yeary suspected the two calls may be related, so he went to the location of the juveniles and found B.H. and J.E. The minors were then arrested for public intoxication and taken to the police department to be interviewed regarding the theft from Howard.

In the car on the way to the station, Deputy Yeary began questioning B.H. about the nature of his relationship with Howard. B.H. told Deputy Yeary that Howard had "tried stuff" but that they had never done anything. Deputy Yeary stopped that conversation and did not continue it until they arrived at the sheriff's office where he could record it. During his interview, B.H.

---

[1] We use initials to identify victims who were minors when the events occurred to protect their privacy. We use the same initials used by the parties in the trial court and in their briefs to this Court.

[2] Klonopin is a brand name of the generic medication clonazepam. Clonazepam is a benzodiazepine that is used to treat certain seizure disorders and panic disorder. *See* https://www.drugs.com/klonopin.html (last visited Jan. 3, 2020).

confirmed many of the details of the relationship that Howard had stated, but also alleged that Howard "tried things" with him and that Howard gave him Suboxone.

After Deputy Yeary finished B.H.'s interview, a different officer who had interviewed J.E. advised Deputy Yeary that he may want to speak to J.E., as J.E. had said things that Deputy Yeary may want to hear. Deputy Yeary testified that during his interview with J.E., the focus of his investigation dramatically changed. During the interview, J.E. alleged that Howard offered him drugs and money in exchange for sex and that Howard had told J.E. that Howard had offered other kids drugs and money in exchange for sex. J.E. also told Deputy Yeary that Howard had told him that Howard had "done things" with another juvenile, A.M.-1.

The allegations made by B.H. and J.E. spawned a lengthy investigation into Howard by Deputy Yeary. This investigation included the interviews of many witnesses and the execution of search warrants on Howard's home, his electronic devices, and his Facebook account. Deputy Yeary's investigation eventually culminated in Howard being indicted on forty-nine (49) counts involving sixteen (16) different victims.

The charges against Howard were divided between two separate Harlan Circuit Court cases, which were consolidated for trial. The trial spanned six days. During that time, thirteen (13) of the victims testified against Howard. At the close of the Commonwealth's case in chief, twenty-five (25) counts against Howard were dismissed on motion of the Commonwealth.

Howard then called three witnesses to testify, and he testified on his own behalf. During Howard's testimony, he admitted to smoking marijuana with G.M. and A.B., two of the victims named in the indictments. He also admitted to having a sexual relationship with B.C. and A.M.-3, two other victims named in the indictments. Specifically, he admitted to both performing and receiving anal sex from B.C. He admitted to performing and receiving oral sex from A.M.-3 and receiving anal sex from A.M.-3. However, he denied any of this sexual conduct was while A.M.-3 was intoxicated or incapacitated. He admitted to having sexual contact with J.J., yet another victim named in the indictments, twice but denied having deviate sexual intercourse with him. He admitted to giving B.C. Ambien[3] once after they had sex but denied ever giving it to him before they had sex. He admitted to giving B.C. Imitrex.[4] Howard admitted giving A.M.-2, another named victim, Klonopin so that A.M.-2 could trade it for synthetic marijuana. Howard also admitted that he sent nude photos to all of his "recipients" on Snapchat but did not admit that the nude photos were of himself. In summary, Howard either denied all other allegations against him or did not address them in his testimony.

At the close of Howard's case, one additional count was dismissed on Howard's motion for a directed verdict. Twenty-one (21) counts were submitted

---

[3] Ambien is a prescription medication used to treat insomnia. *See* https://www.drugs.com/ambien.html (last visited Jan. 3, 2020).

[4] Imitrex is a prescription headache medicine used to treat migraines. *See* https://www.drugs.com/imitrex.html (last visited Jan. 3, 2020).

to the jury,[5] and Howard was found guilty on all twenty-one (21) counts. Howard was sentenced to the statutory maximum of seventy (70) years in prison. He appeals his conviction to this Court as a matter of right.

II. ANALYSIS

Howard alleged several errors by the trial court and urges this Court to reverse his conviction. First, he alleges that he was denied his right to present a defense by the trial court's refusal to review in camera juvenile records of some of the alleged victims. Second, he argues that his right to present a defense was violated by the trial court's refusal to continue the trial so that he could undergo an independent mental health examination. Next, he argues the trial court erred in allowing two of the juvenile victims to testify in chambers, as his attorney's acquiescence to this procedure was invalid and there was no compelling need for them to testify in chambers. Finally, Howard argues that he was substantially prejudiced by the erroneous admission of Kentucky Rules of Evidence ("KRE") 404(b) evidence. We will address each of Howard's arguments in turn.

A. Howard's Motion to Review Victims' Juvenile Records

Howard's first claim of error lies in the trial court's denial of his motion to allow a juvenile expert from his attorney's office to review juvenile court records of J.E., A.M.-1, A.M.-2, A.M.-3, A.B., B.C., and B.H. Specifically,

---

[5] Two counts (Counts 10 and 13 in case number 16-CR-339) were inexplicably not submitted to the jury. The trial court's Final Judgment and Sentencing On a Plea of Not Guilty and Upon Jury Verdict notes that those two counts were dismissed but does not include an explanation.

Howard stated that the juvenile specialist could see that these specific victims had juvenile cases on CourtNet[6] but could not see the disposition of those cases. Howard requested access to the juvenile records in order to see the disposition. His argument was vague regarding how the dispositions in those cases were relevant to his defense or were exculpatory. The trial court denied Howard's motion, finding that Howard failed to provide any evidence suggesting the records contained exculpatory evidence. To this Court, Howard attempts to prove the relevance of these records by citing to the victims' testimony at trial, as two of the victims admitted to stealing from Howard. He argues that the trial court's denial of his motion to inspect these records denied him his right to present a defense.

The confidentiality of juvenile court records is established in KRS 610.340(1)(a) which states,

> Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child, parent, victims, or other persons authorized to attend a juvenile court hearing pursuant to KRS 610.070 unless ordered by the court for good cause.

The statute provides for various exceptions to the confidentiality of juvenile records, but neither party contends that any of the exceptions apply to this situation.

---

[6] CourtNet is an online database that provides access to Kentucky civil and criminal case information. Juvenile cases are confidential and therefore cannot be accessed on CourtNet without permission.

This Court has previously stated,

> It is well established that a criminal defendant has a constitutional right to discover exculpatory documents, even if those documents are confidential or if their disclosure is prohibited by rule or statute. The U.S. Supreme Court has held that a criminal defendant's Sixth Amendment right to confront witnesses prevails over the government's interest in keeping juvenile records confidential.

Commonwealth, Cabinet for Health & Family Servs. v. Bartlett, 311 S.W.3d 224, 227 (Ky. 2010) (internal citations omitted). "To put it simply, 'constitutional rights prevail over conflicting statutes and rules.'" *Id.* (citing *Commonwealth v. Barroso*, 122 S.W.3d 554, 558 (Ky. 2003)).

A defendant is not, however, free to go on a "fishing expedition to see what may turn up." *Barroso*, 122 S.W.3d at 563 (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)). Accordingly, this Court requires that two steps be taken before a criminal defendant is entitled to confidential records. First, the defendant must produce "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." *Id.* at 564. After this preliminary showing is made, "the trial court must conduct an in camera review to determine whether or not the records sought actually do contain such evidence." *Bartlett*, 311 S.W.3d at 227 (citing *Barroso*, 122 S.W.3d at 563-64).

In the case before us, the trial judge found that Howard did not make the preliminary showing of a reasonable belief that the juvenile court records contained exculpatory evidence. Therefore, he never proceeded to the second step and did not review the requested records in camera. We review the trial

court's finding regarding the sufficiency of the evidence in the first step of the *Barroso* analysis for an abuse of discretion. *Eldred v. Commonwealth*, 906 S.W.2d 694, 702 (Ky. 1994), abrogated on other grounds by *Barroso*, 122 S.W.3d 554;[7] *see also Sheets v. Commonwealth*, 495 S.W.3d 654, 672 (Ky. 2016) (holding that "the trial judge acted within his discretion" in finding that the defendant "failed to proffer sufficient proof of a reasonable belief that the requested records would contain exculpatory or impeachment evidence").

Exculpatory evidence has been described as "evidence favorable to the accused and material to guilt or punishment, including impeachment evidence." *Barroso*, 122 S.W.3d at 564. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). In this case, while Howard specifically requested only the dispositions of the juvenile cases of certain of the victims, he provided no evidence that this dispositional information would be exculpatory. He merely made vague references that what transpired in the juvenile cases would be part of his defense and would be exculpatory. Vague assertions such as those provided by Howard are not sufficient "to establish a reasonable belief that the records contain exculpatory evidence." *Barroso*, 122 S.W.3d at 564. Therefore, the trial judge did not abuse his discretion in finding that Howard

[7] Although *Eldred* set forth a less restrictive standard to permit disclosure of confidential records and has since been abrogated by *Barroso* on that issue, its review of the trial court's decision for an abuse of discretion informs our standard of review today.

failed to produce sufficient evidence to merit an in camera review of the requested juvenile records.

B. Defendant's Motion for an Independent Evaluation and to Continue the Trial

Howard's next claim of error lies in the trial court's denial of his second Motion for Evaluation and Continuance of Proceedings filed on April 26, 2018, less than two weeks before trial was set to commence. Howard first filed a Motion for Evaluation and For Continuance of Proceedings on January 2, 2018. This written motion requested that Howard be evaluated at the Kentucky Correctional Psychiatric Center ("KCPC") for both competency and criminal responsibility pursuant to Kentucky Revised Statutes ("KRS") 504.060(4),[8] 504.060(5),[9] and 504.080.[10] On January 4, 2018, a hearing was held on

---

[8] KRS 504.060(4) states, "'Incompetency to stand trial' means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense."

[9] KRS 504.060(5) states, "'Insanity' means, as a result of mental condition, lack of substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law."

[10] KRS 504.080 states,

> (1) A court may commit a defendant to a treatment facility or forensic psychiatric facility for up to thirty (30) days so that a psychologist or psychiatrist can examine, treat, and report on the defendant's mental condition, except that if the defendant is charged with a felony and it is determined that inpatient examination or treatment is required, the defendant shall be committed to a forensic psychiatric facility unless the secretary of the Cabinet for Health and Family Services or the secretary's designee determines that the defendant shall be examined and treated in another Cabinet for Health and Family Services facility.
>
> (2) Reports on a defendant's mental condition prepared under this chapter shall be filed within ten (10) days of the examination.
>
> (3) The defendant shall be present at any hearing on his mental condition unless he waives his right to be present.

Howard's motion. The Commonwealth stated that it did not have an objection to the evaluation. At a bench conference on the motion, Howard's attorney stated that KCPC would usually assess for criminal responsibility at the same time it assessed for competency. The trial court orally granted Howard's motion and continued the trial to May 7, 2018. The next day, on January 5, 2018, the trial court entered its written order on Howard's motion, only ordering KCPC to conduct a competency evaluation.

Howard's case was back in front of the trial court on February 1, 2018. Howard was present, and his attorney explained that he was still waiting to be admitted to KCPC. The trial judge asked if his order was for both competency and criminal responsibility, and defense counsel responded in the affirmative.

Following Howard's court appearance on February 1, 2018, his case was not heard again in front of the trial court until May 2, 2018. Howard was admitted to KCPC on February 22, 2018. A report from Dr. Stephen Sparks at KCPC was written March 16, 2018 and opined Howard was competent. The report, consistent with the trial court's written order, did not address criminal

---

(4) The examining psychologist or psychiatrist shall appear at any hearing on defendant's mental condition unless the defendant waives his right to have him appear.

(5) A psychologist or psychiatrist retained by the defendant shall be permitted to participate in any examination under this chapter.

(6) The Cabinet for Health and Family Services, if the cabinet or its agent or employee does not provide the examination, shall pay a reasonable fee to any psychologist or psychiatrist ordered to examine, treat, and report on a defendant's mental condition.

(7) The termination of criminal proceedings under this chapter is not a bar to the institution of civil commitment proceedings.

responsibility. The fax stamp on the copy of the report in the record indicates that the report was faxed to the trial court, and presumably the parties, on March 19, 2018.

On April 26, 2018, Howard filed his second Motion for Evaluation and Continuance of Proceedings. This motion requested the trial court to "order an evaluation, examination and report and criminal responsibility assessment by Dr. Eric Drogin and to continue the proceedings until such time as a report is completed by Dr. Drogin." The motion was made pursuant to KRS 504.060(4)[11] and KRS 504.060(5).[12] On May 1, 2018, the Commonwealth filed a response and objection to Howard's motion, arguing that Howard had previously been found competent by KCPC and that he was now "shop[ping] for a more favorable opinion." The trial court heard arguments on Howard's motion on May 2, 2018, less than a week before trial was set to begin. Defense counsel merely stated that Howard was requesting an independent evaluation. She did not provide any additional information or argument. The Commonwealth objected, reviewing the history of the case and reiterating its belief that Howard was "fishing" for more favorable results. The Commonwealth requested to move forward with the trial citing to the severity of the charges, the ongoing nature of the offenses, the many victims, and the victims' ages. The trial court summarily overruled Howard's motion.

---

[11] *See* KRS 504.060(4) (defining "incompetency to stand trial," as noted above in footnote 3).

[12] *See* KRS 504.060(5) (defining "insanity," as noted above in footnote 4).

On May 7, 2018, the trial apparently having been continued to the next day, a hearing was held to recognize witnesses to return for trial. Three witnesses critical to the Commonwealth's case were not present, and the Commonwealth informed the trial court that if those witnesses did not appear, it would not be able to announce "ready" for trial, which was scheduled to begin the next morning. The trial judge acknowledged that Howard had requested an independent competency exam[13] which the judge denied because it was made so close to trial. The trial court indicated that if the trial did not "go" the next day as scheduled, he would grant Howard's motion.

The next day, May 8, 2018, Howard's trial began as scheduled. After voir dire but before the jury was seated, the parties had a conference in chambers. At this hearing, the trial judge again addressed Howard's motion describing it as a request for a competency evaluation. Defense counsel acknowledged that the motion did not assert incompetence but asserted that Howard suffered from various psychological problems. The trial court then reviewed the KCPC report, noting that Dr. Sparks agreed that Howard had problems such as anxiety and depression, but that Howard did not meet the criteria for mental illness or the criteria for intellectual disability and that Howard had the capacity to appreciate the nature and consequences of the proceedings against him and to participate rationally in his defense. Defense counsel then stipulated to the "competency conclusions" contained in the KCPC report, and

[13] As stated previously, Howard's motion was for both competency and criminal responsibility examinations.

the trial court found Howard to be competent to stand trial, to appreciate the proceedings against him, and to participate in his own defense.[14] The trial court made no additional explicit ruling regarding Howard's Motion for Evaluation and Continuance of Proceedings.

To this Court, Howard argues that the trial court denied his request for an independent evaluation too quickly, prohibiting him from establishing that an evaluation by Dr. Drogin was reasonably necessary. He argues that he was denied his right to present a defense and that the trial court violated this Court's holding in *Binion v. Commonwealth*, in which we said, "[I]f sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent mental health expert who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." 891 S.W.2d 383, 385 (Ky. 1995) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding indigents have a right

---

[14] We pause now to reference Kentucky Rule of Criminal Procedure ("RCr") 8.06, which states:

> If upon arraignment or during the proceedings there are reasonable grounds to believe that the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense, all proceedings *shall* be postponed until the issue of incapacity is determined as provided by KRS 504.100.

(Emphasis added.) This is mandatory language, *requiring* the trial court to postpone proceedings until a hearing is held, pursuant to KRS 504.100, to determine whether the defendant is competent to stand trial. In this case, the trial court erroneously conducted voir dire prior to determining whether Howard was competent. Howard did not object and stipulated to competency prior to the jury being seated. This issue was not raised on appeal, and Howard suffered no prejudice from the untimely competency hearing. We decline to address it further.

under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the same access to necessary mental health expert assistance as a person of means)).

In *Snodgrass v. Commonwealth* this Court set forth the proper test for appellate review of a typical motion to continue a trial.

> RCr 9.04 allows a trial to be postponed upon a showing of sufficient cause. The decision to delay trial rests solely within the court's discretion. Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

814 S.W.2d 579, 581 (Ky. 1991) (internal citations omitted), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). However, because Howard's request to continue was premised on his request for an independent expert evaluation, we will review the trial court's decision through that lens.

Although Howard's motion did not request funding to hire an expert, it did request an independent examination. Howard was previously determined to be indigent, as he was represented by the Department of Public Advocacy. As previously stated, in *Binion* this Court held that if

> there was a reasonable basis on which to determine [] the indigent defendant was suffering from insanity or acting from a diminished capacity during the commission of the crime [then] he was entitled to either the appointment of, or the funds necessary, to employ a competent mental health expert for assistance in the evaluation and presentation of his defense.

891 S.W.2d at 385.

For this claim, this Court reviews the record to determine if the defendant demonstrated "reasonable necessity" to be entitled to the assistance of an independent evaluator. *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992). In this case, the trial judge had received Howard's evaluation from KCPC and, presumably, reviewed it before denying Howard's motion for an independent evaluation. Although the KCPC report only addressed competency, and Howard's motion requested an independent evaluation for both competency and criminal responsibility, the KCPC report still provided insight into Howard's mental health that could be used by the trial judge in ruling on Howard's motion. As we have previously explained, an initial evaluation from KCPC "can be of great assistance to the trial judge in determining whether the insanity defense is appropriate and whether further action is necessary." *Binion*, 891 S.W.2d at 385.

In the report, Dr. Sparks from KCPC provided the following diagnostic impressions of Howard: opioid and sedative use disorders, unspecified depressive disorder with features of anxiety, to yet rule out: pedophilia, and feigning/exaggeration of psychological symptoms. Although the KCPC report was focused on Howard's mental health at the time the evaluation was completed (as opposed to the time of the commission of the crimes), it does not note any reports from Howard or other psychiatric treatment records to indicate that his mental status at the time of the commission of the crimes would have been any different than it was at the time of the evaluation. Neither

Howard's written motion nor his counsel's argument at the hearing on that motion disputed any of the findings (or lack thereof) of KCPC and did not provide any evidence of a "reasonable necessity." Therefore, the trial court did not err in denying Howard's Motion for Evaluation and for Continuance of Proceedings.

C. Victims' Trial Testimony in Chambers

Howard next claims that the trial court erred by allowing two of his juvenile accusers to testify in chambers and outside of his presence. On May 4, 2018, the Commonwealth filed a one sentence motion, citing no legal authority, requesting that direct and cross-examination of child witnesses occur in chambers. On May 7, 2018, the trial court heard initial arguments on this motion while Howard was not present in the courtroom. Although the bench conference at which this motion was discussed is difficult to hear clearly, it appears as though defense counsel objected to the procedure, as she clearly stated, "They are juveniles, but they are not children." The trial court ordered the Commonwealth to provide him with some authority to allow him to take the juveniles' testimony in chambers.

Later that same day, the Commonwealth filed an Amended Motion for Direct and Cross Examination of Child Witnesses to Occur in Chambers under the Authority of KRS 421.350. That statute provides a procedure by which the testimony of a child allegedly the victim of certain crimes can be taken outside of the courtroom. This motion was not directly addressed until May 11, 2018, immediately before W.J. testified. At a bench conference, the Commonwealth

informed the trial court that W.J. was under the age of twelve when the crimes were committed against him and that W.J. was still a juvenile. The Commonwealth then requested that W.J.'s testimony be taken in chambers. Defense counsel clearly stated that she had no objection to proceeding in this fashion. Because defense counsel did not have an objection, the trial judge did not hold a hearing or make any findings. Howard was not at the bench during the bench conference, and the recording system's white noise was turned on and projected throughout the courtroom. It is highly doubtful that Howard was able to hear the bench conference as it was happening.

Shortly after the bench conference, the video record shows a conference room in the trial judge's chambers. W.J., the trial judge, and defense counsel all entered the room. W.J., who was fifteen years old at the time of trial, asked the trial judge how old he needed to be to testify in the courtroom. The trial judge told W.J. that W.J. may be old enough, and W.J. said he was told he was not old enough. W.J.'s testimony was then taken in chambers and telecast by closed circuit television into the courtroom for Howard and the jury to watch. At the end of W.J.'s testimony, W.J. looked into the courtroom to identify the defendant as the same Michael Howard about whom he had testified.

After W.J.'s testimony, counsel for both sides and the trial judge returned to the courtroom. The Commonwealth called M.F., who was fifteen years old at the time of the trial, as its next witness. After the trial judge asked M.F. a series of questions to establish that M.F. was competent to testify, the attorney for the Commonwealth stated, again at a bench conference, that he

believed M.F. was eleven years old at the time of the crimes. The trial judge then asked defense counsel, "Are you on board with doing this the way we did the previous witness?" Defense counsel responded, "Yes. I agree." M.F.'s testimony was then taken in chambers, and he identified Howard in the same manner as W.J.

To this Court, Howard first argues that defense counsel's waiver amounted to a waiver of Howard's right to confront his accusers. Howard argues that defense counsel's waiver of this right was not valid, as it was made outside of his presence and without his consent. In the alternative, Howard argues that if this Court finds defense counsel's waiver to be valid, we should review the issue for palpable error.

1. Waiver

At the outset, we note that a criminal defendant can waive virtually any of his rights, whether statutory or constitutional. We have previously held that

> if a defendant can waive his constitutional right to a trial by jury, which he can, there is no reason why he cannot also waive his constitutional right "not to be proceeded against criminally by information." Without citation to authority, it is elementary that a defendant can also waive his Fourth Amendment right to be free from a warrantless search, his Fifth Amendment right to remain silent, and his Sixth Amendment right to counsel....[A] defendant c[an] waive the maximum aggregate sentence restriction in KRS 532.110(1)(c) and...a defendant c[an] waive the five-year limitation on a sentence of probation in KRS 533.020(4).

Commonwealth v. Townsend, 87 S.W.3d 12, 15 (Ky. 2002) (internal citations omitted). The procedure by which a right can be waived, however, depends upon the right being waived. Some rights can be waived by counsel whereas some rights must be personally waived by the defendant.

Specific to the intersection between a defendant's right to confront his accusers and KRS 421.350, this Court has said,

> The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right "to be confronted with the witnesses against him." Similarly, the Kentucky Constitution, in section 11, states that the accused has the right "to meet witnesses face to face." Although the language of the two constitutional confrontation clauses is different, this Court has held that the underlying right is "basically the same."
>
> The United States Supreme Court has held that while face-to-face confrontation is preferred, the primary right secured by the Confrontation Clause is that of cross-examination. Accordingly, the right to confront is not absolute and may be limited to accommodate legitimate competing interests. One such exception has been approved by the Kentucky General Assembly in the form of KRS 421.350 concerning children called to testify in criminal proceedings regarding sexual and physical abuse that they suffered or witnessed.

Sparkman v. Commonwealth, 250 S.W.3d 667, 669 (Ky. 2008) (internal citations omitted). We have also previously held that KRS 421.350 imposes "no restrictions on cross-examination" and noted that it allows "the finder of fact to observe the demeanor of the witness." *Commonwealth v. Willis*, 716 S.W.2d 224, 227-28 (Ky. 1986). The procedures laid out in KRS 421.350 also preserve "the ability of the accused to 'see and hear the witness and assess credibility by observation of the demeanor of the witness.'" *Sparkman*, 250 S.W.3d at 669 (quoting *Willis*, 716 S.W.2d at 228). Therefore, taking child victim testimony pursuant to KRS 421.350 is more akin to a procedural waiver than a waiver of the constitutional right to meet or confront witnesses.

This Court and its predecessor court have long held that

> counsel is supposed to, and in legal contemplation does, become the mouthpiece and other self of his client, by which the client is

> forever bound, unless the client at the time manifest [sic] to the court his objections or want of concurrence in the procedure or statement which the counsel is pursuing or making.

Sayre v. Commonwealth, 238 S.W. 737, 739 (Ky. 1922). The United States Supreme Court has also said:

> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.

Taylor v. Illinois, 484 U.S. 400, 417–18 (1988). That Court went on to say, "Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination." *Id.* at 418. It is clear to us that if a defendant is bound by his attorney's decision not to cross-examine a witness, a defendant would also be bound by the attorney's decision on the manner by which, or the location at which, the cross-examination will take place. "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

We hold, therefore, that the waiver of an objection to taking testimony of a child victim pursuant to KRS 421.350 can be executed by counsel without a personal waiver by the defendant. In this case, Howard's attorney clearly

waived any objection to this procedure being used during the testimony of W.J. and M.F., and we find no reason to hold that the waiver was invalid.

2. Palpable Error

Howard next urges this Court to review the trial court's decision to allow W.J. and M.F. to testify in chambers for palpable error. Kentucky Rule of Criminal Procedure ("RCr") 10.26 allows this Court to review an unpreserved error if it is palpable, affects the substantial rights of a party, and resulted in manifest injustice. This Court, however, has repeatedly recognized the difference between unpreserved errors and waived, or forfeited, errors.

"When, as here, a party not only forfeits an error by failing to object to the admission of evidence, but specifically waives any objection, the party cannot complain on appeal that the court erroneously admitted that evidence." *Tackett v. Commonwealth*, 445 S.W.3d 20, 29 (Ky. 2014). Although the issue Howard raises is not one of admission of evidence but rather one of the manner in which evidence was admitted, the same logic applies. "[I]nvited errors that amount to a waiver, *i.e.*, invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011) (citing *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997)). We hold that any alleged error as to this issue was waived, rather than unpreserved, and therefore we decline to review it.

D. KRE 404(b) evidence

Finally, Howard claims that he was substantially prejudiced by the introduction of KRE 404(b) evidence. Howard argues that the sheer volume of

KRE 404(b) evidence erroneously admitted at trial painted a picture of him "as an individual preying on most of the young men in Harlan County" and violated his due process rights.

KRE 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible if offered for some other purpose. "Because the degree of potential prejudice associated with evidence of this nature is significantly higher, 'exceptions allowing evidence of collateral criminal acts must be strictly construed.'" *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994) (quoting *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992)). As a result, KRE 404(b) is exclusionary in nature. *Id.*

In order to determine if other bad acts evidence is admissible, the trial court should use a three-prong test: (1) Is the other bad act evidence relevant for some purpose other than to prove the criminal disposition of the accused? (2) Is evidence of the other bad act sufficiently probative of its commission by the accused to warrant its introduction into evidence? (3) Does the potential for prejudice from the use of other bad act evidence substantially outweigh its probative value? *Id.* at 889-90.

As to the first prong, KRE 404(b)(1) states that other bad act 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." This list, however, is not exhaustive. *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998). KRE 404(b)(2) also allows this

type of evidence to be admitted if it is "so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party."

As for the second prong, evidence of other bad acts is sufficiently probative if "the jury could reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts." *Parker v. Commonwealth*, 952 S.W.2d 209, 217 (Ky. 1997). "This aspect of the *Bell* test relates to whether there is sufficient evidence that the 'other crime, wrong, or act' actually occurred." *Purcell v. Commonwealth*, 149 S.W.3d 382, 400 (Ky. 2004) (citations omitted), *overruled on other grounds by Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010).

Finally, after determining relevancy and probativeness, the trial court must weigh the prejudicial nature of the "other bad acts" evidence versus its probative value.[15] Only if the potential for prejudice substantially outweighs the probative value of the evidence must it be excluded.

Howard cites to multiple instances during the trial where he alleges other bad act evidence was erroneously admitted. However, he also acknowledges that none of these alleged errors were preserved for appellate review. Therefore, we must review any such errors for palpable error.

---

[15] In the second prong of the *Bell* test, we determine whether the evidence put forth is sufficient for a reasonable jury to believe the defendant committed the "other bad act." In this third prong, we consider the probative value of the "other bad act" evidence for its relevance as determined in the first prong and weigh this probative value against the potential for prejudice.

To determine if an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). To be palpable, an error must be "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) (citing *Black's Law Dictionary* (6th ed. 1995)). A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). "It should be so egregious that it jumps off the page...and cries out for relief." *Chavies v. Commonwealth*, 374 S.W.3d 313, 323 (Ky. 2012) (quoting *Alford v. Commonwealth*, 338 S.W.3d 240, 251 (Ky. 2011) (Cunningham, J., concurring)).

Howard alleges multiple instances of the improper admission of KRE 404(b) evidence. We will discuss each instance in turn.

1. Howard had a sexual relationship with one of J.E.'s friends.

Howard alleges error in the admission of evidence that Howard had a sexual relationship with one of J.E.'s friends. This evidence was admitted through the testimony of B.E.,[16] J.E.'s older sister. However, it does not appear to have been purposefully elicited from her. During B.E.'s testimony, she is questioned by the Commonwealth about a message she sent to Howard on Facebook. The message said, "I heard about you asking him to jack you off.

[16] Although B.E. is not a victim in this case, we use initials to identify her to prevent identification of her brother, J.E., who is a victim. The use of B.E.'s initials is consistent with the parties' use of those initials in their briefs to this Court.

You think I don't know?" The attorney for the Commonwealth then asked B.E. who she was talking about in that message. B.E. stated that she could not remember, but that she had to be talking about either her brother or one of his friends, as she knew one of J.E.'s friends "had a relationship with" Howard.

The Commonwealth then asked B.E. if listening to her recorded interview with Deputy Yeary would refresh her recollection, and she stated that it would. It is apparent that the Commonwealth expected B.E. to testify that she was talking about J.E., a named victim in the case. The Commonwealth attempted to play the recording but had technical difficulties. The trial judge ended testimony for the day and allowed the jury to go home with the intent that the Commonwealth would resolve their technical issues and resume B.E.'s testimony the next morning. When testimony resumed the next morning, the Commonwealth did not pursue this line of questioning any further.

The Commonwealth argues that the testimony offered by B.E. corroborated J.E.'s statement that Howard had offered him drugs and/or money to "jack him off." The Commonwealth also argues that the evidence was relevant as a common plan or scheme related to the charge of attempted unlawful transaction with a minor for attempting to induce J.E. to engage in sexual activity in exchange for a ride.

The Commonwealth's arguments would have merit if the other bad act evidence at issue was other sexual contact between Howard and J.E. However, the Commonwealth never clarified who B.E. was referring to, and the evidence of which Howard complains could actually be evidence that he had a sexual

relationship with one of J.E.'s friends. No evidence was presented about who this friend was, whether the friend was one of the named victims, when the relationship occurred, or any other details of the relationship. As such, we cannot find this evidence relevant to anything other than Howard's criminal disposition. However, given the limited scope of this information and the apparent unintentional admission of it by the Commonwealth, we do not believe the error rises to the level of palpable error that seriously affected the fairness of the proceedings. It does not "jump[] off the page...and cr[y] out for relief." *Id.*

2. Howard "did stuff" with other kids, specifically A.M.-1.

Howard also argues that error occurred when evidence was admitted that he "did stuff" with other kids, and specifically, that he "did stuff" with A.M.-1. This evidence was admitted through the testimony of both J.E. and A.M.-1. J.E. testified that Howard had talked to him about "doing things with other kids." J.E. then clarified that Howard had not talked about having sex with other kids, but about touching other kids. Then, J.E. testified, in response to a direct question by the Commonwealth, that Howard told him that Howard "did stuff" with A.M.-1. He again clarified that "did stuff" meant "he let him touch him or let him touch his you know what."

A.M.-1 testified that Howard asked him if he wanted to "play around" while Howard was touching his leg. A.M.-1 further explained that "play around" meant play with his penis. A.M.-1 had denied Howard's request.

Howard was not charged with any sexual offenses relating to A.M.-1. He was only indicted on two counts of unlawful transaction with a minor relating to A.M.-1 which alleged that Howard provided drugs to A.M.-1. Through its direct examination, the Commonwealth attempted to establish a link between Howard's giving of drugs to A.M.-1 and his request to play with A.M.-1's penis but was unsuccessful in connecting the two acts.

The Commonwealth argues to this Court that A.M.-1's testimony "was no more than explanatory of the witnesses's [sic] relationship and manner of interaction with the accused." We, however, do not agree. A.M.-1's testimony did not establish how A.M.-1 and Howard met, did not assist in establishing a timeline of their relationship, and did not provide any other context to their relationship. Because the Commonwealth was unsuccessful at linking the drugs, for which Howard *was* charged, and the requested sexual act, for which Howard *was not* charged, we see no relevance in the evidence other than to prove Howard's criminal disposition. However, because the issue is not preserved, we must review it for palpable error.

As stated before, a palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings. *Ernst*, 160 S.W.3d at 758. Further, we "must consider whether on the whole case there is a substantial possibility that the result would have been any different." *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). The error in the admission of this evidence does not rise to that level. The evidence of Howard's

guilt was overwhelming. We do not believe the result would have been any different if this evidence was excluded.

3. Howard "tried things" with B.H.

Howard alleges further error occurred when Deputy Yeary testified that B.H. told him that Howard had "tried things" with him. Deputy Yeary testified that B.H. did not explain what he meant by "things." Of the multiple counts included in the indictments, B.H. was the victim in only one count, Count 6 of the indictment in case number 16-CR-339. That count charged Howard with unlawful transaction with a minor in the first degree for allegedly giving B.H. a Suboxone strip. Howard was not charged with committing any sexual offense against B.H. B.H. did not testify at Howard's trial, and the count relating to him was dismissed by motion of the Commonwealth at the end of the Commonwealth's evidence.

The first question we must answer is whether the testimony from Deputy Yeary was relevant for any purpose other than to prove Howard's criminal disposition. The Commonwealth argues that the testimony by Deputy Yeary was inextricably intertwined with the other evidence in the case. We agree. Deputy Yeary testified to B.H.'s statements in the context of discussing his interview with B.H. regarding the alleged theft of Howard's money and prescription medication. This interview, along with the interview of J.E., the other juvenile alleged to have stolen the money and medication from Howard, is how Deputy Yeary's investigation into all of the charged crimes began. We have previously held, "KRE 404(b)(2) allows the Commonwealth to present a

complete, unfragmented picture of the crime and investigation[,] including a picture of the circumstances surrounding how the crime was discovered." *Kerr v. Commonwealth*, 400 S.W.3d 250, 261 (Ky. 2013) (internal citations and quotation marks omitted) (modification in original). This is exactly what the Commonwealth did through Deputy Yeary in its case against Howard.[17]

We next must determine whether the evidence that Howard "tried things" with B.H. was sufficiently probative of its commission by Howard to warrant its introduction into evidence. While there was no directly corroborating evidence presented, there also was no contradictory evidence presented at trial or to this Court other than Howard's testimony. At the end of his trial testimony, Howard made a general statement denying attempts to engage in sexual acts with anyone "other than the ones I've stated." He had not previously admitted to "trying things" with B.H., and this, therefore, was a denial of B.H.'s claims. Whether Howard had actually "tried things" with B.H. came down to a credibility determination by the jury. Based on the evidence presented to them, the jury could have reasonably inferred that Howard had "tried things" with B.H.

Finally, we must determine whether the evidence's probative value was substantially outweighed by its potential for prejudice. We do not believe that it was. The complained of testimony lasted less than three minutes in a trial that

[17] We recognize, as an aside, the multiple levels of potential hearsay that shroud this statement. The statement was not objected to on the grounds of hearsay, perhaps because it was not offered for the truth of the statement, but merely to explain why Deputy Yeary took the actions that he took after hearing the statement.

spanned approximately six days with a break for a weekend in the middle. The evidence was admitted during the first witness's testimony on the first day of testimony. It merely set the stage for the rest of the testimony that was to come. It did not have a high potential for prejudice but did have a high probative value in that it provided context to the investigation into Howard.

Accordingly, we find no error in the admission of evidence that Howard had "tried things" with B.H.

4. Howard offered kids money and drugs for sex.

Howard also argues that error occurred when evidence was admitted that he offered money and drugs to kids if they would have sex with him. This evidence was admitted through Deputy Yeary's testimony of what J.E. told him when he interviewed J.E. after the alleged theft of Howard's money and medication. Deputy Yeary testified that he "asked [J.E.] what he knows about Michael Howard and [J.E.] stated that he gets kids up there and offers them money for sex acts." A little later in his testimony, the Commonwealth asked Deputy Yeary if J.E. also told him "that Michael Howard had offered him 10 Neurontin[18] before in exchange for letting him stick it in [J.E.]'s butt." Deputy Yeary answered, "Yes. What he exactly said is that 'He'll get little people up there, my age, about 15. He'll get them up there and be like I'll give you 10 Neurontins if you suck my thing, like that. I'll give you twenty (20) bucks if you let me stick it in your butt.'" The Commonwealth then asked Deputy Yeary to

[18] Neurontin is also known as gabapentin. It is often used in adults to treat nerve pain. *See* http://www.drugs.com/neurontin (last visited Jan. 3, 2020).

describe how J.E. talked about his relationship with Howard. In the course of answering this question, Deputy Yeary makes clear that J.E. told Deputy Yeary that Howard had said "those things," presumably referring to the offer of money or drugs in exchange for sex, directly to him.

The Commonwealth argues that the testimony by Deputy Yeary was inextricably intertwined with the other evidence in the case. We agree. Deputy Yeary testified to J.E.'s statements in the context of discussing his interview with J.E. regarding the alleged theft of Howard's money and prescription medication. This interview is how Deputy Yeary's investigation into all of the charged crimes began. In fact, Deputy Yeary testified that the direction of his investigation dramatically changed during his interview with J.E., presumably from investigating J.E. and B.H. for theft against Howard to investigating Howard for sexual and drug offenses against juveniles.

Further, Howard was indicted on one count of attempted unlawful transaction with a minor for allegedly "attempting to induce, assist, or cause [J.E.] to engage in sexual intercourse with Defendant in exchange for controlled substances." Deputy Yeary's testimony indicates that J.E.'s disclosure of the acts that gave rise to this charge was elicited as a direct result of J.E.'s statement that Howard offered other kids drugs and money for sex.

As stated before, the Commonwealth is permitted to "present a complete, unfragmented picture of the crime and investigation[,] including a picture of the circumstances surrounding how the crime was discovered." *Id.* This is

exactly what the Commonwealth did through Deputy Yeary in its case against Howard.

Regarding whether the evidence of the uncharged act was sufficiently probative to warrant admission, Howard does not specifically argue that it was not. Again, we note that "[t]his aspect of the *Bell* test relates to whether there is sufficient evidence that the 'other crime, wrong, or act' actually occurred." *Purcell*, 149 S.W.3d at 400 (citations omitted). Although Howard denied offering either J.E. or D.F. money or drugs in exchange for sex, as with the last piece of evidence, determinations of credibility must be left to the jury. Our review of the record reveals that the jury could have reasonably inferred that Howard had offered other kids money and drugs in exchange for sex.

Finally, we must determine whether the evidence's probative value was substantially outweighed by its potential for prejudice. We do not believe that it was. The complained of testimony had a high probative value in that it provided context to the investigation into Howard. Any potential prejudice was not substantially outweighed by that probative value.

Accordingly, we find no error in the admission of this evidence.

5. Howard attempted to exchange nude photos with G.M.

Howard claims that evidence he attempted to exchange nude photos with G.M. prior to the indictment period was erroneously admitted. Specifically, G.M. testified that he first met Howard on Snapchat and that Howard asked him questions about sperm production. Howard sent G.M. a picture of his penis and asked G.M. to send him nude pictures. After this, G.M. removed

Howard from his social media accounts and did not speak to him again until the next school year.

G.M. testified that the following school year Howard contacted G.M. and apologized for saying anything the previous year that made G.M. uncomfortable. G.M. gave Howard the benefit of the doubt, and their friendship began again. It was during this time that the events giving rise to the indictment took place, namely Howard provided marijuana and Ambien to G.M. Howard was charged only with two counts of unlawful transaction with a minor for his interactions with G.M. Howard was not charged with any crimes related to his request for nude photos from G.M.

We must first determine whether evidence that Howard asked G.M. questions about sperm production, sent G.M. a photo of his penis, and asked G.M. to send him nude photos is relevant for any purpose other than to show the criminal disposition of Howard. It is. As with much of the other KRE 404(b) evidence admitted in this case, the evidence at issue here was inextricably intertwined with the criminal acts for which Howard was charged. The Commonwealth is permitted to fully explain the relationship between the parties, and the jury is entitled to see the full picture. *See Kerr*, 400 S.W.3d at 261. Unlike A.M.-1's testimony which we held was erroneously omitted, G.M.'s testimony provided a timeline for his relationship with Howard. In this instance, the complained of evidence was necessary to explain why G.M. cut off contact with Howard for a period of time. Had the jury not heard this explanation, the evidence of the relationship between Howard and G.M. would

have contained an unexplained gap. The Commonwealth was entitled to explain this gap. Accordingly, the evidence of Howard's interactions with G.M. prior to the indictment period was relevant for a purpose other than to show his criminal disposition.

Regarding whether the evidence of the uncharged act was sufficiently probative to warrant admission, again, little evidence was offered to contradict G.M.'s version of events. In fact, G.M. was not even cross-examined on these allegations. During Howard's testimony, he stated that he met G.M. on Facebook, not Snapchat, but admitted sending a nude photo to all of his "recipients" on Snapchat. He was not asked about his questions regarding sperm production or his request that G.M. send him nude photos. Given Howard's at least partial admission, a jury could have reasonably inferred that Howard did in fact ask G.M. about sperm production, send G.M a photo of his penis, and ask G.M. to send him nude photos.

Finally, we must weigh the probative value and potential for prejudice to determine if the potential for prejudice substantially outweighed the probative value. In this case, it did not. The probative value of the evidence was high, as it was required in order for the jury to have an unfragmented view of the relationship between Howard and G.M. Its prejudicial effect, in light of the substantial evidence against Howard, was minimal.

Accordingly, no error occurred in the admission of evidence that Howard asked G.M. about sperm production, sent G.M a photo of his penis, and asked G.M. to send him nude photos.

6. Howard encouraged B.C. to send him explicit photos.

Howard's next claimed error lies in the admission of evidence that Howard encouraged B.C. to send Howard photos of B.C.'s penis when B.C. was around thirteen years old.

B.C. testified that he first met Howard on Facebook when B.C. was thirteen years old. Their conversations stayed on social media for a time, during which Howard asked B.C. to video chat and show Howard his penis. B.C. testified that these requests were the "main subject" of their conversations and that he "guess[ed]" he did show his penis. Eventually, Howard and B.C. met in person and their relationship turned sexual. Howard was charged with multiple counts of sodomy for engaging in anal intercourse with B.C. and for possessing pornographic videos of B.C. when B.C. was a minor.

This Court has held on multiple occasions that "evidence of similar acts perpetrated against the same victim are almost always admissible." *Harp v. Commonwealth*, 266 S.W.3d 813, 822 (Ky. 2008) (quoting *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002)). Here, the relevant charges against Howard related to sexual contact with B.C. and possession of pornographic images of B.C. Howard's request that B.C. send nude photos would, therefore, be a similar act perpetrated against the same victim. Any prejudice suffered by Howard at the introduction of this evidence was not sufficient to overcome the general rule regarding admissibility of similar acts perpetrated against the same victim. No error was committed by the admission of this evidence.

7. Howard tried to get J.J. to participate in sexual activity.

Howard's next claim of error also stems from B.C.'s testimony. B.C. testified that on one occasion when he was in Howard's room, another little boy was also in the room playing video games. B.C. testified that the boy said his butt hurt. He also testified that Howard tried to convince the little boy to participate in sexual activities, but B.C. stopped him. B.C. testified that the boy had the same first name as the victim J.J. and that the boy's sister's first name was the same as the victim J.J.'s sister's first name.

The Commonwealth argues that this testimony was directly relevant to the five counts of the indictment within which Howard was charged with sodomy against J.J. Howard, however, argues that this testimony was not about the named victim J.J. He argues that it does not make sense that B.C. would call J.J. a "little boy" because J.J. is only two years younger than B.C.

Review of the record makes clear that the complained of testimony was referring to the victim J.J. named in the indictment. Howard's argument that the testimony was about a person other than the named victim J.J. is unpersuasive.

As discussed regarding the evidence relating to B.C., "evidence of similar acts perpetrated against the same victim are almost always admissible." *Id.* This evidence was evidence of a similar act perpetrated against J.J. and therefore was admissible. No error was committed by the admission of this evidence.

8. Cumulative effect

Finally, Howard argues that the sheer volume of improper KRE 404(b) evidence and its cumulative effect rendered his trial substantially unfair. Having found only two instances of improperly admitted 404(b) evidence, neither of which rose to the level of palpable error, we reject this argument. Even taken together, the admission of the two pieces of evidence did not render Howard's trial substantially unfair.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Harlan Circuit Court in these matters.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Emily Holt Rhorer
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Daniel Jay Cameron
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General