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Supreme Court of Kentucky

2022-SC-0432-MR

LARRY FINCH — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU STEVENS, JUDGE
NO. 18-CR-001200

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING

Larry Finch (Finch) was convicted of first-degree rape, first-degree sexual abuse, and intimidating a participant in a legal process. After he was further found to be a first-degree persistent felony offender (PFO), he was sentenced to twenty years' imprisonment. He now appeals his convictions and resulting sentence to this Court as a matter of right.[1] After review, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

In the early morning hours of July 1, 2016, then forty-three-year-old Finch raped and sexually assaulted the fourteen-year-old daughter of his long-

[1] Ky. Const. § 110.

time live-in girlfriend, Karen Smith[2] (Karen). That night, the victim, Jane, was watching television in the living room on the main floor of their three-story home with her sister. Jane's sister had fallen sleep on the couch, but Jane was awake waiting for some laundry to dry that she needed for a trip that day. Karen, Jane, and Karen's parents were going to drive to Detroit, Michigan to visit relatives and to celebrate Karen's birthday, which was on July 3.

At about 3:30 a.m., Finch came out of the bedroom that he shared with Karen and sat with Jane on the couch. They talked and watched television for about twenty minutes, and then Jane went downstairs to the laundry room to see to her laundry. When Jane was done, she turned around and saw Finch standing behind her. Finch asked her if she trusted him, and she responded that she did. He then said he wanted to show her something and led her into her bedroom, which was also in the basement. After they entered her bedroom, Finch told Jane to take off her clothes. Jane attempted to leave, but Finch locked the door and told her again, this time in a more aggressive tone, to take off her clothes. Jane did as she was told, at which point Finch laid her on her back and began kissing and licking her body, including her breasts and vagina. He then pulled his shorts down and raped her. During the rape, Finch put his hands around Jane's neck, though she never lost consciousness and no bruising resulted. Afterwards, Finch offered her $100 not to say anything, which she declined. He then told her he would kill her if she told anyone.

[2] Because the victim was a minor at the time of the offenses, we will refer the mother and the victim using pseudonyms to protect the identity of the victim.

Finch then made Jane take a shower. The only working shower in the home shared a wall with Karen and Finch's bedroom. Karen testified that she remembered Jane taking a shower at 4:00 a.m. that day, which was not typical behavior. After she showered, Jane sat on the living room couch in a daze until about two hours later when it was time for her and Karen to leave for Detroit. Jane tried to wake her sister up before they left to tell her what happened but was unable to as she was a heavy sleeper. Jane sent her sister a message while she and Karen were driving telling her what happened. Jane also told her boyfriend and one of her cousins that day. Jane testified that she did not tell Karen at that time because she wanted Karen to enjoy their trip as well as her upcoming birthday. Nevertheless, Jane's brother called Karen and told her around the time they were passing through Columbus, Ohio.[3] Jane confirmed to Karen that the rape occurred but did not want her grandparents, who were also in the car, to know until she and Karen had the opportunity to talk about it privately. They therefore continued to Detroit.

When they got to Detroit, Karen purchased Plan B for Jane and called the police. However, police officers in Detroit told Karen she needed to contact law enforcement in the jurisdiction where the rape occurred. When they returned to Louisville on July 3, they contacted the police, and Detective Patrick Allen (Det. Allen) was assigned to the case. Det. Allen instructed Karen

[3] Jane's brother found out from Jane's boyfriend.

to take Jane to a local hospital to have a rape kit performed. He collected Jane's rape kit from the hospital the following day and kept it in an evidence room until he collected a buccal swab from Finch three months later. Afterwards, Det. Allen sent the items to be tested at the Kentucky State Police's forensic laboratories, which, due to a backlog, took several months. Serology testing on the internal vaginal swab from Jane's rape kit revealed the presence of human semen. Later DNA testing on that semen confirmed that it was Finch's, and that there was a one in one hundred and ten sextillion chance that the DNA belonged to anyone other than Finch.

At trial, Finch testified in his own defense and denied raping or sexually assaulting Jane. When asked how his semen got into her vagina he simply replied, "I don't know." His counsel implied during closing argument that Karen and Jane had fabricated their story because Karen's and Finch's relationship was deteriorating due to infidelity on both sides.

The jury found Finch guilty of first-degree rape, first-degree sexual assault, and intimidating a participant in a legal process. After the jury further found that he was a first-degree PFO, he was sentenced to twenty years' imprisonment.

Additional facts are discussed below as necessary.

II. ANALYSIS

A. The Commonwealth did not improperly comment on Finch's right to remain silent during voir dire.

Finch first asserts that the Commonwealth improperly commented on his right to remain silent during voir dire and deprived him of an impartial jury by

making a burden shifting argument to the venire should Finch have chosen to testify. Finch concedes this alleged error is not preserved, but requests palpable error review pursuant to RCr[4] 10.26. "Under this rule, an error is reversible only if a manifest injustice has resulted from the error. That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial."[5]

During voir dire, the following exchange occurred between the Commonwealth and the venire:

> **CW[6]:** So on the topic of credibility, what are some reasons why a person would lie? Put yourself in the situation, why have you lied before? What are some reasons for that?
>
> **VM 1[7]:** [inaudible]
>
> **CW:** I'm sorry?
>
> **VM 1:** To protect someone.
>
> **CW:** To protect somebody, okay. How about to protect—
>
> **VM 2[8]:** Self-preservation.
>
> **CW:** Yeah, how about to protect yourself? I think that's probably one of the most common reasons that people lie. So, I'm sure that [defense counsel] will talk about this a little bit more, but on the topic of credibility and your ability to weigh it and just testimonial evidence in general, **the defendant has the right to remain**

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[4] Kentucky Rule of Criminal Procedure.

[5] *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006) (quoting *Graves v. Commonwealth* 17 S.W.3d 858, 864 (Ky. 2000)).

[6] Commonwealth.

[7] Venire member one.

[8] Venire member two.

> **silent**. **He has the right to choose not to testify in this case, he does not have to do that. And you cannot hold it against him if he chooses not to testify. Do we all agree with that? Okay. However, if the defendant does choose to testify, do we all agree that we have to weigh his credibility the same way that you weigh any other witness' credibility? Can we all agree to do that?** Whenever a person takes the stand the judge is going to have them swear to tell the truth, and that's taken very seriously in a court of law. Is there anybody here who feels that if the defendant takes the stand he has less of a duty to tell the truth **simply because he is the one in trouble? No? Again, self-preservation, we all do it.**[9]

Finch takes issue with the bolded language from the foregoing excerpt and urges this Court to adopt a rule that categorically precludes the Commonwealth from making comments about a defendant's right to remain silent during voir dire. The Commonwealth responds that the statement was not an improper comment on Finch's right to remain silent and that, at any rate, it was a fleeting comment made during a four-day trial and was not repeated or emphasized during trial. And, because it could not have affected the outcome of the trial it cannot be considered palpable error. We agree with the Commonwealth.

In order to be prejudicial, "[a] prosecutor's comment on the failure of a defendant to testify must be manifestly intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take it as such to constitute prejudice."[10] Here, the Commonwealth's statement that the defendant had a right not to testify and that the jury could

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[9] Emphasis added.

[10] *Byrd v. Commonwealth*, 825 S.W.2d 272, 275 (Ky. 1992), *overruled on other grounds by Shadowen v. Commonwealth*, 82 S.W.3d 896 (Ky. 2002).

not hold his decision not to testify against him was just an accurate statement of the law. Moreover, as the statement occurred during voir dire, it could not have been a comment on Finch's failure to testify as the opportunity to testify had not yet presented itself. The remainder of the complained of language seems to be meant to assess whether anyone in the venire would view a defendant's credibility differently than any other witness. This served the fundamental purpose of voir dire: "to obtain a fair and impartial jury whose minds are free and clear from all interest, bias, or prejudice that might prevent their finding a just and true verdict."[11] Finally, given the strength of the evidence against Finch, there is no substantial possibility that, absent this fleeting statement made during voir dire, the outcome of the trial would have been different. We affirm.

B. The trial court did not err by denying Finch's motion to strike two jurors for cause.

Finch next alleges that the trial court committed reversible error by failing to strike Juror 2908426 (Juror A) and Juror 2908820 (Juror B) for cause. This error was properly preserved for our review under the procedure set forth in *Floyd v. Neal.*[12] "A determination whether to excuse a juror for

[11] *Newcomb v. Commonwealth*, 410 S.W.3d 63, 86 (Ky. 2013).

[12] 590 S.W.3d 245, 252 (Ky. 2019) ("[T]o preserve the error that a trial court failed to strike a juror for cause a litigant must: (1) move to strike the juror for cause and be denied; (2) exercise a peremptory strike on said juror, and show the use of that peremptory strike on the strike sheet, and exhaust all other peremptory strikes; (3) clearly indicate by writing on her strike sheet the juror she would have used a peremptory strike on, had she not been forced to use a peremptory on the juror complained of for cause; (4) designate the same number of would-be peremptory strikes as the number of jurors complained of for cause; (5) the would-be peremptory

cause lies within the sound discretion of the trial court and is reviewed only for a clear abuse of discretion."[13] A trial court's decision is an abuse of discretion if it is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[14]

During voir dire, the following exchange occurred between the Commonwealth and Juror A:

> **CW:** Is there anything you all have had on your minds that you think we need to know about as it pertains to your ability to be a juror on this case? Sir?
>
> **Juror A:** [Juror] 2908426. You were talking about involvement in the legal system—
>
> **Judge:** Sir, if you'll speak up a little bit just to make sure I can here you.
>
> **CW:** Sure, if you think that I should know about it, absolutely.
>
> **Juror A:** I was a police officer for 30 years; I've investigated sexual assault.
>
> **CW:** Okay. And based on that experience do you think that you would be unable to be impartial in this case?
>
> **Juror A:** No.
>
> **CW:** Okay, and obviously you've heard that there are going to be some law enforcement witnesses. As a law enforcement officer, yourself are you going to be more inclined to give more credibility to a witness simply because they are a law enforcement officer?
>
> **Juror A:** No.

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strikes must be made known to the court prior to the jury being empaneled; and (6) the juror identified on the litigant's strike sheet must ultimately sit on the jury.").

[13] *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004).

[14] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Immediately thereafter, the following exchange took place between the Commonwealth and Juror B:

> **CW:** Anybody else? Ma'am?
>
> **Juror B:** It's about where I worked also.
>
> **CW:** Okay.
>
> **Juror B:** I worked at the children's hospital.
>
> **CW:** Oh did you? And what was your position there?
>
> **Juror B:** I worked with the forensics team.
>
> **CW:** With the forensics team? Okay, and what in particular were you involved with with the forensics team?
>
> **Juror B:** I currently—
>
> **CW:** Oh you still do?
>
> **Juror B:** I process subpoenas [inaudible].
>
> **CW:** Alright, oh, pediatric protection specialist, okay, I am familiar. Being that you work in pediatrics and that you work with the doctors who potentially treat victims of crime, are you going to bring any of that in if you're selected for this jury? Are you going to be able to simply weigh the facts, the evidence in this case and be impartial?
>
> **Juror B:** [inaudible].
>
> **Judge:** And that's a "yes" ma'am?
>
> **Juror B:** Yes, that's yes.

Defense counsel did not thereafter inquire further about the potential biases of either juror, but later moved to have them both struck for cause. The defense alleged that Juror A shook his head as the court was reading the counts of the indictment to the jury and further argued that because of his position as a

police officer that investigated sexual assault, he could unduly influence the other jurors. The trial court denied the motion to strike for cause, stating:

> The motion will be denied based upon that it's insufficient that he's a police officer. I didn't see him shaking, not to say that I couldn't strike him for that, but I just didn't see it and I wouldn't be comfortable striking him for any kind of non-verbal response that I didn't see in response to the reading.

The defense then moved for Juror B to be struck solely because she worked in the pediatric protection specialist department of a hospital. The Commonwealth responded that pediatric protection specialists were not involved with the case being tried, she stated that she could be fair and impartial, and she offered no responses that would give the court pause about her sitting on the jury. The court overruled the motion to strike.

Finch's argument against both jurors is the same: he contends that because they possessed unique and specialized information regarding the investigation of child sexual assault allegations, they could potentially exert undue influence over the other jurors. And, that they worked in fields in which their professional roles aligned them with the victims of child sexual abuse. Under these circumstances, he alleges, the probability of bias or prejudice is so high that this Court should adopt a categorical rule precluding such potential jurors from service. We decline to do so and affirm the trial court.

In accordance with RCr 9.36, a trial court is mandated to strike a potential juror for cause only when "there is reasonable ground to believe that [the] prospective juror cannot render a fair and impartial verdict on the evidence[.]" The party that alleges bias bears the burden of proving that bias

and the resulting prejudice,[15] and a trial court must consider the totality of the circumstances when ruling on a motion to strike rather than a response to any one question.[16]

First, concerning Juror A, "[w]e have many times held that "the mere fact that a person is a current or former police officer is insufficient to warrant removal for cause. . . . Additional evidence of bias must be shown"."[17] Here, the *only* evidence of bias asserted by Finch was that Juror A was a law enforcement officer and that he had previously investigated sexual assault.[18] Otherwise, Juror A was unequivocal in stating that his experience as a police officer would not affect his ability to be impartial, nor would it cause him to give more credence to a police officer's testimony. There was accordingly no reasonable ground for the trial court to believe that Juror A could not render a fair and impartial verdict, and it did not abuse its discretion.

Similarly, Finch's only basis for challenging Juror B was her employment with the pediatric protection specialist department at a local hospital. It was not alleged, for example, that Juror B or one of her close family members took part in the investigation in this case[19] or was otherwise involved in any way.

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[15] *Cook v. Commonwealth*, 129 S.W.3d 351, 357 (Ky. 2004).

[16] *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008).

[17] *Brown v. Commonwealth*, 313 S.W.3d 577, 597 (Ky. 2010).

[18] We acknowledge that defense counsel also alleged that Juror A shook his head during the reading of the indictment. But, as the trial court did not make a finding that the same occurred, we will not consider it as part of the totality of the circumstances.

[19] *Cf. Ordway v. Commonwealth*, 391 S.W.3d 762 (Ky. 2013) (holding trial court reversibly erred by not striking a juror in capital murder case whose sister was a

And, we have previously held that even when a prospective juror has themselves been the victim of a crime similar to the one charged, there must be some additional evidence of bias before striking the juror for cause is mandated.[20] Certainly, if a prospective juror being a victim of a similar crime is not, by itself, enough to require a presumptive strike for cause, simply working with children who are sex crime victims is not either. Juror B unequivocally stated that her employment would not affect her ability to be fair and impartial. There was no reasonable basis in the record upon which the trial court could have believed that Juror B could not be fair and impartial, and it did not abuse its discretion by denying Finch's motion to strike.

C. Cumulative error did not occur.

Finally, Finch asserts that cumulative error occurred. Under the cumulative error doctrine, "multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair."[21] Cumulative error may only be said to occur "where the individual errors were themselves substantial, bordering, at least, on the prejudicial."[22] When none of the individual errors raise any real question of

victim's advocate that worked in close cooperation with the prosecution and aided and comforted the family members of the victims of the murders being tried).

[20] *Little v. Commonwealth*, 422 S.W.3d 238, 242 (Ky. 2013).

[21] *Brown*, 313 S.W.3d at 631.

[22] *Id.*

prejudice, "we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice."[23]

Finch contends that cumulative error resulted from: (1) the Commonwealth eliciting hearsay statements from Jane; (2) the Commonwealth eliciting statements from Karen and a forensic interviewer that improperly bolstered Jane's testimony; (3) the Commonwealth introducing evidence that Finch's DNA was collected pursuant to a search warrant; and (4) the Commonwealth making improper "golden rule" arguments during closing arguments and interjecting facts not in evidence that bolstered Jane's testimony.

Finch concedes that none of these alleged errors, save for Det. Allen's testimony that Finch's DNA was collected pursuant to a warrant, were properly preserved for our review. He requests palpable error review of each of the non-preserved issues. Accordingly, any error that occurred will be considered non-prejudicial unless "upon consideration of the whole case, a substantial possibility does not exist that the result would have been different[.]"[24]

We now address each alleged error in turn.

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[23] *Id.*

[24] *Martin*, 207 S.W.3d 1, 3 (Ky. 2006).

1) Jane's testimony was not hearsay.

Finch first argues that the Commonwealth elicited two hearsay statements from Jane that improperly bolstered her own testimony. Finch first challenges the following line of questioning concerning to whom Jane disclosed following the rape:

> **CW:** I know that we said that you tried to tell [your sister]. After this incident, did you successfully tell anybody what happened?
>
> **Jane:** Yes. . . . I texted [my sister] on Facebook and I told her to get out of the house and to call me when she got to work.
>
> . . .
>
> **CW:** Who else did you tell about what happened?
>
> **Jane:** I told her and then I told my boyfriend at the time.
>
> . . .
>
> **CW:** Did you tell anybody else?
>
> **Jane:** Yes, I also told my cousin.

Finch also challenges the following testimony about Jane's rape kit examination and her interview with a forensic interviewer at a children's advocacy center:

> **CW:** Did you have to tell the doctors what happened to you?
>
> **Jane:** I did.
>
> **CW:** And [Jane] were you truthful with the doctors?
>
> **Jane:** I was, and I am now too.
>
> **CW:** [Jane] do you recall giving an interview at the Family and Children's Place about what happened to you?
>
> **Jane:** Yes I do.

CW: Were you truthful in that interview?

Jane: Yes I was.

Relying on *Winstead v. Commonwealth*, Finch argues that Jane's testimony in both of the foregoing excerpts was "hearsay for which no exception applied" because "a witness' out-of-court prior consistent statement is not admissible merely to corroborate the witness' in-court testimony,"[25] and that reversal is mandated.

Winstead involved a murder and first-degree robbery trial wherein one of the witnesses who discovered the victim's body "testified that she gave a statement to the police that day, that it was essentially the same as her testimony, and that it had been truthful."[26] Winstead argued on appeal that the witness' "testimony about her prior statement amounted to improper self-bolstering and entitle[d] him to a new trial."[27] The *Winstead* Court agreed, noting that KRE 801A(a)(2)

> provides that a witness's out-of-court prior consistent statement is not admissible unless "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Under this rule and KRE 802 (the rule against hearsay), a witness's out-of-court prior consistent statement is not admissible merely to corroborate the witness's in-court testimony.[28]

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[25] 283 S.W.3d 678, 688 (Ky. 2009).

[26] *Id.* at 687.

[27] *Id.*

[28] *Id.* at 688.

Notwithstanding, the Court held that the error did not merit reversal because it was not properly preserved and, at any rate, was harmless as the Court could not say with fair assurance that the judgment was substantially swayed by the error.[29]

With that said, Jane's testimony about whom she reported the rape to was not testimony about a prior consistent statement. She merely named the people she told, and in context it was part of her testimony of the timeline of events. No error occurred in its admission. And, while it appears at first blush that *Winstead* applies to her testimony about being truthful in her statements to her treating physicians and forensic interviewer, there is one key distinction between *Winstead* and the case at bar: in *Winstead*, the defense had not leveled an "express or implied charge against the [witness] of recent fabrication or improper influence or motive[.]"[30] But, here, Finch's sole defense was that Jane lied about the rape and that it never occurred, and his defense counsel implied that Jane was lying about the rape during its opening statement when it stated "Larry Finch didn't rape anyone." The testimony was therefore permissible under KRE 801(A)(a)(2) and no error occurred.

2) Jane's testimony was not improperly bolstered by other witnesses.

Finch next alleges that Jane's testimony was improperly bolstered by two other witnesses: Karen and Amanda Chapman (Amanda), Jane's forensic interviewer at the children's advocacy center. "Bolstering" occurs when a

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[29] *Id.* at 689.

[30] KRE 801A(a)(2).

person speaks directly of the "character for truthfulness" of a witness.[31] Finch first contests the following from Karen's testimony:

> **CW:** Karen based on the actions that you took after finding out what happened to [Jane], is that because you believed her?
>
> **Karen:** Yes.

Thus, Karen did not bolster Jane's testimony. She made no reference to Jane's character for truthfulness; she merely stated that she personally believed Jane when she made the disclosure.

Finch next challenges the following testimony elicited from Jane's forensic interviewer:

> **CW:** So you've conducted close to 2,000 forensic interviews, does the child disclose something every time?
>
> **Amanda:** No they do not.
>
> . . .
>
> **CW:** And in that interview, Ms. Chapman, did [Jane] make a disclosure?
>
> **Amanda:** Yes she did.

As with Karen's testimony, the forensic interviewer made no reference to Jane's character for truthfulness. And, importantly, she did not testify expressly or impliedly that she believed Jane was telling the truth.[32] She therefore did not improperly bolster Jane's testimony and no error occurred.

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[31] *Koteras v. Commonwealth*, 589 S.W.3d 534, 548 (Ky. App. 2018) (citing *Harp v. Commonwealth*, 266 S.W.3d 813, 824 (Ky. 2008)).

[32] *Cf. Hoff v. Commonwealth*, 394 S.W.3d 368, 375 (Ky. 2011).

3) Det. Allen's testimony regarding the search warrant for Finch's DNA is not reversible error.

For his next assertion of error, Finch contends that the Commonwealth elicited improper evidence regarding the collection of Finch's DNA pursuant to a search warrant. This is the only assertion of error under the cumulative error umbrella that was preserved. Finch filed a pre-trial motion in limine regarding "[a]ny reference to the fact that a search warrant was needed to get Mr. Finch's DNA." During oral argument on the motion, the Commonwealth objected to the motion, and explained that it intended to introduce evidence that the search warrant was required because Finch would not give law enforcement consent to the DNA collection. The Commonwealth wanted to in turn use his refusal to consent as evidence of his consciousness of guilt.

The trial court ruled that the Commonwealth could elicit that Finch's DNA was collected pursuant to a search warrant, but it sternly warned the Commonwealth that it was not permitted to elicit evidence from any witness that Finch refused to give consent. Det. Allen's subsequent testimony, of which Finch complains, did not fun afoul of the trial court's ruling:

> **CW:** And in order to collect the defendant's buccal sample, or swab, did you have to do anything in particular in order to obtain that?
>
> **Allen:** I did obtain a search warrant to get those buccal swabs.
>
> **CW:** And what all does a search warrant entail?
>
> **Allen:** Just an explanation of what the case is to the judge and why I'm wanting to obtain a certain piece of evidence and how its valuable to me to the case.
>
> **CW:** Okay, so you have to present it to a judge?

> **Allen:** Yes, I present that information to a judge in a written document called an affidavit, and if the judge reads that and approves of it he will sign the affidavit and a search warrant.

While Finch acknowledges that the trial court was correct in forbidding any reference to Finch's refusal to give consent, he argues it should have also prevented the Commonwealth from presenting any evidence whatsoever that a search warrant was required to obtain his DNA because "those facts were not relevant to any disputed fact, and the introduction of them did not serve any proper purpose." Even assuming arguendo that we agreed with Finch's argument, because there was no evidence presented of Finch's refusal to consent, we would be hard pressed to find prejudicial error. The above testimony was a fleeting discussion of a procedural matter in a four-day trial. Moreover, because the DNA evidence in this case was so crucial, the Commonwealth elicited a good deal of testimony from several witnesses regarding the process of obtaining, testing, and safekeeping the integrity of the forensic evidence in this case. Thus, this testimony would likely not have seemed odd or particularly noteworthy to the jury. No prejudicial error occurred.

4) The Commonwealth's closing arguments were not improper.

Regarding the Commonwealth's closing arguments, Finch first alleges that the Commonwealth made improper "golden rule" arguments. "A 'golden

rule' argument is one in which the prosecutor asks the jurors to imagine themselves or someone they care about in the position of the crime victim."[33] For example, the following argument was found to be a "golden rule" argument: "Suppose you run a store and somebody comes in on you and does that to you. What's it worth?"[34] Although it should be noted that, while this Court held that the trial court should have sustained the defense's objection to the foregoing statement, it did not hold that the statement necessitated reversal.[35] In this case, Finch challenges the following arguments as golden rule arguments:

- "If you [press on the sides of your neck] to yourself for three or four minutes, you are going to get lightheaded, but you aren't going to bruise."
- "[Jane] told you when it was happening to her, it's like she was looking down on herself. Like she wasn't even in her own body. You don't just make that up."
- "[A rape kit examination involves] consenting to having Q-tips shoved into your vagina and rubbed around in there. It's consenting to have pubic hairs plucked, combed; your external genitalia swabbed."
- "And if this was a lie, you're not going to want a sexual assault exam done. Again, you're going to say, I'm the mother, I walked in on him doing it. I'm an eyewitness to this."
- (Referring to the rape kit examination) "I don't know about you, but if that were me and some man walked in and said, 'Hey I'm going to put this in your vagina now.' I would throw my hands up, absolutely not."

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[33] *Caudill v. Commonwealth*, 120 S.W.3d 635, 675 (Ky. 2003).

[34] *Lycans v. Commonwealth*, 562 S.W.2d 303, 305–06 (Ky. 1978).

[35] *Id.* at 306.

- (Noting that Jane came in to testify six years after the rape occurred)[36] "If this was all a lie, you don't do that."

None of the foregoing statements asked the jurors to imagine themselves or someone they care about in the position of the crime victim. They are therefore not "golden rule" arguments, and no error occurred.

The second challenge that Finch levels against the Commonwealth's closing argument is that it interjected facts not in evidence that improperly bolstered Jane's testimony. The two complained-of statements were:

- "And [Jane] gave multiple statements which [Det. Allen] was aware of; which he had listened to; been a party to, and compared. And they were consistent. And that's why he took out the charges."

- "[Sexual assault] does happen in houses where there are other people all the time. And so the perpetrators know to be quiet and to keep their victims quiet."

As noted, bolstering occurs when a person speaks directly to a witness' character for truthfulness.[37] Neither of the foregoing statements speak directly to Jane's character for truthfulness. Moreover, regarding the first argument, Det. Allen testified that he spoke with Jane and several of her family members whom she told about the rape. Det. Allen also observed her forensic interview with Amanda at the children's advocacy center. The Commonwealth was therefore not introducing facts not in evidence. And, the Commonwealth's second argument was clearly in response to the defense's closing argument

[36] The trial in this matter was delayed due to the state forensic lab's backlog and COVID-19 restrictions.

[37] *Koteras*, 589 S.W.3d at 548.

that it was not possible that the rape occurred without someone in the house hearing it. It was a commonsense argument that was not outside the bounds of propriety, and no error occurred.

Accordingly, because no prejudicial error occurred by virtue of any of the alleged errors argued by Finch, no cumulative error occurred. In this vein, we emphasize the truly overwhelming nature of the evidence against Finch: his semen was found in Jane's vagina and his only defense was that he did not know how it got there. Because of this, there is truly no substantial likelihood that the outcome of Finch's trial would have been different absent any of the errors he has alleged.

III. CONCLUSION

Based on the foregoing, Finch's convictions and resulting sentence is hereby affirmed.

All sitting. VanMeter, C.J.; Bisig, Conley, Keller, and Nickell, JJ., concur. Thompson, J., concurs in result only by separate opinion.

THOMPSON, J., CONCURRING IN RESULT ONLY: I concur with the majority's opinion that Finch's convictions were supported by overwhelming evidence. I am compelled to write separately to explain why I believe direct comments made by a prosecutor regarding a defendant's Fifth Amendment privilege should, in almost all instances, be viewed as *per se* prejudicial. This Court must explicitly and plainly admonish prosecutors because the warnings found in our caselaw have been ignored. Future violations should require reversal.

We should adopt a new and simple maxim: *Commonwealth's Attorneys must never mention the Fifth Amendment or a defendant's choice to remain silent whatsoever.*

For more than a century, while our laws have always stayed the same, the courts of this Commonwealth have had to dissect the impact of prosecutor's comments on this subject. Here, the Commonwealth's Attorney focused the jury's attention on the defendant's silence by mentioning the privilege when there was no legitimate justification for raising this topic during *voir dire.*

In 1918, Kentucky's then-highest Court held that "the determining factor is, of course, whether the indirect reference [to the accused's right to remain silent] was such as was reasonably liable to have directed the jury's attention to the failure of the defendant to testify, or was so remote as not reasonably liable to have had such effect[.]" *Miller v. Commonwealth*, 206 S.W. 630, 633 (Ky. 1918). I would assert that ***any*** reference to the Fifth Amendment by the prosecution can do nothing other than direct a jury's attention to the defendant's Constitutional right to silence.

In 1941, this Court's predecessor went so far as to rule that where the Commonwealth infringes on this right, admonitions are insufficient to cure the error.

> Section 1645 of Baldwin's 1936 Revision of Carroll's Kentucky Statutes permits a defendant in a criminal prosecution to testify in his own behalf upon his request to do so, but a part of it says: "But his failure to do so **shall not be commented upon**, or be allowed to create any presumption against him." Numerous

> cases are cited in the notes to that section in the edition of the statutes referred to, and in Baldwin's Annual Supplement thereto, in which we reversed convictions where comment was expressly made upon the fact that defendants had not testified in their own behalf, and in every one of them it was held that it was the duty of the court to set aside the submission and continue the case when such comment was made if the defendant on trial requested it. Those cases are decisive of the question as presented in this record, and for that reason also the judgment is erroneous.

Williams v. Commonwealth 154 S.W.2d 728, 729–30 (1941) (emphasis added).

The statute cited in *Williams*, remains in effect and is now codified at Kentucky Revised Statute (KRS) 421.225 (originally enacted as KS 1645, 1893 Ky. Acts, ch. 227, § 22, at 1163).

Later, in *Adams v. Commonwealth*, 264 S.W.2d 283, 286 (Ky. 1954), in an opinion reversing a conviction due to statements which "unnecessarily called to the jury's attention that the defendant had failed to testify in his own behalf[,]" the Court correctly noted that "it is elementary, of course, that the failure of a defendant to testify in a criminal prosecution cannot be commented upon or referred to before the jury" and stated:

> The privilege of an accused person against having his silence questioned is a corollary to his constitutional right against self-incrimination and has always been zealously guarded by the courts. In those cases where the representative of the Commonwealth infringes upon this right, an admonition by the court to disregard the improper remarks is not considered sufficient to cure the error.

Id. at 286.

When our Kentucky courts have failed to recognize the importance of protecting defendant's rights and failed to find error in a prosecutor's commentary, the federal courts have stepped in. In *Eberhardt v. Bordenkircher,* 605 F.2d 275 (6th Cir. 1979), the Sixth Circuit Court of Appeals granted a writ of habeas corpus in a Kentucky case because the prosecutor gestured toward the defendant during his closing argument and asked, "[w]hat other witnesses could the defendant's case have put forward who were totally available to you? What other witnesses? Ask yourself that question. Who else could have testified in this case?" *Id.* at 278–80.

The Sixth Circuit rejected our conclusion that the error was "harmless" pursuant to *Chapman v. California,* 386 U.S. 18 (1967), and admonished us that *"[i]t only takes a single comment, however, to remind a jury that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant is guilty merely because of his exercise of that right.*" *Eberhardt,* 605 F.2d at 279 (emphasis added).

Despite these warnings, Commonwealth's attorneys continue to reference defendants' rights to remain silent, thusly inviting trial courts' admonishments or appellate court reversals, when there should be no discussion by the Commonwealth whatsoever.

The Fifth Amendment of the U.S. Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." In *Griffin v. California,* 380 U.S. 609 (1965), the U.S. Supreme Court

held that "the Fifth Amendment . . . forbids . . . comment by the prosecution on the accused's silence . . . ." *Id.* at 614.

Section 11 of the Kentucky Constitution also states "the accused . . . cannot be compelled to give evidence against himself."

As mentioned previously, KRS 421.225 states "[i]n any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so **shall not be commented upon** or create any presumption against him." (Emphasis added).

Kentucky Rules of Evidence (KRE) 511(a) specifically states regarding claims of privilege that "[t]he claim of a privilege, whether in the present proceeding or upon a prior occasion, is **not a proper subject of comment** by judge or counsel." (Emphasis added). KRE 511(b) then instructs that "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the assertion of claims of privilege without the knowledge of the jury."

The Commonwealth's statements here were clear violations of both of these rules. The admonition not to "comment" on the accused's privilege found in both the statute and the evidentiary rule is crystal clear and no exceptions are mentioned whatsoever.

The right to remain silent is the defendant's own personal right. It is the defendant alone who may invoke the privilege and, if he or she chooses, may address that issue before the jury to ensure commitment to its

principals.[38] The Commonwealth has no concomitant right whatsoever to either offer observations on the defendant's exercise of the privilege or to offer commentary on the privilege itself. There is no tolerable purpose in any such statements. Discussion by the Commonwealth at the very least serves to focus the jury's inquiry on the defendant's refusal to testify and at worst can make jurors question whether they are truly prohibited from inferring the defendant's guilt if he chooses to invoke his privilege.

The Commonwealth's statements directly and intentionally focused the jury on the defendant's privilege before the trial had even begun.

In Finch's case, we cannot know whether the Commonwealth's discussion in *voir dire*—prior to any proof whatsoever being offered—caused Finch to alter his defense and feel compelled to testify. Here the Commonwealth's statements *en toto* can be seen as an allegation that Finch's only choice going forward was to either testify and lie (described by the Commonwealth as "self-preservation") or invoke the privilege and not testify at all. Faced with that Catch-22, any defendant would feel compelled to testify thusly waiving his right and eviscerating the Fifth Amendment. The fact that these statements occurred during *voir dire* not only implicates the Fifth Amendment but also the Sixth Amendment's right to an impartial jury.

[38] See Rules of Criminal Procedure (RCr) 9.54(3), which provides that "[t]he instructions shall not make any reference to a defendant's failure to testify **unless** so requested by the defendant . . . ." (Emphasis added).

A defendant's rights in this specific area of law were discussed at length by this Court in *Hayes v. Commonwealth*, 175 S.W.3d 574 (2005). That opinion should have informed the jurists of our Commonwealth of the full import of defendant's rights under the privilege, but now bears repeating.

> The Fifth Amendment to the United States Constitution affords a criminal defendant the right not to testify at his own trial; and the Sixth Amendment entitles him to an impartial jury that will not be adversely influenced by the fact that he exercised that constitutional right. *Carter v. Kentucky,* 450 U.S. 288, 305, 101 S.Ct. 1112, 1121–22, 67 L.Ed.2d 241 (1981). "[T]oo many, even
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> those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime . . . ." *Ullmann v. United States,* 350 U.S. 422, 426, 76 S.Ct. 497, 500, 100 L.Ed. 511 (1956). "[A] state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Carter,* 450 U.S. at 305, 101 S.Ct. at 1121–22.
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> *Id.* at 583.
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> *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored.
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> *Id.* at 584.
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> A criminal defendant is entitled to a trial by jurors who will not be prejudiced by the fact that the defendant exercised the Fifth Amendment privilege not to testify.
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> The principle that a defendant's failure to testify in his own behalf cannot be held against him is perhaps the most critical guarantee under our criminal process, and it is vital to the selection of a fair and impartial jury that a juror understand this concept.
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> *Id.*

In conclusion, the Commonwealth's remarks were not general, they were specific. They were not benign, they were prejudicial. It is only because the evidence against Finch was indeed overwhelming that I can concur with the majority's opinion.

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