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# Supreme Court of Kentucky

2022-SC-0126-MR

DARREN BOUNDS

APPELLANT

V. ON APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE DANIEL ZALLA, JUDGE  
NO. 17-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Darren Bounds was found guilty by a Campbell County jury of multiple acts of sexual assault he inflicted on his daughter,<sup>1</sup> who was under twelve years old at the time, and of resisting arrest. In conformity with the jury's recommendations, Bounds was sentenced to life in prison on one count of first-degree rape, life in prison for one count of first-degree sodomy, fifty years for a second count of first-degree sodomy, ten years for first-degree sexual abuse, and six months for resisting arrest, all to be served concurrently.

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<sup>1</sup> To protect the identity and privacy of the victim, she will be referred in this opinion as "daughter" or "victim" and her relatives who testified will be identified as "the mother" and "the sister."

Bounds previously appeared before this Court in the matter of *Bounds v. Commonwealth*, 630 S.W.3d 651 (Ky. 2021). That opinion stemmed from his convictions of twenty counts of possession of matters portraying a sexual activity of a minor (child pornography).<sup>2</sup> Those materials were found on Bounds’s personal computer when police were investigating his daughter’s allegations of abuse.

Bounds now appeals his convictions as a matter of right, alleging two evidentiary errors, an impermissible attempt to shift the burden of proof by the Commonwealth, and incorrect testimony presented to the jury by a probation and parole officer during the penalty phase of his trial. Finding none of his contentions meritorious, we affirm his convictions and sentences.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

Bounds is the natural father of victim. He was also a “father figure” to victim’s older half-sister. The two sisters continued to visit Bounds after he and their mother separated in 2009.

Victim testified that Bounds first sexually assaulted her in 2016, when she was seven years old. The first incident occurred on Bounds’s bed in the ersatz bedroom he had fashioned for himself with sheets in his mother’s basement. Bounds took off his clothes and made his daughter rub his privates. Bounds ejaculated on her and on the ground next to her before cleaning up with a rag. According to his daughter, Bounds threatened her that if she told

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<sup>2</sup> We found one of Bounds twenty convictions to be duplicative, affirmed the remaining nineteen convictions, and remanded the matter.

anyone about what happened he would kill her entire family and any police officers who came to arrest him.

Next, in July 2016, Bounds laid on top his daughter, held her arms down and “put his privates inside [her] privates.” According to his daughter it “hurt so badly” that it caused her vagina to bleed. His daughter testified that she screamed but no one was in the home to hear her.

To conceal the vaginal bleeding, Bounds told victim’s mother that she must have started menstruating. In response, victim’s mother took her to her primary care physician the next day. Victim was asked by her physician if she had perhaps hurt herself riding a bicycle which she denied. Victim was next taken by her mother to an endocrinologist who ruled out menstruation but failed to diagnose the cause of her bleeding. At this appointment however, victim stated she had bled because she fell off her bicycle and hit her vagina. Bounds suggested that his daughter be placed on birth control despite her only being seven years old.

The assaults continued and the victim began getting upset at the prospect of visiting Bounds, especially if her older sister would not come along with her. According to victim though, Bounds would find ways to separate the girls even when her sister came along. Assaults occurred in either Bounds’s basement living area, victim’s bedroom, or in a first-floor bathroom. Bounds could lock the door to the bathroom, but used a board to keep the door to victim’s bedroom closed because it did not have a lock. According to the victim, Bounds always placed a towel underneath her when he abused her and when

“white stuff” would come out of his privates it would either go on a towel or into her mouth.

Bounds also showed victim child pornography, telling her the children in the videos were her age. These videos were ultimately located on Bounds’s personal computer. Bounds also showed victim his collection of sex toys and would rub some of them against her vagina. She described one item in particular; a purple one with a hole in it that vibrated. Victim also stated that Bounds put his penis in her butt and applied lubricant to her vagina and anus prior to assaulting her.

On November 21, 2019, Bounds was to take the two girls to see the movie, *Trolls*. Instead, Bounds took the girls to his mother’s home and sent victim’s sister to the basement telling her that he and victim were going to cook and work on homework upstairs. Upstairs, Bounds took victim into the bathroom and after taking his clothes off, had victim perform oral sex upon him. He forced her head up and down during this assault and, once finished, licked victim’s vagina.

The next time the victim was scheduled to go to visit Bounds, her mother described her as becoming hysterical; then victim told her mother that Bounds was putting his penis in her privates which hurt and she didn’t want it to happen anymore. Victim also related to her mother the threats Bounds had made and the collection of knives, swords, machetes and hatchets he kept in his basement living area.

Victim's mother contacted the police and was directed to take her daughter to the hospital immediately. At Cincinnati Children's Hospital, a pediatric sexual assault nurse examiner (PSANE) performed a pediatric sexual assault exam and prescribed medications to treat sexually transmitted diseases (STDs). The PSANE nurse later testified that based on her experience, it was "not normal for pediatric patients to have a transection of the hymen" which she had noted in her examination. Victim was also seen by the pediatrician who runs the Mayerson Center at Cincinnati Children's Hospital. At trial, this physician testified that although not all sexual abuse victims show physical signs of abuse, in victim's case, she had endured vaginal penetration which was "pretty diagnostic of child sexual abuse." He further testified that it would be very rare for the victim to have experienced such injury from a fall off a bike.

The next day, a detective conducted a forensic interview with victim and her sister during which victim made "multiple disclosures of rape and sodomy."

A warrant was issued for Bounds's arrest. Police determined to arrest Bounds away from his residence and conducted a traffic stop at which Bounds refused to exit the vehicle despite requests and despite being informed he was under arrest. Bounds was forcibly removed and physically resisted arrest, requiring numerous officers to restrain him in order for him to be handcuffed.

Police also executed a search warrant for the home where Bounds resided with his mother. This search resulted in finding a computer with two sex toys being charged via the computer's USB ports. More than twenty other sex toys were found including the purple sex toy that the victim had described

as being used on her. Not only were the sex toys described by the victim found, but Bounds's weapons, the sexual lubricant, and the board victim described as being used by Bounds to secure her bedroom door, were also located and placed into evidence.

Subsequently, the purple sex toy described by the victim was tested and the victim's DNA was found on it.

Inspection of Bounds's seized computer and three hard drives (all connected to or located in his computer) showed that the hard drives contained child pornography as described by the victim. The resultant child pornography charges were severed from the sexual assault and resisting arrest charges and tried first. Bounds's first trial ultimately resulted in his conviction on nineteen counts of possession of matter portraying a sexual act of a minor and concurrent twenty-year sentences on each count.

Following his convictions for possession of child pornography, Bounds expressed frustration with his counsel and after a series of hearings conducted in accord with *Faretta v. California*, 422 U.S. 806, 807 (1975), he was permitted to represent himself at the sexual assault trial *pro se* with standby counsel appearing alongside him.

Bounds's trial commenced on December 6, 2021. His defense consisted of a flat denial that he committed the assaults with allegations of a potential conspiracy between the victim and her mother, police, and the healthcare professionals. Bounds pointed out that neither victim's primary care physician nor the endocrinologist had initially found evidence of rape. He alleged that

ovarian cysts may have caused victim's vaginal bleeding and that some non-criminal means of transference of victim's DNA to the purple sex toy could have occurred. He testified that the assaults could not have occurred as the victim had alleged since either his mother, his mother's boyfriend, or victim's sister were often present. Bounds also alleged that victim's mother had initiated the allegations in order to prevent him from having custody and medical rights over victim. Additionally, Bounds suggested that if victim had been assaulted, his mother's now-deceased boyfriend may have done it.

## **II. ANALYSIS**

Bounds challenges his convictions based on four alleged errors made by the trial court, the first being prosecutorial misconduct during its closing argument, the next two relating to the improper admission of testimonial evidence, and the last being incorrect testimony proffered by a probation officer during the sentencing phase.

### **A. Did the Trial Court Commit Reversible Error by Allowing the Commonwealth's Comments in Closing? – Preserved**

Bounds argues that a statement made by the Commonwealth in its guilt phase closing argument, that there was “no evidence to the contrary,” was a flagrant and prejudicial “burden-shifting” argument. Bounds alleges that this statement may have caused the jury to deliberate “believing that Bounds needed to refute evidence.” This argument was preserved by a contemporaneous objection which was overruled by the trial court.

We only reverse for prosecutorial misconduct in a closing argument if the misconduct was “flagrant” *or* if each of the following are satisfied: “(1) proof of



defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with sufficient admonishment." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (citations omitted).

Misconduct is "flagrant" if it "render[ed] the trial fundamentally unfair." *Duncan v. Commonwealth*, 322 S.W.3d 81, 87 (Ky. 2010). In *Brafman v. Commonwealth*, 612 S.W.3d 850, 861 (Ky. 2020) we wrote:

The Court weighs four factors to determine whether improper conduct is sufficiently flagrant to require reversal, namely: (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused. We look at the claimed error in context to determine whether, as a whole, the trial was rendered fundamentally unfair.

In reviewing a claim of an improper closing argument, we also keep in mind that parties are allowed "wide latitude" in their closings and the closing argument must be considered "as a whole." *Mulazim v. Commonwealth*, 600 S.W.3d 183, 194 (Ky. 2020).

The portion of the Commonwealth Attorney's closing argument containing the allegedly flagrant statement is as follows:

Commonwealth's Attorney: "Here's something I cannot get out of my mind—it's hard not to close your eyes and picture the way that [victim] described this happening. She said that when they went into the bathroom, her dad made her get naked. She's able to remember that her clothes went under the sink, there was an open pedestal sink that you can see in the pictures, that's where they put their clothes, and her dad got naked too, and he put his penis inside her mouth. But, not only was she able to tell you that, she was able to tell you that he moved her head down while his penis was in her mouth. [Victim] was sodomized by her dad. You need to look at the testimony that came out. *I really don't think there was*

*any evidence to the contrary that this happened.* I mean, they want you to discount it because her sister . . .

Defense Counsel: Objection your honor, burden shifting.

Trial Judge: Overruled, go ahead.

The Commonwealth's statement came fifty-nine minutes into its closing argument while it was concluding its summary of the evidence presented at trial in support of the charges of first-degree sodomy. The Commonwealth had already presented its summary of the evidence supporting the charges of first-degree rape without objection. The Commonwealth's closing argument would then continue for another fifteen minutes without objection.

After reviewing the trial, we are satisfied that the Commonwealth's remark was an isolated and harmless event. Given the remark's singular example and the Commonwealth's multiple references to it having the burden of proof, we cannot agree that the statement, or any improper suggestion therein, was deliberate. We are also satisfied that the jury was not misled by the remark. The jury instructions, the trial court's admonitions, the defense's opening and closings, and the Commonwealth's own opening statement and closing arguments all reinforced the correct standard that the burden of proof rested solely with the Commonwealth. The Commonwealth provided significant evidence of each of the crimes alleged and, as a whole, we cannot agree that the remark could have rendered the trial fundamentally unfair. Accordingly, we conclude that the remark was not flagrant.

Next, given that Bounds's counsel objected, and the trial court overruled the objection, we consider whether the proof of Bounds's guilt was "not

overwhelming.” While the substantive proof offered was definitively one-sided, we need not address the “overwhelming” nature of the proof because we may determine that the remark made was not “misconduct,” flagrant or otherwise. Certainly, as argued by Bounds, he did not have to disprove any allegation or prove his innocence. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). However, the statement made (“I really don’t think there was any evidence to the contrary that this happened.”) did not truly implicate a shifting of the Commonwealth’s burden onto Bounds to prove his innocence.

In *Tamme v. Commonwealth*, 973 S.W.3d 13, 38 (Ky. 1998), we held that “[a] prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.” A prosecutor is also “entitled to attack a defendant’s credibility if the defendant testifies as a witness.” *Id.* at 39.

The Commonwealth’s statement here is substantively similar to statements which we have found to be acceptable. In *Goncalves v. Commonwealth*, 404 S.W.3d 180 (Ky. 2013), the Commonwealth stated during its closing argument that “[i]n order to believe this defendant’s story, you must disbelieve all these other witnesses.” There, we held such statement was not an attempt at improper burden-shifting, but was “a permissible attempt by the Commonwealth to refute Gonclaves’s conspiracy defense.” *Id.* at 195.

The Commonwealth’s burden of proof was sufficiently defined and Bounds’s presumption of innocence were clearly stated in the jury instructions, which required that the jury find Bounds “not guilty unless you are satisfied

from the evidence alone, beyond a reasonable doubt, that he was guilty” of each offense. The trial court also specifically informed the jury that Bounds was under no obligation to produce any evidence and that it was only to consider evidence presented during trial and that remarks during opening statements or closing arguments were not evidence.

A jury is presumed to follow a trial court’s instructions and we find no reason here to question that presumption. *Dixon v. Commonwealth*, 263 S.W.3d 583, 593 (Ky. 2008). Bounds’s argument that the effect of the Commonwealth’s statement on the jury’s understanding of the burden of proof resulted in an unfair trial or a due process violation is unavailing.

### **B. The Admission of Allegedly Prejudicial Testimony**

We review preserved evidentiary issues for abuse of discretion and will only find error if the trial court’s decision was arbitrary, unreasonable, or unsupported by law. *Whaley v. Commonwealth*, 567 S.W.3d 576, 582 (Ky. 2019). If we find that the trial court erred, we then review whether the error was harmless, or requires reversal because it rendered the trial unjust. *Id.*

#### **1. Did the Trial Court Err in Admitting Character Evidence? – Preserved**

During the sister’s testimony, the sister testified why she began avoiding visiting Bounds and stated, “[a] few times while I was over at his house, he would make comments on my body, one time . . .” Bounds counsel objected and at a bench conference argued that Bounds was not charged with any offenses regarding the older sister, such conduct was not relevant to whether he assaulted the victim, and such testimony was improper bolstering. The

Commonwealth countered that the sister's statement explained why she no longer wanted to visit Bounds and that it was not unlawful to make comments about a girl's breasts. The trial court overruled the objection without commenting on its rationale and victim's sister later testified that Bounds had told her she had larger breasts than most girls her age and "other times he would pick me up and like refuse to let me go, stating that he would do as he pleased 'cause he was my dad."

Bounds argues that the trial court erred in allowing the admission of improper character evidence regarding alleged bad acts concerning victim's sister in violation of the Kentucky Rules of Evidence (KRE) 404(b)(1) and (2), and such statements were unduly prejudicial. KRE 404(b), which concerns character evidence regarding "other crimes, wrongs, or acts[,]" provides as follows:

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:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If 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.

However, we have determined that "the list provided in KRE 404(b)(1) is illustrative rather than exhaustive." *Kelly v. Commonwealth*, 655 S.W.3d 154, 165 (Ky. 2022).

“In order to determine if other bad acts evidence is admissible, the trial court should use a three-prong test: (1) Is the evidence relevant? (2) Does it have probative value? (3) Is its probative value substantially outweighed by its prejudicial effect?” *Leach v. Commonwealth*, 571 S.W.3d 550, 554 (Ky. 2019). “[A]fter determining relevancy and probativeness, the trial court must weigh the prejudicial nature of the ‘other bad acts’ evidence versus its probative value. Only if the potential for undue prejudice substantially outweighs the probative value of the evidence must it be excluded.” *Id.*

In this case, one central issue presented by the defense was whether or not Bounds could have committed the acts of which he was accused if and when the victim’s sister was present. A more critical issue presented by the defense was the delay in the victim reporting the assaults. The defense looked at such delay as evidence of the alleged crimes never occurring and the allegations being manufactured. That issue deserved an explanation. Victim and victim’s mother testified that victim began resisting going to Bounds’s residence without her sister. That part of the narrative intertwined with victim’s sister’s own reasons for not visiting Bounds (which afforded him greater opportunity to assault the victim), which begged the question: Why? To not allow victim’s sister to answer that question would have created an unnecessary gap in the victim’s narrative.

Bounds did testify that he wanted both girls on birth control and, regarding the sister, he wanted her to have the option because he thought she was no longer visiting because she was on her periods. He also admitted that it

was possible that he had made comments about her breasts to tease or aggravate her and admitted that she was sensitive about the size of her breasts. In the full context of the events leading up to the victim reporting the assaults, her sister's reasons for not visiting Bounds were relevant, probative and 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." KRE 404(b)(2).

We next focus on whether the evidence admitted was more prejudicial than probative, and if so, whether its admission was harmless. While it is generally easy to determine whether evidence is relevant and probative, the more challenging part of this evaluation is often weighing "the prejudicial nature of the 'other bad acts' evidence versus its probative value." *Leach*, 571 S.W.3d at 554.

"The prejudice must go beyond that which is merely detrimental to a party's case and be of such character that it 'produces an emotional response that inflames the passions of the triers of fact or is used for an improper purpose.'" *Kelly*, 655 S.W.3d at 165 (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25[3][d], at 135 (4th ed. 2003)).

Furthermore, such evidence "is, of course, prejudicial to [the defendant] as all evidence of culpability is in a criminal proceeding" but is still properly admissible so long as it is not "*unduly* prejudicial because it is not unnecessary or unreasonable." *Luna v. Commonwealth*, 460 S.W.3d 851, 873 (Ky. 2015) (footnote omitted).

In weighing the prejudicial nature of the statements, we are not convinced that they were so unduly prejudicial or inflammatory as to require a reversal. Here, there was never any implication that Bounds had ever inappropriately touched the sister and the Commonwealth did not attempt to focus on the sister's testimony as proof of Bounds's overt sexual predilections. While Bounds's comments to victim's sister may be considered untoward, they were not so shocking or outrageous as to cause us concern that her statements caused the jury to believe that Bounds had a criminal disposition to rape his daughter.

Even were we to conclude that allowing the admission of the sister's testimony was erroneous, we would not be compelled in this instance to reverse Bounds's convictions. In *Meece v. Commonwealth*, 348 S.W.3d 627, 664–65 (Ky. 2011), we stated:

As a general rule, the erroneous admission of evidence in violation of state law is not a federal constitutional error. And, as the Supreme Court of the United States noted in *United States v. Hasting*, 461 U.S. 499, 509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983):

Since *Chapman [v. California]*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)], the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. . . . The goal, as Chief Justice Traynor of the Supreme Court of California has noted, is “to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.”



(Internal citations omitted); *See also* RCr 9.24.<sup>[3]</sup> And, as we explained in *Winstead* [283 S.W.3d 678, 688-689 (Ky. 2009)]:

[N]on-constitutional evidentiary error may be deemed harmless. . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The inquiry is not simply “whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.” *Id.* at 765, 66 S.Ct. 1239.

Considering the trial record as a whole, we have no concern that these few statements were key to Bounds’s conviction or that they substantially swayed the jury. Bounds’s trial was replete with explicit testimony from his own daughter regarding the horrific acts committed against her. That testimony, coupled with the graphic photographic evidence and expert testimony regarding her vaginal injuries make the sister’s statements pale in comparison and effect. Therefore, any purported error in their admission was harmless and does not rise to a level where we question the discretion afforded the trial court in making its determination.

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<sup>3</sup> Kentucky Rules of Criminal Procedure (RCr) 9.24, Harmless error:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

**2. Did the Trial Court Err in Admitting Testimony of the Administration and Effects of STD medications on the Victim During the Guilt of the Trial? - Preserved**

Bounds next argues that the trial court committed reversible error in allowing the PSANE nurse who examined the victim to testify as to the effects of STD medications which were prophylactically administered to the victim.

During her examination by the Commonwealth, the nurse testified that prophylactic medications were sometimes given to children to prevent disease. Bounds's counsel objected arguing victim did not have a sexually transmitted disease and was not relevant. The Commonwealth argued the testimony was proper because victim's mother had already testified about the side effects of the medications. The trial court stated that the evidence could be relevant to victim's trauma and Bounds's counsel countered that this type of evidence might be relevant in a sentencing phase of trial, but it was highly prejudicial in the guilt phase.

The PSANE nurse proceeded to testify that the prophylactic medication to prevent Human Immunodeficiency Virus (HIV) was prescribed to the victim and the medication was "very heavy on the liver" and caused nausea. The nurse did not have firsthand knowledge of the actual effects on the victim and did not testify on that subject.

The PSANE nurse was not testifying about injuries she witnessed that evidenced the victim being sexually assaulted. She was testifying about potential side-effects of the medications she prescribed for potential STDs that were not diagnosed. Therefore, the side effects of such medications had no

relationship whatsoever to either identifying Bounds as the victim's assailant, or proving that the victim had been sexually assaulted. Had the PSANE nurse's testimony stopped at the prescribing of the medications (without going into side effects), such testimony *could have* been relevant, but that was not the case here.

The administration of, and potential effects of, these drugs were neither relevant nor probative to the issue of whether or not Bounds had sexually assaulted the victim. Victim-impact evidence is typically inadmissible until the penalty phase of the trial. *See Roe v. Commonwealth*, 493 S.W.3d 814, 823 (Ky. 2015) ("The prohibition of victim-impact evidence during the criminal responsibility phase of trial is deeply rooted in both our precedent and Kentucky statutory law.").

As explained in *Tackett v. Commonwealth*, 445 S.W.3d 20 (Ky. 2014), victim impact evidence masquerading as victim background evidence is not permissible and the "introduction of victim impact evidence during the guilt phase is reversible error." *Id.* at 33 (quoting *Ernst v. Commonwealth*, 160 S.W.3d 744, 763 (Ky. 2005), *overruled on other grounds by Mason v. Commonwealth*, 559 S.W.3d 337, 341-42 (Ky. 2018)). We can differentiate between impermissible victim impact evidence, and allowable victim background evidence, by looking at whether the evidence is "aimed primarily at appealing to the jurors' sympathies" or "provid[es] an understanding of the nature of the crime[.]" *Tackett*, 445 S.W.3d at 33.

“[H]ighly inflammatory” evidence with “little or no probative value” which concerns the “terrible loss” suffered based on the crime is not appropriate for introduction during the guilt phase of a trial. *Ice v. Commonwealth*, 667 S.W.2d 675-76 (Ky. 1984).

The PSANE nurse’s testimony on the potential side effects of these drugs constituted clearly impermissible victim impact testimony because it solely established a bad consequence of Bounds’s actions on the victim’s life well after the assault and was indeed likely to arouse the jurors’ sympathy. The effects of such medication, like other post-assault suffering and/or treatments afforded victims for either their physical or psychological health, should be segregated to the penalty phase of a trial. The admission of such testimony during the guilt phase of this trial was in clear error.

Regardless, we can determine the error to be harmless under Rules of Criminal Procedure (RCr) 9.24 because the improper testimony was cumulative. *Brewer v. Commonwealth*, 206 S.W.3d 343, 352 (Ky. 2006). The victim’s mother was the first to testify, without objection, that that the victim had been prescribed “STD medication to help prevent anything” and that the medication had made her “very sick, so sick that Thanksgiving that year, she couldn’t eat.” Bounds did not seek palpable error review of the mother’s testimony on this subject. Regardless, the trial court should have been more wary of allowing the introduction of evidence which was irrelevant to the issues at hand and which could have provided the foundation for a reversal.

Bounds had the right to a fair trial, not a perfect one. *McDonald v. Commonwealth*, 554 S.W.2d 84, 86 (Ky. 1977). We are confident that this error Bounds has identified, while improper, did not render his trial fundamentally unfair. The trial concerned whether he had sexually assaulted his daughter. Bounds's credibility was in no way effected by testimony about his daughter's reaction to these medications. Furthermore, such testimony regarding the effects of the medications was mild *in extremis* compared to the pain and trauma suffered by, and testified to, by Bounds's daughter as an immediate result of his attacks.

Thus, though we reiterate our criticism of allowing irrelevant testimony which might improperly engender sympathy for the victim during the guilt phase of a trial, the introduction of such evidence in this case, considering the trial as a whole, was harmless error.

**C. Is a New Penalty Phase Necessary Due to Incorrect Testimony From the Probation and Parole Officer? – Unpreserved**

Lastly, Bounds argues that a new penalty phase is necessary due to a probation and parole officer testifying, incorrectly, that Bounds could be paroled without completing the Sex Offender Treatment Program (SOTP). This issue was not preserved and Bounds requests palpable error review pursuant to RCr 10.26.

The testimony in question occurred while the probation officer was being cross-examined by Bounds's counsel. While questioning the probation officer regarding specifics of Bounds's parole eligibility, Bounds's counsel asked if it would be possible for Bounds to be eligible for parole if he did not complete

SOTP. The probation officer answered affirmatively. Counsel obviously knew that such was untrue and asked if “it would still be possible for him to be eligible for parole even without the Sex Offender Treatment Program” to which she received another affirmative response. Bounds’s counsel then, again, asked “Okay, so if he didn’t complete the Sex Offender Treatment Program, he would still see the Parole Board in twenty years?” Again, the probation officer agreed.

At no point did Bounds ask the trial judge for an instruction or attempt to correct the information given to the jury.

The probation officer’s testimony was indeed incorrect. Kentucky Revised Statute (KRS) 197.045 states in relevant part, “[a] sexual offender who does not complete the sex offender treatment program for any reason shall serve his or her entire sentence without benefit of sentencing credit, parole, or other form of early release.

*In Deemer v. Finger*, 817 S.W.2d 435, 437 (Ky. 1990), we stated that “a palpable error affecting the substantial rights of a party, even if insufficiently raised or preserved, is reviewable, and, upon a determination that it has resulted in manifest injustice, reversible.” For such an error to be palpable, and require reversal, it must be “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky 2006).

While the Commonwealth argues that this Court should consider this alleged error to have been waived since it was Bounds’s counsel who elicited the incorrect information and did nothing to correct the error, we will perform just such an analysis in deference to Bounds’s right to a proper trial.

In arguing the significance of the erroneous testimony, Bounds asserts that the jury may have been more likely to grant a shorter sentence if they knew he was required to receive treatment before the possibility of release and that the jury's recommendation of a sentence was indicative of prejudice citing to *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969).

In *Robinson v. Commonwealth*, 181 S.W.3d 30 (Ky. 2005), this Court reviewed a sentencing hearing where it was Commonwealth that elicited incorrect testimony from probation and parole officer during sentencing. We stated:

The use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material. *Napue v. Illinois*, 360 U.S. 264, 269, 272, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). This is true irrespective of the good faith or bad faith of the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–1197, 10 L.Ed.2d 215 (1963). When the prosecution knows or should have known that the testimony is false, the test for materiality is whether “there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).

*Id.* at 38.

Unlike in Bounds's trial, in *Robinson*, the parole officer not only incorrectly stated that good time credits would be figured into the defendant's parole eligibility, but the Commonwealth also reiterated that incorrect statement during its closing. In *Robinson*, we determined that that Commonwealth “relied, almost solely, on Franklin's testimony to persuade the jury to recommend the maximum sentence” before concluding there was “a

reasonable likelihood” that the jury was influenced by the incorrect testimony.

We do not share those concerns here. The question remains whether we believe the testimony influenced the jury to render a sentence greater than what it might otherwise have given absent the incorrect testimony. There was no testimony offered that Bounds would refuse, or not complete, SOTP. While Bounds’s counsel wanted to present SOTP as something Bounds would need to accomplish in order to be paroled, there was no issue regarding “when” Bounds would be eligible for parole, and would otherwise qualify, assuming he did complete the program as mandated by statute.

In a matter such as this, we also cannot presume that the jury’s recommended sentences were indicative of prejudice; not when the sentences are juxtaposed with the proof heard by the jury of a man who repeatedly raped his young daughter. While we must advise trial courts and counsel to be more alert to the information being provided by both court clerks and probation and parole officers during sentencing hearings, under the narrow circumstances presented here, we cannot see this issue as creating a reasonable likelihood that the incorrect testimony affected the jury’s recommendation.

### **III. CONCLUSION**

We affirm Bounds’s convictions and sentences by the Campbell Circuit Court.

All sitting. All concur.



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