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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, RAP 40(D), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 28, 2023
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2021-SC-0490-MR

WILLIAM KENNETH RIGGLE, JR. — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
NO. 17-CR-002836-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

William Kenneth Riggle, Jr. ("Junior"), was convicted following a jury trial in Jefferson Circuit Court of rape in the first degree, use of a minor in a sexual performance, two counts of intimidating a participant in the legal process, five counts of sodomy in the first degree, and eight counts of sexual abuse in the first degree. The jury recommended an aggregate sentence of 150 years' imprisonment, but the trial court appropriately imposed a sentence of seventy years in conformity with the mandates of KRS[1] 532.110(1)(c). Junior now appeals as a matter of right[2] raising five allegations of error. Following a careful review, we affirm.

[1] Kentucky Revised Statutes.
[2] KY. CONST. §110(2)(b).

FACTS AND PROCEDURAL HISTORY

Danielle, Angela, and Alyssa,[3] are sisters who were placed in the care of their aunt, Kathy Riggle, and her husband, William Riggle, Sr. ("Senior"), in 2009. The girls' biological parents, Chrystal and Johnnie, struggled with drug abuse and could not appropriately care for their children. At the time they came into the Riggles' care, Danielle was five years old, Angela was two, and Alyssa was sixteen months old. Junior, along with his five younger siblings, also resided in the Riggle house. For the next eight years, the girls stayed with the Riggles, while their biological parents exercised only supervised visitation.

In July 2017 Chrystal regained custody of the girls. Shortly thereafter, Angela disclosed she had been sexually abused by both Junior and Senior. Alyssa likewise told her mother she had been sexually abused. The following day, Danielle divulged she too had been sexually abused at the hands of Junior and Senior. Chrystal took the three girls to the hospital where they underwent physical examinations. They were also interviewed by an investigator from Child Protective Services ("CPS"). Subsequently, Louisville Metro Police Department Detective Stacey Robey took over the investigation. Each girl participated in an individual forensic interview outside the presence of their parents.

Following further investigation, Senior was indicted on fifteen felony counts and Junior was indicted on fifty-seven felony counts and three

[3] We use the same pseudonyms selected by the Commonwealth to protect the identities of the child victims in this case.

misdemeanor counts. The charges included first-degree rape, first-degree sodomy, first-degree sexual abuse, attempted first-degree rape, attempted first-degree sodomy, use of a minor in a sexual performance, unlawful transaction with a minor, intimidating a participant in the legal process, distribution of obscene matter to a minor, and attempted first-degree sexual abuse. Prior to trial, the trial court dismissed forty-two of the counts against Junior and one count against Senior. The remaining thirty-two counts were the subject of a joint, multi-day jury trial.[4]

At trial, each of the sisters testified the sexual abuse began when they were seven or eight years old. Danielle stated Junior would come into her room at night, carry her downstairs to his room, and sexually assault her in numerous ways. She described multiple acts of performing oral sodomy on him, anal sodomy, Junior placing his finger in her vagina, and his penis touching her vagina and breasts. Danielle also testified Junior threatened to stab her if she screamed when his penis touched her vagina. She said he also threatened her family on another occasion.

Angela testified to abuse occurring on multiple occasions. Once, Junior placed his fingers in her vagina and lifted her up, put his penis on her "butt,"

[4] The remaining charges for Junior were as follows: Angela—three counts of sodomy in the first degree, one count of rape in the first degree, one count of sexual abuse in the first degree as a lesser-included offense of rape, three counts of sexual abuse in the first degree, and one count of intimidating a participant in a legal proceeding; Danielle—one count of sodomy in the first degree, five counts of sexual abuse in the first degree, and one count of intimidating a participant in a legal proceeding; Alyssa—one count each of sodomy in the first degree and use of a minor in the first degree.

and stuck his penis in her mouth. On another occasion, she vomited after Junior forced his penis into her mouth. Junior masturbated in her presence while wearing a condom. Angela stated Junior placed his penis between the folds of her vagina, after which he "wiped stuff" off her leg with a sock, turning it pink. She spoke of Junior licking her vagina. She recounted two instances of Junior threatening her or her little sister with violence which she believed were intended to keep her from disclosing the abuse.

Alyssa testified Junior forced her to place his penis in her mouth. She also stated he asked her to take a photograph of her vagina for him. Junior provided her with his cellphone, and she complied with his request.

All three girls gave similar detailed descriptions of Junior and Senior's genitalia and described differences between the two. Those descriptions were verified through the later introduction of photographs and testimony from detectives who executed a search warrant to observe the two men's private areas.

The Commonwealth also presented testimony regarding uncharged sexual acts perpetrated against three other minor girls. Only one of those instances involved Junior. K.W. lived in the Riggle home for approximately six months. She detailed numerous inappropriate acts she observed and to which she was also subjected, including Junior once hugging her, grabbing her buttocks, and attempting to kiss her. Another witness, M.W., often stayed overnight at the Riggle home and recounted seeing Junior touch Danielle's buttocks.

In his opening statement, Senior challenged the veracity of statements made during the girls' forensic interviews, noting some of the accusations would have triggered a mandatory obligation to report sexual abuse but no such report had been made. In response, during its case-in-chief the Commonwealth called a school social worker, Jennifer "Rosie" Morehous ("Ms. Rosie"), who testified she made a report to the Department of Child Services ("DCS") in Indiana[5] following a meeting in which Angela confided in her about the sexual abuse allegations.

Junior's defense was generally one of complete denial of any inappropriate acts and allegations Chrystal had coached her daughters into fabricating the sexual abuse accusations. He utilized cross-examination to highlight the large number of people living in a relatively small home with creaky floors and the numerous occasions when sizeable gatherings of friends and relatives would occur at the house in an effort to imply that he had no opportunity to commit the acts of which he was accused.

The jury found Junior guilty on all of the charged counts.[6] Following the sentencing phase, the jury recommended twenty-five-year sentences on the five sodomy counts and one rape count to be served consecutively. It recommended five-year sentences on the two counts of intimidating a participant in a legal process and one of the sexual abuse charges against

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[5] At the time of the report, the children had left the Riggle home and were residing in Indiana with their mother.

[6] Because the jury found Junior guilty of rape, it did not return a verdict on the lesser-included sexual abuse charge.

Danielle, and ten-year sentences on the remaining counts, all to run concurrently with one another and the previously described sentences. The trial court sentenced Junior in accordance with the jury's recommendation but limited the aggregate total to the statutory maximum of seventy years. This appeal followed.[7] Further facts will be developed as necessary.

ANALYSIS

Junior asserts five allegations of error in seeking reversal. First, he contends the jury instructions lacked specificity regarding which abusive act the jury should consider which denied him the right to a unanimous verdict. Second, he argues the trial court erred in denying his motions for a directed verdict as to ten of the charges. Third, Junior alleges the testimony elicited from Ms. Rosie constituted improper bolstering. Fourth, he asserts the trial court erroneously permitted K.W. and M.W. to give corroborating testimony tending only to show his predisposition for sexually touching young girls. Finally, Junior contends the Commonwealth confused the jury when it misstated the law regarding consecutive and concurrent sentencing resulting in a manifest injustice.

Some of Junior's arguments were properly preserved for appellate review while others were not. To the extent his arguments are unpreserved, Junior requests palpable error review pursuant to RCr[8] 10.26. Although not properly

[7] Senior has separately appealed from his convictions. *William Kenneth Riggle, Sr. v. Commonwealth*, 2021-SC-0510-MR.

[8] Kentucky Rules of Criminal Procedure.

preserved, a palpable error "affects the substantial rights of a party" and "relief may be granted upon a determination that manifest injustice has resulted" from the error. RCr 10.26. To obtain a reversal based on an alleged palpable error, a defendant must show that the error was "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). "When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Id*. at 5.

A. Unanimity of Jury Verdict

Junior first challenges eleven of the trial court's eighteen instructions to the jury, asserting he was denied his right to a unanimous verdict on those charges. Section 7 of the Kentucky Constitution guarantees criminal defendants the right to unanimous jury verdicts. *See also* KRS 29A.280(3); RCr 9.82(1); *Cannon v. Commonwealth*, 291 Ky. 50, 163 S.W.2d 15-16 (1942). As a matter of law, we review unanimity errors de novo. *Smith v. Smith*, 563 S.W.3d 14, 16 (Ky. 2018) (quoting *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015)).

Junior asserts the contested instructions permitted the jury to convict him of a single crime although the proof at trial showed multiple instances of criminal conduct which could satisfy the elements of the crime charged. Thus, he argues it is impossible to determine which criminal act all twelve jurors agree upon to convict him, and therefore, his right to a unanimous verdict was denied. This Court has held "a general jury verdict based on an instruction

including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement of a unanimous verdict." *Kelly v. Commonwealth*, 554 S.W.3d 854, 864 (Ky. 2018) (citations omitted).

Although he contends otherwise, our review of the record reveals Junior did not properly preserve his allegations of error as he did not tender his own instructions to the trial court and his objections to the instructions as given were on different grounds than those argued before this Court. RCr 9.54(2).[9] His motion for directed verdict based on insufficiency of the evidence likewise did not preserve the alleged errors. As these issues are unpreserved, absent a finding that manifest injustice resulted, no palpable error will be deemed to have occurred. *See Sexton v. Commonwealth*, 647 S.W.3d 227, 232 (Ky. 2022) (holding that "reversal is not the universal, essential result of a unanimous verdict error. Where manifest injustice will not result, this Court can find no palpable error"). "In all cases presenting an unpreserved error regarding a unanimous jury, the courts must 'plumb the depths of the proceeding' and scrutinize the factual idiosyncrasies of the individual case. That includes a consideration of the weight of the evidence." *Johnson v. Commonwealth*, ___

[9] "No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection."

S.W.3d ___, 2021-SC-0541-MR, 2023 WL 4037845 at *8 (Ky. June 15, 2023) (quoting *Martin*, 207 S.W.3d at 4) ("*Johnson II*").

We disagree with Junior on most of his arguments but discern error occurred as to jury instructions 12, 14, 15, and 16. We will discuss these errors before turning briefly to Junior's other instructional challenges.

Instruction 12 stated:

> You will find Mr. Riggle Jr. guilty of Sodomy in the First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (A) That in Jefferson County sometime between March 14, 2011 and April 14, 2016, he engaged in deviate sexual intercourse* with [Danielle];
>
> AND
>
> (B) That at the time he did so, [Danielle] was less than twelve (12) years of age.
>
> * **"deviate sexual intercourse"** means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

In her testimony, Danielle described an incident of oral sodomy which occurred when she was around seven years old. Subsequently, she discussed an incident of anal sodomy which occurred when she was ten or eleven years old. Both instances transpired in the time period covered by Instruction 12 and the instruction did not inform the jury which of the two alleged instances of sodomy it was to consider. As such, Junior asserts the instruction was duplicitous in that it allowed the jury to convict him of a single crime based on two criminal acts which allegedly occurred several years apart, but which also violated the same criminal statute. We agree.

> When . . . the instruction does not specify which specific act it is meant to cover, we cannot be sure that the jurors were unanimous in concluding the defendant committed a single act satisfying the instruction. Instead, the jury's verdict only reflects their unanimous view that the defendant committed the crime, without necessarily resulting in a unanimous conclusion that the defendant committed a single criminal act beyond a reasonable doubt.

Martin v. Commonwealth, 456 S.W.3d 1, 6 (Ky. 2015) (*abrogated on other grounds by Sexton*, 647 S.W.3d at 232)). Given the proof adduced at trial of two separate and distinct sodomies, the instruction quoted above allowed the jury to convict Junior on the basis of either. This is not an instance of alternative theories supporting a single offense but is rather the type of error condemned in *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013), (*overruled on other grounds by Johnson II*, ___S.W.3d at ___, 2023 WL 4037845 at *8) ("*Johnson I*"). In *Johnson I*, the victim suffered two injuries at the hands of the defendant at two different times. Either injury was sufficient to support a conviction of first-degree criminal abuse. The defendant was convicted of criminal abuse under a single crime instruction. This Court concluded a unanimous verdict violation occurred because it was possible some jurors cast a guilty vote based on one fracture while other jurors relied on the other injury in support of their vote for a guilty verdict. *Johnson I* plainly stands for the proposition that a verdict is not unanimous unless all jurors base their vote for conviction on the same criminal act. Furthermore, the instructions must include language eliminating any possible ambiguity regarding the jury's accord.

The Commonwealth contends any error caused by Instruction 12 was cured during closing argument when the prosecutor informed the jury the incident it was to consider was the oral sodomy, and not the anal sodomy. However, in *Harp v. Commonwealth*, 266 S.W.3d 813, 820-21 (Ky. 2008), we held an erroneous jury instruction cannot be "cured" by arguments of counsel. "[T]he concept of fleshing out bare bones instructions permits counsel to attempt to explain the instructions to the jury but does not permit counsel to attempt to correct erroneous jury instructions." *Id.* at 820. Here, Instruction 12 contained a duplicitous-instruction error.

Instructions 14, 15, and 16, also contained a duplicitous-instruction error as conceded by the Commonwealth. Instruction 14 stated:

> You will find Mr. Riggle Jr. guilty of Sexual Abuse in the First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (A) That in Jefferson County sometime between March 14, 2011 and April 14, 2016, he subjected [Danielle] to sexual contact when he rubbed his penis between her breasts*;
>
> AND
>
> (B) That at the time he did so, [Danielle] was less than twelve (12) years of age.
>
> * **"sexual contact"** means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.

Instructions 15 and 16 were essentially identical to Instruction 14 but replaced the alleged sexual contact in paragraph (A) with "touched her breast" and "touched her butt" respectively.

Danielle testified about "a couple of times" Junior rubbed his penis between her breasts. She also testified to the various times Junior would touch her butt and breasts, but no details were provided about any particular incident. Danielle described a general pattern of behaviors which occurred over a five-year period without providing any peculiar, explicit, or differentiating facts. Although the three separate instructions specified the particular type of conduct allegedly committed by Junior which each purported to address, there was no qualifying language regarding which instance of the recurring occurrences the jury was to consider. "Without an instruction to channel the jury's deliberation, the jury was left to adjudicate guilt on any or all of the vaguely alleged incidents, resulting in a verdict of doubtful unanimity." *Ruiz v. Commonwealth*, 471 S.W.3d 675, 679 (Ky. 2015). For these reasons, Instructions 14, 15, and 16, violate the rule laid down in *Johnson I* and *Ruiz*.

Having concluded Instructions 12, 14, 15, and 16 were erroneous, we must determine whether those errors were palpable. Our recent decisions in *Sexton* and *Johnson II* have made clear that unpreserved unanimity errors are no longer to be considered structural errors which automatically require reversal, thereby abandoning our previously held minority position. Instead, we have returned to an individualized analysis of the facts of the case to determine whether a manifest, fundamental, and unambiguous error occurred whereby the integrity of the judicial process is threatened. *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

After reviewing the evidence previously set forth, we cannot conclude the instructional errors here were palpable. Junior was plainly apprised of the numerous charges lodged against him. The victims' incriminating testimony was clear and unrebutted related to the appalling sexual exploitations they endured. The various allegations were not complex, nor would they have been confusing to the venire. Rather, the jury heard ample damning and unrebutted trial testimony to reasonably support its convictions of Junior for the crimes for which he stood accused. Thus, having "plumb[ed] the depths of the proceeding," *id.* at 4, and considered the weight and strength of the evidence, we are convinced the problematic instructions did not subject Junior to a manifest injustice. There can be no reasonable doubt the instructional errors did not contribute to the verdicts of guilt and there was no possibility of a different result absent the errors. The integrity of the judicial process was not threatened. *Id.* at 5. Thus, no palpable error occurred.

Junior's remaining contentions of instructional error relate to Instruction 3 (Sodomy in the First Degree—Angela), Instruction 4 (Rape in the First Degree—Angela), Instruction 9 (Intimidating a Participant in the Legal Process—Angela), Instruction 10 (Sodomy in the First Degree—Alyssa), Instruction 13 (Sexual Abuse in the First Degree—Danielle), Instruction 17 (Sexual Abuse in the First Degree—Danielle), and Instruction 18 (Intimidating a Participant in the Legal Process—Danielle). As with his prior allegations of error, Junior's complaints regarding these instructions center on the fact that testimony elicited at trial alleged multiple instances of criminal conduct which

would support a conviction under each of these instructions, but the jury was not informed which particular incident it was to consider. Our review of the record again reveals Junior's contentions to be without merit.

As to the sodomy and sexual abuse charges addressed in Instructions 3, 10, and 13, although there were vague references to multiple instances of abuse, the Commonwealth elicited testimony regarding specific occurrences of conduct. Angela, Alyssa, and Danielle each isolated and identified individual events of sodomy or sexual abuse related to the crime charged in each instruction and the appropriate identifying language was added to each instruction to inform the jury's decision. Thus, there was no unanimity issue and no error relative to these instructions.

With respect to the remaining charges set out in Instructions 4, 9, 17, and 18, a review of the testimony adduced at trial reveals identification of singular instances of conduct sufficient to support conviction on each charged offense. Angela testified to only one time when Junior penetrated her vagina which was the basis for the single rape charge. Further, Angela and Danielle each testified about a single specific threat voiced by Junior during the abusive period, in which he threatened to stab them or use the swords he had hanging on the wall above his bed. This testimony provided the sole basis for the two charges of intimidating a participant in the legal process. Conversely, Angela's statement that Junior made her "swear on her little sister" and Danielle's vague reference to her family being threatened by Junior could not constitute "threats" as defined in KRS 524.010. As such, their testimony relative to those

events would be insufficient to satisfy the statutory elements required for sustaining a charge of intimidating a participant in the legal process. Finally, Danielle testified about a time when Junior placed his penis between her vagina lips. Although she also referenced a time when Junior's penis penetrated her vagina, Instruction 17 made no reference to penetration, thereby leaving no doubt as to which incident was covered thereunder.

In each of the foregoing instances, the singular specific acts upon which a finding of guilt could appropriately be premised were sufficiently set forth in the instructions. Although passing references to other instances of abuse and/or threats were made by the young victims, the proof adduced by the Commonwealth of singular specific events which could satisfy the statutory elements for conviction eliminated any chance of a unanimity issue.

We hold no palpable error resulted from the giving of Instructions 3, 4, 9, 10, 13, 17, and 18. The evidence against Junior was overwhelming and uncontroverted. After the jury was presented with testimony from each of the three girls describing in detail the abuses they suffered at the Riggle home, the jurors convicted Junior of all charges. We hold there is no reasonable possibility the trial result would have been any different absent the challenged instructions as submitted to the jury by the trial court.

B. Directed Verdict

Junior next argues the trial court erred in refusing to grant a directed verdict on ten of the charged counts. He alleges a failure of sufficient proof on each of the challenged charges.

It is well-settled that "[o]n motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The trial court is directed to assume all of the Commonwealth's evidence is true "but reserving to the jury questions as to the credibility and weight to be given to such testimony." *Id.* "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id.* A trial court must direct a verdict for the defendant "if the prosecution produces no more than a mere scintilla of evidence." *Id.* at 187-88. Although we have held in this case that some of the jury instructions were erroneous, the standard of review for a trial court's decision regarding directed verdict motions is different. As we recently explained in *Smith v. Commonwealth*, 636 S.W.3d 421, 434 (Ky. 2021):

> We employ the directed verdict standard retrospectively, sometimes knowing more than the trial court knew at the time it made its determination on the motion. Despite this potential for additional knowledge, we are constrained to review the trial court's determination in light of the stage of the proceeding in which it was made. We thus review the trial court's decision on a motion for directed verdict taking into account only the information the trial court had in front of it at the time it made its decision. Because of this constraint on our review, the specific facts as described in the jury instructions have no bearing on our review of the trial court's ruling on a motion for directed verdict. In fact, we explained in *Acosta v. Commonwealth* that "a directed verdict may be inappropriate even though the jury instructions were flawed." 391 S.W.3d 809, 816 (Ky. 2013), *overruled on other grounds by Ray v. Commonwealth*, 611 S.W.3d 250 (Ky. 2020).

> On a motion for directed verdict, the trial court must compare the proof presented at trial with the statutory elements of the alleged offense. *Id.* (citing *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011)). "The directed-verdict question is not controlled by the law as described in the jury instructions, but by the statutes creating the offense." *Id.* (*citing Lawton*, 354 S.W.3d at 575).

With these standards in mind, we turn to Junior's specific arguments.

i. Count 56 (Instruction No. 8): Sexual Abuse in the First Degree (Angela)

Under this count, Junior was charged with knowingly masturbating in Angela's presence when she was less than twelve years old while he wore a condom. Angela testified she observed Junior naked, rubbing his penis, and then removing the condom he had been wearing. She could not remember her exact age at the time of the incident but testified she was "either eight or eleven." Junior argues the Commonwealth failed to prove he masturbated and further failed to show that he was over twenty-one years of age at the time of the incident—as required by KRS 510.110(1)(c)—because it was possible he was only twenty when Angela was eight. We disagree.

Regarding Junior's first argument, taken in the light most favorable to the Commonwealth, Angela's testimony was sufficient to infer Junior masturbated in her presence because she plainly stated she observed him rubbing his penis while in her presence. Regarding his second argument, the instructions did not require the jury to determine Junior's age, he did not request such an instruction, and he did not argue this theory before the trial court. Thus, the appropriateness of him raising it before this Court is questionable at best. Nevertheless, Junior's argument relative to his age

clearly disregards the plain language of KRS 510.110(1)(d) which criminalizes masturbation in the presence of a minor by "a person in a position of authority." Junior occupied a position of special authority under the definition set forth in KRS 532.045(1)(a) which states, in pertinent part: "'Position of authority' means but is not limited to the position occupied by a . . . relative [or] household member . . . ." Thus, regardless of his age, Junior could be found guilty of this count of sexual abuse in the first degree because of his authoritative position. He was not entitled to a directed verdict.

ii. Count 22 (Instruction No. 11): Use of a Minor in a Sexual Performance (Alyssa)

Alyssa testified Junior gave her a cellphone and asked her to photograph her vagina. She said she complied and did so in an upstairs bathroom. Junior argues he did not "authorize" or "induce" Alyssa to photograph her vagina but merely "permitted her to use his phone to take a photograph." He avers he did not ask for or demand an explicit photograph. In addition, he contends the Commonwealth failed to prove he had the requisite intent or that a "sexual performance" occurred. However, Junior's contentions have no support in the record. Alyssa's clear and direct testimony was that Junior specifically asked for a photograph of her vagina and provided her with an electronic device capable of capturing an image. A person is guilty under KRS 531.310(1) of using a minor in a sexual performance if "he employs, consents to, authorizes or induces a minor to engage in a sexual performance." KRS 531.300(5) defines a performance as "any . . . photograph[.]" Here, sufficient evidence was presented to defeat Junior's directed verdict motion.

iii. Counts 69 & 71 (Instruction Nos. 9 & 18): Intimidating a Participant in the Legal Process (Angela and Danielle)

Angela testified Junior made her look at swords hanging on his wall and told her "I don't want to have to use them." She testified hearing Junior's statements frightened her. Danielle similarly testified Junior threatened to stab her if she screamed while he was sexually assaulting her and, on other occasions, he had made threats directed toward her family. Once again, Junior challenges the sufficiency of the Commonwealth's evidence in asserting he was entitled to a directed verdict. We hold his assertions are without merit.

KRS 524.040(1) states, in pertinent part:

> [a] person is guilty of intimidating a participant in the legal process when, by use of physical force or a threat directed to a person he believes to be a participant in the legal process, he or she:
>
> . . .
>
> (f) Hinders, delays, or prevents the communication to a law enforcement officer or judge of information relating to the possible commission of an offense or a violation of conditions of probation, parole or release pending judicial proceedings.

Junior argues none of the proffered testimony was sufficient to present these two charges to the jury because no nexus was shown between the threats and any intent to prevent the reporting of a crime to law enforcement. He asserts there were no direct threats to kill or injure a specific person and no commands against disclosing his criminal behaviors. However, taking the evidence in the light most favorable to the Commonwealth, a reasonable inference may be made that Junior's direct threats of physical harm to Angela and Danielle during or immediately following a sexual assault were intended to

"hinder, delay, or prevent" them from reporting his criminal acts. More than a mere scintilla of evidence was presented, thereby foreclosing the requirement of granting a directed verdict. *Benham*, 816 S.W.2d at 187-88.

iv. Remaining Directed Verdict Arguments

Junior likewise contends he was entitled to directed verdicts on Counts 3, 8, 29, 30, 31, and 32 (Instructions 3, 10, 13, 14, 15, and 16, respectively). In support, he argues the Commonwealth failed to describe specific, uniquely identifiable events supporting each charge. As noted by the Commonwealth, each of these challenges represent nothing more than a repackaging of Junior's unanimous verdict arguments, which we have previously described.

Our review of the evidence reveals there was sufficient evidence which, when taken as a whole, would permit a reasonable juror to find guilt under each of the challenged charges. *Id.* at 187. Again, more than a mere scintilla of evidence was presented and certainly the Commonwealth's proof established more than a prima facie case on each charge sufficient to overcome Junior's motions for directed verdicts. *Id.* at 187-88. There was no error.

C. Ms. Rosie's Testimony

During her forensic interview, Angela stated she had reported being sexually abused to a school counselor while she was still living with the Riggles. In the course of her investigation, Detective Robey contacted the school where the three girls attended but was unable to confirm that any of the girls disclosed they were being sexually abused. In his opening statement, Senior's counsel seized on Detective Robey's findings in an attempt to show the

girls were not being truthful in the forensic interviews and to imply the sexual abuse allegations were fabrications. The following day, Angela testified she told a school counselor about being abused but could not remember the counselor's name and was unsure which school she was attending when she made the report. When asked by the Commonwealth if she remembered speaking to a counselor named "Ms. Rosie," Angela responded in the affirmative. She remained steadfast in her belief she was still living with the Riggles when she made the report, but still could not recall at which school Ms. Rosie worked. She confirmed her disclosure to Ms. Rosie was the one she was referring to in the forensic interview.

On cross-examination, the defense pressed Angela regarding the timing of her discussion with Ms. Rosie. While living with the Riggles, she attended Westport Middle School. However, Ms. Rosie worked for West Washington School Corporation where Angela was enrolled after moving out of the Riggle home. The defense exploited this discrepancy to cast doubt on the truthfulness of Angela's testimony and the underlying allegations of sexual abuse.

The next day, the Commonwealth called Ms. Rosie who confirmed Angela had spoken to her about being sexually abused and, in response, she had reported the disclosure to DCS in Indiana. Her testimony revealed Angela told her about the abuse on August 31, 2017, which was after Angela had moved away from the Riggle home. Ms. Rosie was not asked about, nor did she volunteer, any specifics of the statements Angela made to her and did not opine

as to whether she believed Angela's allegations were true. She testified regarding Angela's overall demeanor during their "almost daily" interactions including during the conversation in which the sexual abuse was discussed. The entirety of her testimony lasted under seven minutes.

Junior contends Ms. Rosie's testimony was intended by the Commonwealth solely for the improper purpose of bolstering and vouching for Angela's credibility.[10] Further, he asserts her testimony was irrelevant and inadmissible and the trial court erred in not so finding. Conversely, the Commonwealth asserts admission of Ms. Rosie's testimony was wholly proper because it was merely rehabilitative and introduced to counter the defense's suggestion of fabrication by Angela. We agree with the Commonwealth.

The defense plainly attempted to convince the jury that the victims should not be believed because no school official ever reported allegations of sexual abuse while the girls were living in the Riggle home. In particular, the defense used Detective Robey's failure to locate any incriminating reports from the girls to school officials to imply Angela was lying in her forensic interview and in her trial testimony about disclosing the abuse to a school counselor. Such a conclusion might have led the jury to believe Angela had similarly fabricated her allegations against Junior in their entirety. Thus, Angela was

[10] "The rule against bolstering or vouching addresses attempts by one witness to express belief in the credence of another witness." *Ruiz*, 471 S.W.3d at 683 (citation omitted).

vigorously cross-examined about the discrepancies in her testimony in a clear attack on her overall credibility.

Contrary to Junior's assertion, under the foregoing circumstances, Ms. Rosie's testimony about Angela's August 31, 2017, disclosure was not offered as a prior consistent statement under KRE[11] 801A(a)(2). It was not offered to prove the truth of the content of any previous disclosure nor to bolster Angela's credibility. Rather, Ms. Rosie's testimony was clearly presented for rehabilitative purposes and to rebut Junior's insinuation that Angela's testimony was inconsistent and her claims were false, all of which was intended to infer Angela could not be trusted to be truthful.

We addressed a similar situation in *James v. Commonwealth*, 360 S.W.3d 189, 206 (Ky. 2012). There, we held:

> [i]n this context, "the statement had 'some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" *Noel v. Commonwealth*, 76 S.W.3d 923, 929 (Ky. 2002) (quoting *United States v. Ellis*, 121 F.3d 908, 920 (4th Cir. 1997)).
>
> In such a case, the statement is not admitted under KRE 801A(a)(2) as a prior consistent statement. Indeed, KRE 801A(a)(2) does not even address this scenario, as "[i]t is silent with respect to the propriety of using evidence of prior consistent statements for other purposes (most notably for rehabilitation after impeachment that does not involve a claim of recent fabrication or improper influence motive)." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.10[3], at 581 (4th ed. 2003). Instead, the statement is admitted as non-hearsay because it is offered not for the truth of the matter but "to rehabilitate . . . credibility." *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 730 (6th Cir. 1994); *see also* Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.10[3], at 583 (4th ed. 2003) ("In these situations, of course, the

[11] Kentucky Rules of Evidence.

> prior statement would have to be used for credibility and not substantive purposes (there being no applicable hearsay exception), and the opposing party would be entitled to a limiting instruction to that effect upon request.").

Here, as noted by the Commonwealth, Ms. Rosie's testimony was elicited solely for the purpose of rehabilitating Angela's credibility and explaining apparent inconsistencies in her statements which the defense had attempted to capitalize upon. In such instances, the trial court's discretion to admit such testimony is far greater than if a statement is offered for its truth under KRE 801A(a)(2). *Id.* (quoting *Engebretsen*, 21 F.3d. at 730). Thus, we discern no abuse of the trial court's substantial discretion in permitting Ms. Rosie's testimony under the circumstances.

D. Corroborating Testimony of K.W. and M.W.

Next, Junior challenges the admission of corroborating testimony from K.W. and M.W. He contends their testimony was unduly prejudicial, amounting to nothing more than propensity evidence relative to his "lifestyle" which was introduced solely to suggest he had a criminal predisposition to molesting young girls. Thus, he argues the evidence was admitted in contravention of KRE 404(b). We disagree.

Prior to trial, the Commonwealth filed a notice under KRE 404(c) of its intent to introduce testimony from Angela, Alyssa, and Danielle to establish their abuse started as kissing and touching of their breasts and buttocks by both Junior and Senior. The Commonwealth also indicated its intent to introduce testimony regarding the inappropriate touching and kissing of K.W.,

M.W., and C.R.[12] It argued introduction of these prior acts was necessary to provide the jury a "complete picture" of the circumstances surrounding the charged crimes, including an explanation of how the victims were groomed and why they did not actively resist or fight Junior or Senior during the charged incidents. Having occurred at the Riggle home while the three girls were residing there, the Commonwealth asserted the prior acts were probative to show the sexual touching of young girls was normalized in the home and helped explain why the crimes went unreported even with multiple other children and frequent guests being present in the residence. Following a hearing, the trial court determined the proposed testimony was admissible as it tended to show a common pattern of behavior, citing *Lear v. Commonwealth*, 884 S.W.2d 657 (Ky. 1994).

At trial, K.W. testified she lived on and off in the Riggle home for approximately six months and was subjected to unwanted sexual touching, including Junior's touching of her buttocks, Senior's touching of her buttocks and breasts, and Senior "intimately" kissing her. Moreover, she recounted seeing Senior inappropriately touch Angela, Alyssa, and Danielle. She also stated she had witnessed Senior intimately kissing C.R.[13] She indicated it was "normal" for Junior and Senior to act inappropriately with any young girl who

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[12] C.R. is Senior's biological daughter.

[13] C.R. testified for the defense. She denied ever having had any inappropriate contact with Senior and categorically denied having been intimately kissed by him. She further testified she never saw Junior or Senior touch anyone in an inappropriate sexual manner.

was in the house, and that such behaviors "happened all the time." In addition, K.W. testified to having observed physical abuse inflicted by Senior on the three sisters.

M.W. testified Senior was her uncle and indicated she often visited and stayed overnight in the Riggle home during the time Angela, Alyssa, and Danielle lived there. She, too, recounted how Senior would rub her back, touch her buttocks, and kiss her on the lips, and testified to having observed Senior kiss Danielle and C.R., and touch Danielle's buttocks. Like K.W., she also testified to having observed physical abuse inflicted by Senior against Angela, Alyssa, and Danielle. However, she offered no testimony indicating that she ever experienced or observed any specific inappropriate actions by Junior.

Junior argues the events relayed by K.W. and M.W. were insufficiently similar to the acts alleged to have been committed against Angela, Alyssa, and Danielle so as to establish a method or pattern of operation. His argument emphasizes the testimony did not show K.W., M.W., or C.R. were subjected to the more serious sexual acts, including rape and sodomy, as alleged by Angela, Alyssa, and Danielle. Thus, he asserts no repetitive pattern of sufficiently similar misconduct existed to adequately support the trial court's reliance on *Lear* to admit the contested testimony, and that it should have been excluded as improper under KRE 404(b).

Under KRE 404(b), evidence of other crimes, wrongs or acts is generally inadmissible to prove a defendant's character or propensity to act in conformity

therewith, but 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). This list of "other purposes" is "illustrative rather than exhaustive." *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 219 (Ky. 2003) (quoting *Colwell v. Commonwealth*, 37 S.W.3d 721, 725 (Ky. 2000)). Evidence of prior bad acts is admissible if "probative of an element of the crime charged . . . even though it may tend to prove the commission of other crimes." *Sanders v. Commonwealth*, 801 S.W.2d 665, 674 (Ky. 1990). Further, evidence of other crimes, wrongs, or acts are admissible if a "special relationship" to the crimes charged exists and the evidence tends to prove "motive, identity, absence of mistake or accident, intent, or knowledge, or *common scheme or plan.*" *Pendleton v. Commonwealth*, 685 S.W.2d 549, 552 (Ky. 1985) (emphasis added) (citations omitted).

Trial courts must admit evidence of other crimes, wrongs, or acts under KRE 404(b) "cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). To determine the admissibility of prior bad acts evidence, courts must ascertain whether the evidence is relevant for a permitted purpose, probative of the prior bad act, and not overly prejudicial under KRE 403. *Id.* A trial court's evidentiary ruling is reviewed for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

Based on the foregoing standards, our review of the record convinces us the proffered testimony was not, as urged by Junior, offered merely to show he had a proclivity for sexually assaulting young girls. Instead, we hold it was offered to show similarities to the particulars of how the abuse of Angela, Alyssa, and Danielle began and progressed, as well as to confirm the normalization of inappropriate sexual contact within the Riggle home. The contested testimony tended to show a common pattern, scheme, plan, or modus operandi for the purpose of proving motive, intent, knowledge, and absence of mistake or accident. In this manner, the challenged testimony contradicted Junior's defense which asserted the girls were fabricating the allegations and maintained he never subjected anyone to inappropriate sexual advances or touching. Indeed, the testimony elicited from K.W. and M.W was strikingly similar to that of Angela, Alyssa, and Danielle regarding the beginning of their abuse by Junior. In each instance, the victim was a young girl, the touching occurred in the Riggle home, and the tactic of touching was the same. Just as in *Lear*, the instances were not isolated events intended to show criminal or lustful proclivities and tendencies, but rather indicated a pattern of purposeful and intentional conduct spanning a lengthy period of time. 884 S.W.2d at 660. Thus, we hold the evidence was relevant and probative to show a modus operandi.

Even so, under KRE 403(b), the probativeness of testimony regarding other crimes, wrongs, or acts must be balanced against the risk of unjustified prejudice. Such balancing is inherently factual and is therefore a task which is

properly reserved to the sound discretion of the trial court. *Rake v. Commonwealth*, 450 S.W.2d 527, 528 (Ky. 1970). In making a KRE 403 ruling, trial courts are to consider three factors: the probative value of the evidence, the probability of undue prejudice, and whether the harmful effects substantially outweigh the probative worth. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (citing Robert Lawson, *The Kentucky Evidence Law Handbook*, § 2.10 at 56 (3rd Ed. 1993)) (*overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008)). "An appellate court evaluating a trial court's balancing under KRE 403, must consider the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum prejudicial value." *Yates v. Commonwealth*, 430 S.W.3d 883, 897 (Ky. 2014) (citing *Major v. Commonwealth*, 177 S.W.3d 700, 707 (Ky. 2005)).

Here, all of the acts testified to occurred during the same time period, were perpetrated by the same persons, were similar in nature, and happened in the same location. There was a multiplicity of victims and occurrences. The probative value of the testimony was high as it tended to show a common plan, scheme, or modus operandi. While the contested testimony was clearly prejudicial, KRE 403 does not operate to exclude evidence that is merely "detrimental to a party's case." *Id.* at 897 (quoting *Webb v. Commonwealth*, 387 S.W.3d 319, 326 (Ky. 2012)). We cannot say the testimony of K.W. and M.W. was unduly prejudicial nor that its probativeness was outweighed by any

harmful effects. Thus, we hold the trial court did not abuse its discretion in admitting the evidence of Junior's prior acts of sexual misconduct.

E. Prosecutor's Statement Regarding Sentencing Laws

Finally, Junior asserts the Commonwealth misstated Kentucky's sentencing laws during closing arguments, thereby resulting in jury confusion and a manifestly unjust sentence. This argument is admittedly unpreserved. It is also without merit.

During the trial's penalty phase, the Commonwealth informed the jury that, by statute, all of the sentences for Junior's sodomy convictions had to run consecutively. Junior contends this was a misstatement of sentencing laws. Without citation to any authority, Junior argues KRS 532.110(1)(d) required "the jury to run the sex crimes against each girl consecutive to the sex crimes against the other girls" but "[w]ithin each set of sex crimes against a girl, the jury could run those concurrent." Not so.

KRS 532.110(1)(d) simply and plainly states "[t]he sentences of a defendant convicted of two (2) or more felony sex crimes, as defined in KRS 17.500, involving two (2) or more victims shall run consecutively." There is no question Junior was convicted of numerous qualifying felonies nor that he had three victims. Contrary to Junior's assertion, nothing in the statutory language permits concurrent sentences when a defendant is convicted of two or more sex crimes against two or more victims.

In *Payne v. Commonwealth*, ___ S.W.3d ___, 2022-SC-0120-MR, 2023 WL 4037696, at *5 (Ky. June 15, 2023), we recently reiterated "the purpose of KRS

532.110(1)(d) is to eliminate *judicial* discretion concerning whether to impose consecutive or concurrent sentences when a person is convicted of multiple sexual felonies involving multiple victims. [*Commonwealth v.*] *Stambaugh*, 327 S.W.3d [435,] 438 [(Ky. 2010)]. The trial court was constrained to impose consecutive sentences for each count pursuant to KRS 532.110(1)(d) and *Stambaugh*." The only limitation on consecutive sentences under KRS 532.110(1)(d) is the sentencing cap set forth in KRS 532.110(1)(c). In the present case, the trial court appropriately applied the requisite statutory sentence. Thus, we hold no palpable error occurred.

CONCLUSION

In conclusion, and for the foregoing reasons, we discern no reversible error. The Jefferson Circuit Court's judgment of convictions and sentence is affirmed.

All sitting. All concur.

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