Commonwealth of Kentucky
Supreme Court
Case No. 2021-SC-485-MR
(Electronically Filed)

MICHAEL ROBERTSON — **APPELLANT**

v.

Appeal from Daviess Circuit Court
Hon. Jay Wethington, Judge
Indictment No. 20-CR-0641

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for the Commonwealth of Kentucky

Submitted by,

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CERTIFICATE OF SERVICE

I certify that on August 11, 2022, the appellate record was returned to the Clerk of this Court and a copy of this brief was delivered via U.S. Mail to Hon. Jay Wethington, Chief Circuit Judge, Holbrook Judicial Center, 100 East Second Street, Owensboro, Kentucky 42301; via email to Hon. Bruce Kuegel (bkuegel@prosecutors.ky.gov); and via State Messenger Mail to Hon. Aaron Reed Baker, Assistant Public Advocate, Department of Public Advocacy, 5 Mill Creek Park, Suite 100, Frankfort, Kentucky 40601.

/s/ *Matthew R. Krygiel*
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INTRODUCTION

Appellant, Michael Robertson, was convicted of two counts of first-degree rape against his stepdaughter (a victim less than 12 years of age). Robertson was sentenced to a total of 20 years' imprisonment with the Kentucky Department of Corrections.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant has requested oral argument–stating that a novel issue exists related to Marsy's Law. Interestingly, the first two issues of this appeal (regarding the intersection of Marsy's Law and KRE 615 [separation of witnesses] as well as the use of the term "victim" for a complaining witness) are essentially identical to two issues raised under Marsy's Law in the case of *Rico Lamont Cavanaugh v. Commonwealth*, No. 2021-SC-441-MR. Briefing for that case recently concluded. Oral argument was requested in the *Cavanaugh* case by the Commonwealth, and will be here as well for the same reason (first appeal[s] raising substantive questions about how to apply Marsy's Law in a criminal trial).

STATEMENT CONCERNING THE RECORD

The original record in this matter consists of one volume of court documents and four video discs. The court documents are numbered consecutively and will be referred to as "TR [Transcript of Record] [page number]." The video discs are chronologically arranged and will be cited by number and date in accordance with CR 98(4).

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Pursuant to CR 76.12(4)(d)(iii), the Commonwealth does not accept Appellant's statement of the case.

On August 13, 2020, Appellant, Michael Robertson, took his stepdaughter, AC (DOB: 4/30/2010), to get medical attention due to a rash on her private area.[1] VR No. 3, 6/1/21, 2:19:20. AC went to an urgent treatment center (Owensboro Health Medical Group) "across town" on Mayfair Drive in Owensboro, Kentucky. VR No. 4, 6/2/21, 9:51:30, 3:08:01. AC wore a dress to the appointment but had been told by Robertson not to wear panties "because they were going to have to check down there anyway." VR No. 3, 6/1/21, 2:25:39. AC was diagnosed with poison ivy and prescribed the corticosteroid Prednisone. VR No. 4, 6/2/21, 10:03:55. In the parking lot of the urgent care facility, Robertson pulled two white pills from his pocket and instructed AC to take them. VR No. 3, 6/1/21, 2:25:39. AC thought the pills were from the doctor, however they were Benadryl that Robertson had brought with him from home. VR No. 3, 6/1/21, 2:26:35; VR No. 4, 6/2/21, 2:42:40, 2:43:45.

Robertson and AC stopped at Meijer to pick up her prescription, but it was not ready. VR No. 4, 6/2/21, 2:44:30. Robertson and AC went to Burger King while they were waiting and AC ordered a milkshake. *Id.* While sitting in the Burger King dining area, AC stated that she was "feeling funny," and she became very groggy. VR No. 3, 6/1/21, 2:53:30; VR No. 4,

[1] This case involved two primary households. The first home was occupied by Robertson (AC's stepfather), Robertson's mother, and Robertson's wife Keeley (AC's biological mother), who lived on Blueberry Lane in Owensboro, Kentucky. VR No. 4, 6/3/21, 10:02:30. Robertson and Keeley have 3 children in common. *Id.* Keeley also had AC and EC, who were born during Keeley's marriage to Tyler Stanley. VR No. 4, 6/2/21, 9:34:10. While Keeley was the primary residential custodian of AC and EC, Keeley and Tyler frequently diverted from their custody order. *Id.*

The second home was on Christy Place in Owensboro, Kentucky. VR No. 3, 6/1/21, 3:51:10. The household included Tyler Stanley (AC's biological father), Angela (Tyler's girlfriend), and four kids including AR (Angela's daughter). *Id.* Tyler's mother and aunt also lived nearby. *Id.* at 3:57:10. In fact, AC was at the home of Tyler's mother when she revealed Robertson's crimes to AR, setting in motion the events surrounding the prosecution of this case. *Id.* at 2:41:10.

6/2/21, 2:44:30. Robertson believed that the milkshake was too thick for AC, so he dumped it out and replaced it with Coke. VR No. 4, 6/2/21, 2:44:30. After a second attempt to fill the prescription was unsuccessful, Robertson and AC started towards home. *Id.* at 2:49:35.

As Robertson was driving, AC was lying in the front passenger seat of the vehicle. VR No. 3, 6/1/21, 2:38:40. Robertson became concerned with AC's condition (noting "something was off") and decided to video call his paramour, Sylvia Walters. VR No. 4, 6/2/21, 2:46:01, 3:22:44. Walters was a medical assistant at a doctor's office, and Robertson wanted her opinion as to whether he needed to take AC for emergency medical care. *Id.* at 3:22:44. Robertson ultimately took AC to Walters's residence for a physical examination, and Walters checked AC's pulse, blood pressure, and blood oxygen levels. *Id.* at 3:26:30. All of AC's vital signs were normal. *Id.* at 3:27:45. Walters concluded that AC's condition was likely being caused by the side effects of the Benadryl and that Robertson could take AC home to sleep it off. *Id.* at 2:48:10, 3:27:45.

After driving away from Walters's home, AC indicated that she had intended to go to sleep. VR No. 3, 6/1/21, 2:30:20. The passenger seat was partially leaned back and AC turned over and closed her eyes. *Id.* At that point, Robertson pulled her dress above her waist and "put his finger inside [AC's] private area." *Id.* AC indicated that what Robertson did "hurt" and that she froze and kept her eyes closed. *Id.* at 2:31:01. She stated that the car was moving when this occurred and neither of them spoke. *Id.* at 2:32:00.

A short time later, while stopped near a gas station, she peeked and saw Robertson put his finger on the top of the straw from her soft drink and lifted the straw from the container. VR No. 3, 6/1/21, 2:32:40. AC demonstrated how Robertson did this in a manner that would cause a vacuum and allow some of the liquid from the cup to remain in the straw. *Id.* at 2:34:01. Robertson released the liquid on AC's private area and put his finger inside of her

again. *Id.* AC testified that no Coke spilled on her dress. *Id.* AC indicated that this second incident also caused pain. *Id.*

When AC arrived home, her mother (Robertson's wife, Keeley) met them in the driveway. VR No. 4, 6/2/21, 9:56:20. AC was groggy to the point she had to be supported as she walked into the house. *Id.* Keeley assisted getting AC ready for bed, which included holding AC up while she took a shower. *Id.* Keeley put AC's dress in the hamper and did not notice it was wet or that any Coke had spilled on it. *Id.* at 9:56:20, 9:58:10. After AC put on her pajamas, she went to bed and did not tell her mother what happened. VR No. 3, 6/1/21, 2:40:00. Keeley noted that AC seemed overly tired for the next couple days, so much so that Keeley called the urgent care facility to find out what they had given to AC. VR No. 4, 6/2/21, 10:01:00, 10:02:30. It was at that point that Keeley learned that the only treatment that was provided was the prescription that had not been picked up. *Id.* at 10:03:55.

Several weeks later, over Labor Day weekend, AC was visiting at the home of her biological father, Tyler Stanley, and his girlfriend, Angela. VR No. 3, 6/1/21, 2:41:10. It was at that time AC told Angela's daughter, AR, about what happened. *Id.* AR facilitated AC telling other adults in the household and eventually Tyler was informed. *Id.* at 2:43:05, 2:44:00, 2:45:20, 3:57:40. After speaking with AC, Tyler became angry and had a friend drive him to Robertson's home to confront him. *Id.* at 2:45:20, 4:00:10. An argument and minor physical altercation ensued. *Id.* at 4:00:10. The police were called but no one was arrested. *Id.* Given the nature of the allegations, Keeley agreed that AC should stay at Tyler's home. *Id.* at 4:03:00.

On November 22, 2019, Robertson was interviewed by Detective Jared Ramsey of the Daviess County Sheriff's Office. VR No. 4, 6/2/21, 2:31:20. Robertson's factual recitation was mostly consistent with AC's version of events, however, he denied that the assaults occurred. *Id.* at 2:59:10, 3:01:20, 3:18:10. Robertson claimed that after leaving Walters's

residence he called Keeley and spoke to her until they got home. *Id.* at 2:48:10. Robertson claimed that AC hit her head on the seat belt and spilled Coke on herself while they were in the car. *Id.* at 2:49:35. He also claimed that he didn't tell AC not to wear panties under her dress for the doctor visit. VR No. 4, 6/3/21, 10:13:10.

Robertson was eventually indicted for three counts of first-degree rape (victim less than 12 years of age). TR 1-2. A jury trial took place from May 28, 2021, to June 3, 2021. VR Nos. 2-4. Due to the testimony from AC, the Commonwealth agreed to a directed verdict for one of the three counts in the indictment. VR No. 4, 6/2/21, 3:36:45.

Robertson testified on his own behalf and his recitation of facts was consistent with his prior police interview.[2] VR No. 4, 6/3/21, 10:11:20-10:30:30. Robertson's defense was that AC made up the allegations at Tyler's behest because she wanted to live with Tyler and Tyler no longer wanted to pay child support. VR No. 3, 6/1/21, 2:07:20.

As proof regarding the assertion that Tyler wanted AC to live with him (and so did AC), the defense intended to show that Tyler had repeatedly sought full custody of AC and EC (AC's younger brother) in the past. VR No. 3, 6/1/21, 2:07:20. However, the evidence revealed that, although Tyler filed three pro se motions for full custody, the motions were filed between January and early March of 2017, a three-month period during which Keeley and Robertson were doing drugs (a fact they both admitted) and Keeley had attempted suicide. VR No. 3, 6/1/21, 4:15:30; VR No. 4, 6/2/21, 9:37:40; VR No. 4, 6/3/21, 10:51:01. In addition, AC countered this narrative by admitting she was "really attached to [her] mom" and that she had recently moved to Tennessee to live with her mom once school and softball

[2] Because Robertson testified, the jury also learned that he was a convicted felon–with Robertson claiming it was a mistake related to some drug stuff when he was younger and "hanging with the wrong crowd" and "trying to fit in." VR No. 4, 6/3/21, 10:07:22. In light of Robertson's commentary, the Commonwealth was allowed to impeach him–noting that his felony was for manufacturing methamphetamine. *Id.* at 10:35:50.

ended. VR No. 3, 6/1/21, 3:01:10. Tyler agreed, referring to AC as a "mommy's girl" and indicating he had known for some time that AC wanted to live with Keeley in Tennessee. VR No. 4, 6/2/21, 4:04:30. EC remained in Kentucky with Tyler. *Id.*

Further, defense counsel's contention that Tyler wanted full custody to avoid child support was also refuted by documentation. While it was true that Tyler had developed an arrearage of $8,193.03 in the years following his divorce from Keeley, Tyler's child support had been suspended related to a temporary removal order in 2017 that awarded Tyler temporary custody. VR No. 4, 6/2/21, 1:33:10, 1:34:20. Keeley was given 60 days to reply regarding the arrearage and she failed to do so, therefore, the case was closed in April of 2017. *Id.* at 1:35:20. It was noted that Keeley could petition to reopen the case at any time. *Id.* at 1:36:21. However, during her testimony Keeley indicated that it was her understanding that no more child support was allowed after it had been suspended by social services (and she had no intention to seek any further support from Tyler anyway). *Id.* at 10:46:09. Therefore, the evidence showed that Tyler had not been paying child support for multiple years (since 2017).

The jury ultimately found Robertson guilty on the remaining two counts of first-degree rape and sentenced him to 20 years' imprisonment on each count, running concurrently, for a total sentence of 20 years. TR 82-83, 87. An Amended Judgment and Sentence was entered October 21, 2021, sentencing Robertson consistent with jury's verdict. TR 135-139.

This appeal followed. TR 122-123.

ARGUMENT

I. The circuit court did not misapply Marsy's Law.

In his brief, Robertson alleges that the trial court misapplied Marsy's Law by allowing the victim's father, Tyler Stanley, to remain in the courtroom prior to his testimony, and that by doing so, KRE 615 (exclusion of witnesses) was violated in a manner that constituted reversible error. *Brief for Appellant*, pp. 6-11. For the reasons noted herein, this claim must fail.

Lack of Preservation – Waiver – Palpable Error Standard of Review

Robertson asserts in his brief that the issue was preserved based on a pretrial motion regarding Marsy's Law and because defense counsel objected when Tyler was called to testify–since Tyler had been in the courtroom prior to his testimony. *Brief for Appellant*, p. 6. Robertson's perseveration statement ignores the fact that his pretrial motion in limine solely related to anticipated bolstering by "parents, law enforcement, social workers, [and] Child Advocacy Center." TR 71-74.[3] The written motion makes no mention of Marsy's Law. *Id.*

During an in-chambers hearing immediately before the beginning of the trial, the only mention of Marsy's law was defense counsel's admission that Tyler was allowed in the courtroom (he specifically stated he was not objecting from a "constitutional standpoint"), but he was concerned with Tyler's body language having an effect on the jury. VR No. 3, 6/1/21, 1:34:40, 1:36:01. Defense counsel suggested that Tyler's Marsy's Law rights would be adequately protected in terms of his "presence in the courtroom" if he watched the trial on video from outside the courtroom. *Id.* at 1:38:05. The trial judge overruled the video request

[3] The trial court ruled that the motion in limine was sustained except that witnesses would be able to testify who AC told to explain the sequence of events that led to the beginning of the investigation and AC's trip to the Child Advocacy Center (CAC) in Henderson, Kentucky. VR No. 3, 6/1/21, 1:29:30.

and indicated that the jury would not be told that Tyler was AC's legal representative. *Id.* at 1:36:30, 1:39:50. The prosecutor stated he would talk to Tyler about the concerns raised, Tyler would not sit at or near counsel table, and he would tell him to sit in the rear of the courtroom gallery (which Tyler did–placing him behind the jury).[4] *Id.* Based on these circumstances, in particular defense counsel's awareness of Marsy's Law implications, the failure to object should be treated as a waiver. *See Salisbury v. Commonwealth*, 566 S.W.2d 922, 927 (Ky. App. 1977) (noting that "[w]hen a defendant's attorney is aware of an issue and elects to raise no objection, the attorney's failure to object may constitute a waiver of an error having constitutional implications").

Regardless, if the error is not deemed waived, it was definitely not properly preserved and, if reviewed, should be governed by the palpable error standard of review. RCr 10.26 provides that "[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal" and "relief may be granted upon a determination that manifest injustice has resulted from the error." Only if there is a "substantial possibility" that the result of the case would have been different is reversal warranted. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Palpable errors are those "plain and obvious" errors that affect the substantial rights of a party. *Gray v. Commonwealth*, 479 S.W.3d 94, 96 (Ky. App. 2015). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

[4] Note, from the video the layout of the courtroom can be seen. The arrangement was such that the jury faced the bench and witness box, with counsel tables to each side (slightly forward to the right and left of the jury). The public gallery where Tyler was sitting was directly behind the jury. The entire jury had their backs to Tyler when he was in the courtroom gallery – and he was several rows back from the back row of the jury.

Analysis

Pursuant to the Kentucky Constitution § 26A (Rights of victims of crimes), commonly referred to as Marsy's Law, a victim has a number of enumerated rights that include the right to be present during a criminal trial. Marsy's Law establishes several specific, enumerated rights for crime victims that must "be respected and protected by law in a manner no less vigorous than the protections afforded to the accused." Ky. Const. § 26A. Under the "express language of [Marsy's Law]," *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019), the victim of a crime is entitled to attend a trial whenever the parties are presenting evidence to the jury—including, of course, witness testimony. KRS 421.500(1)(a) provides that, when the victim is a minor, the term "victim" also refers to other lawful representatives including one or more parents. Therefore, it is without question that the circuit court did not err by permitting Tyler to be in the courtroom, he qualified to exercise the rights of a victim as AC's legal representative.

Further, to the extent it is being raised here, during the in-chambers meeting it was stated multiple times that Tyler would testify, however, there was never any discussion regarding separation of witnesses. VR No. 3, 6/1/21, 1:34:40, 1:36:55. Defense counsel did not invoke the rule until Tyler's cross-examination was underway, when it was noted that the second witness, Sylvia Walters, was sitting in the gallery, and she was subject to recall. VR No. 3, 6/1/21, 4:10:05. Regardless, similar to a defendant, the presence of a victim, or her representative, in the courtroom for trial includes observing the testimony of other witnesses. *See Commonwealth v. McGorman*, 489 S.W.3d 731, 738 (Ky. 2016) (noting that it is well-established that a criminal defendant has a right to be present in the courtroom during his trial).

Kentucky Rule of Evidence (KRE) 615 provides that the trial court shall order that witnesses be excluded from the courtroom during the testimony of other witnesses *if requested*

by a party or on its own motion. (Emphasis added). "This sequestration is meant to preserve the authenticity of a prospective witness's testimony by preventing influence, even if subtle and subconscious, of one witness's testimony on a prospective witness's testimony." *Dooley v. Commonwealth*, 626 S.W.3d 487, 499 (Ky. 2021).[5] As noted, defense counsel did not timely invoke the rule for sequestration of witnesses. Regardless, KRE 615 is a rule of evidence, not a rule of constitutional law. *See McAbee v. Chapman*, 504 S.W.3d 18, 31 (Ky. 2016) (explaining that a violation of KRE 615 is a "non-constitutional error[]"). "As a general proposition, constitutional rights prevail over conflicting statutes and rules." *Commonwealth v. Barroso*, 122 S.W.3d 554, 558 (Ky. 2003). Because a rule of evidence does not supersede constitutional law, to the extent that KRE 615 conflicts with the "express language" of any portion of the Kentucky Constitution, the Constitution prevails.[6]

Tyler was the third witness to testify, immediately after AC and Sylvia Walters. VR No. 3, 6/1/21, 3:47:02. When defense counsel objected at the bench immediately prior to Tyler's testimony, noting that Tyler heard the earlier testimony and could change his testimony to conform to prior witnesses, defense counsel specifically acknowledged that he had not invoked KRE 615 (and didn't until later on during Tyler's cross-examination). *Id.* at 3:47:30. However, defense counsel argued that Tyler's ability to tailor his testimony was prejudicial and caused by

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[5] "Although the rule itself is silent as to remedies for violation, most reported cases present three avenues of remedy: (1) preemptively exclude the allegedly contaminated testimony; (2) permit the testimony notwithstanding a violation and allow the testimony subject to impeachment and probing cross-examination regarding the alleged contamination; and (3) reverse on appeal, if so required. Notably, this Court has preferred the second remedy, after holding a required hearing." *Dooley*, 626 S.W.3d at 500 (citations omitted).

[6] *See also State v. Uriarte*, 981 P.2d 575, 578-579 (Ariz. 1998) (procedural court rules will yield in the presence of a specific constitutional provision – Arizona Constitution was amended to give the legislature authority to enact substantive and procedural laws to define victim's rights – to the extent statute allowing a parent of a minor child to exercise rights on behalf of the victim and be present during the trial, even though the parent was expected to testify and conflicts with a defendant's request for sequestration of witness, the conflict is resolved by giving effect to the Arizona Constitution); *Butler v. State*, 315 So.3d 30, 34 (Fla. App. 2021) (approving the tenet that state constitutional right of father of both victim and defendant to be present in courtroom during trial did not conflict with defendant's right to a fair trial, and thus constitutional right prevailed over rule of sequestration of witnesses).

Marsy's Law. *Id.* at 3:48:40. The prosecutor stated that the Kentucky Constitution dictated that Tyler was allowed to be in the courtroom. *Id.* The trial court overruled the objection and responded that defense counsel could vigorously cross-examine Tyler about any matters related to earlier testimony and arguments–which he did. *Id.* at 3:49:40, 4:05:55-4:29:40, 4:36:10-4:37:59. Defense counsel also argued in his closing that Tyler was in the courtroom during testimony and argument and knew what he needed to say when he testified (suggesting that Tyler lied in order to conform his testimony to fit the prosecutor's narrative and cut against Robertson's theory of the case). VR No. 4, 6/3/21, 1:44:30.

Note, cases from Ohio have discussed the fact that Marsy's Law allows victims in the courtroom even when a defendant has moved for separation of witnesses. However, in that jurisdiction, the rules of evidence specifically exempt individuals given rights under the Ohio Constitution from the separation requirement. *See State v. Montgomery*, -- N.E.3d --, 2022 WL 2347210 (Ohio Jun. 30, 2022). It seems that Kentucky's framework came from the opposite angle to achieve the same result. Kentucky's version states that "[n]othing in this section or any law enacted under this section shall be construed as creating: (1) A basis for vacating a conviction; or (2) A ground for relief requested by a defendant." Ky. Const. § 26A. This language serves the same purpose as Ohio's decision to alter its evidence rule.

For example, similar language has been interpreted in Illinois but in a different context–victim impact statements. In *People v. Richardson*, 751 N.E.2d 1104, 1108 (Ill. 2001), the Supreme Court of Illinois highlighted that the Illinois Constitution contains a Crime Victim's Rights amendment that states that "[n]othing in this Section or in any law enacted under this Section shall be construed as creating a basis for vacating a conviction or a ground for appellate relief in any criminal case." In that case, the Court was deciding what effect would come from the fact that the trial court permitted three victim-impact statements to be

considered at a defendant's sentencing when a statute only allowed for one. *Richardson*, 751 N.E.2d at 1107-1108. The *Richardson* Court concluded that "a defendant is prohibited by our constitution from seeking appellate relief on the ground that more than one victim impact statement was presented and considered at sentencing." *Id.* Specifically, it was noted that the drafters of the amendment "intended them to serve 'as shields to protect the rights of victims,' and expressly delineated that their provisions 'not be used as a sword by criminal defendants seeking appellate relief.'" *Id.* (quoting *People v. Benford*, 692 N.E.2d 1285, 1289 (Ill. App. 1998)).

In fact, Section 26A looks more like the law in states like Alaska. *See* Alaska Const. art. I, § 24. Like Section 26A, Alaska's constitution provides that victims have the right "to be present at all criminal or juvenile proceedings where the accused has the right to be present." Alaska Const. art. 1 § 24. And Alaska's courts have rejected challenges like the one here, holding that victims may be allowed to testify after observing trial *even if* there was evidence that the witness had "tailor[ed] her testimony to corroborate the testimony of a previous witness." *See Proctor v. State*, 236 P.3d 375, 379 (Alaska Ct. App. 2010). This Court should do the same.

Of particular importance, however, is also the fact that the subject matter of Tyler's testimony was of a nature that he would have little need to alter his testimony. Tyler was not a witness to Robertson's crimes or the interaction between Robertson, Walters, and AC. There was nothing in his testimony that required "tailoring" to fit the evidence that was already presented. There was no prejudice to Robertson from Tyler's courtroom presence. As noted, the allegation that Tyler put AC up to making these allegations for custody and child support changes were disputed by the records related to those matters from Tyler's pro se custody motions (showing only 3 motions to the family court over a very short period that coincided with a collateral social services case - VR No. 3, 6/1/21, 4:15:30; VR No. 4, 6/2/21, 9:37:40;

VR No. 4, 6/3/21, 10:51:01) and the child-support office (showing Tyler's child support was suspended when he received temporary custody in 2017 and was never reinstated - VR No. 4, 6/2/21, 1:33:10, 1:34:20). Furthermore, Tyler had already testified at two pretrial bond hearings, so defense counsel had prior testimony about custody matters he could use to impeach Tyler if any of his trial testimony was contradictory to his earlier statements. VR No. 1, 12/10/20, 2:04:55-2:13:10; 2/25/21, 9:28:16-9:42:50.

In sum, Marsy's Law permitted Tyler to be in the courtroom. Section 26A guarantees crime victims an unqualified right to attend trial on the same terms as the accused. No one would argue that the U.S. Constitution or the Kentucky Constitution would allow excluding a criminal defendant from trial if he or she intends to testify as a witness. So under Section 26A, that same right must be given to the victim of a crime as well. Robertson has not cited to any authority to support his position. From that basis, no error occurred, much less palpable error.

II. There was no error when the trial court overruled Robertson's motion seeking to prevent the Commonwealth from using the term "victim" when referring to AC.

For his second assignment of error, Robertson has alleged that the trial court erred by allowing the child victim in this case, A.C., to be referred to as the "victim." *Brief for Appellant*, pp. 11-16. Robertson identified at least three instances where the prosecutor referred to A.C. as a victim in his opening statement. *Id.* at 11. For the reasons noted, this claim is without merit.

As admitted by Robertson in his brief, this issue is controlled by *Whaley v Commonwealth*, 567 S.W.3d 576 (Ky. 2019). Just three years ago, in *Whaley*, this Court held that the trial court had not abused its discretion by denying a defense motion *in limine* asking that the complaining witnesses not be referred to as "victims" (instead of the defendant's preferred

nomenclature of "alleged victims"). 567 S.W.3d at 590. In reaching its conclusion, the *Whaley* Court stated:

> Referring to the accusers as "alleged victims" during the course of the trial would be cumbersome and untenable. Identifying this group of children in this manner in no way constituted a judgment as to the identity of the perpetrator of these crimes. This reference to the children as victims would not be unduly prejudicial. In fact, it would be no more so than the reading of the indictment listing the charges against Whaley.
>
> Furthermore, the three Kentucky Revised Statutes regarding sexual abuse that apply to both adults and children, KRS 510.110, 510.120, and 510.130 refer to the subject child as a victim.

Id. Robertson has put forth that this Court "wrongly decided" *Whaley* and it should be overruled. *Brief for Appellant*, p. 12.

Contrary to Robertson's assertion, referring to the victim in a manner consistent with the indictment does not invade the province of the jury. With regard to personal opinion, this Court has stated that "[i]t is improper for counsel to express personal opinions as to a person's guilt or innocence, or to make any inferences unwarranted by the evidence." *Padgett v. Commonwealth*, 312 S.W.3d 336, 353 (Ky. 2010) (citing *United States v. Young*, 470 U.S. 1, 9–11, (1985)). In *Padgett*, the prosecutor prefaced statements with "I think" and "I find." This common pattern of speech was not impermissible personal opinion, as "nothing suggests these phrases were used to attempt to inflame the jury, bolster the credibility of witnesses by personally vouching for them, or to make the jury consider anything other than the evidence presented a[t] trial." *Id.*

Here, the limited use of the word "victim" was not an expression of opinion, was not inflammatory, and did not bolster the testimony of AC. It was a warranted inference. "[T]he term 'victim' is relatively mild and non-prejudicial[.]" *Cueva v. State*, 339 S.W.3d 839, 864 (Tex. App. 2011). "While use of the word 'victim' assumes a crime has been committed, the fact that a prosecutor is of that view would not surprise a reasonable juror, nor would the

prosecutor's use of the word in argument or voir dire generally be understood as anything other than the contention of the prosecution." *Weatherly v. State*, 283 S.W.3d 481, 486 (Tex. App. 2009); *see also State v. Warholic*, 897 A.2d 569, 584 (Conn. 2006) (finding that the jury is likely to understand that the prosecutor's limited references to complainant as "victim" reflected state's contention that, based upon evidence, complainant was the victim of the alleged crimes).

In fact, a recent decision from the Supreme Court of Wyoming, *Buszkiewic v. State*, 424 P.3d 1272, 1279 (Wyo. 2018), analyzed this issue for plain error before concluding that the prosecutor's reference to the complaining witness as a "victim" was not improper. The *Buszkiewic* Court noted that the prosecutor was simply referring to the victim's role in the criminal proceeding, it was made very clear through the jury instructions and argument that it was the jury's role to determine whether Mr. Buszkiewic had committed the alleged crimes, and he was presumed to be innocent. *Buszkiewic*, 424 P.3d at 1280. Because the prosecution affirmatively detailed the State's burden of proving all the elements of the charges beyond a reasonable doubt, and that statements of counsel were not evidence, there was no plain error. *Id.*

Robertson has cited *State v. Cortes*, 885 A.2d 153, 158, n. 4 (Conn. 2005), to support his position, however, that case is an outlier. In *Cortes*, the prosecution referred to the complaining witness as a "victim" a total of 76 times, an amount that the reviewing court found to be improper and "pervasive." *Id.* The footnote went on to note cases from out-of-state as support, however, all of those cases referred to instances where the trial court was making the reference–not the prosecutor. *Id.*

A more recent case from that same jurisdiction is instructive and aligns with authority already cited herein. In *State v. Williams*, 238 A.3d 797, 804-805 (Conn. App. 2020), the following was noted:

> In cases where the use of the term "victim" is at issue, "[o]ur Supreme Court has stated that a court's repeated use of the word victim with reference to the complaining witness is inappropriate when the issue at trial is whether a crime has been committed. . . . **A different set of circumstances exists when the person making reference to the complaining witness is the prosecutor.**" (Emphasis added.) *State v. Rodriguez*, 107 Conn. App. 685, 701, 946 A.2d 294, cert. denied, 288 Conn. 904, 953 A.2d 650 (2008).
>
> "This is so, our courts have held, for two basic reasons. First, although a prosecutor's reference to the complainant as the 'victim,' in a trial where her alleged victimization is at issue, risks communicating to the jury that the prosecutor personally believes that she in fact is a victim, and thus the defendant is guilty of victimizing her, the isolated or infrequent use of that term in a trial otherwise devoid of appeals to passion or statements of personal belief by the prosecutor will probably be understood by jurors to be consistent with the prosecutor's many proper references to the complainant as the complainant or the alleged victim, particularly where the prosecutor openly acknowledges and willingly accepts the state's burden of proving the defendant guilty beyond a reasonable doubt solely on the basis of the evidence admitted at trial. Second, when a prosecutor uses that term in argument, where his or her role is generally expected and understood to be that of an advocate, such isolated or infrequent references to the complainant as the 'victim' are likely to be understood by jurors as parts of a proper argument that the evidence has established the complainant's victimization, and thus the defendant's guilt, beyond a reasonable doubt. In either of those circumstances, the prosecutor's use of the term 'victim' in reference to the complainant is not considered improper because such usage does not illicitly ask the jury to find the defendant guilty on the basis of the prosecutor's personal belief in the complainant's victimization or the defendant's guilt." *State v. Thompson*, 146 Conn. App. 249, 268–69, 76 A.3d 273, cert denied, 310 Conn. 956, 81 A.3d 1182 (2013).

Once examined, it is obvious that the only time error has been noted concerning the prosecutor referring to a complaining witness as a victim involved circumstances where the references were pervasive and excessive. There is no support for a general rule that references to an alleged crime victim as a victim by a prosecutor should constitute reversible error.

Here, the references were minimal. The arguments of the prosecutor and the jury instructions (TR 81) made it very clear that Robertson was presumed innocent, that the

Commonwealth had the burden of proving all of the elements of the charged offenses beyond a reasonable doubt, that the statements of counsel were not evidence, and that the ultimate decision rested with the jury. *See. e.g.*, VR No. 2, 5/28/21, 11:46:25, 11:56:06; VR No. 3, 6/1/21, 1:44:01. The prosecutor was permitted to act as an advocate for AC, a role that common sense dictates. Without excessive or pervasive references, there is simply no prejudice to a defendant, and thus no error. Nothing from Robertson's claim of error compels this Court to revisit the recent, unanimous decision from *Whaley*.

III. Improper bolstering by the victim's father did not occur. In the alternative, it was harmless.

Robertson has alleged that the trial court erred by allowing AC's father, Tyler Stanley, to improperly bolster AC's testimony. *Brief for Appellant*, pp. 15-18. For the reasons noted herein, Robertson's claim must fail.

In this case, AC did not reveal the assaults until she told AR, the daughter of her father's girlfriend. VR No. 3, 6/1/21, 2:41:10. The disclosure set into motion a chain of events that eventually led to Tyler learning about the allegations. *Id.* at 2:43:05, 2:44:00, 2:45:20, 3:57:40. AR had AC tell AR's grandmother, then AR's aunt, before finally telling AR's mother, Angela. *Id.* Angela told Tyler and he became very upset. *Id.* at 2:45:20, 4:00:10. He testified that he "spoke to AC about it, and I made sure that is wasn't a . . . " *Id.* at 3:57:20. At that moment, defense counsel objected, citing his pretrial motion in limine to avoid bolstering. VR No. 3, 6/1/21, 3:58:10. A bench conference ensued and defense counsel argued that the anticipated statement was that Tyler wanted to make sure what she was saying was true before he headed over to Robertson's house to confront him. *Id.* The prosecutor specifically stated that he was not asking if he believed her, rather it would be confirming that AC said what Tyler had heard from Angela. *Id.* This was the same intention the prosecutor stated during

an in-chambers hearing immediately before the trial began. *Id.* at 1:25:20. The objection was overruled. *Id.* at 3:59:01.

Tyler continued his testimony and stated that he wanted to "make sure what had happened was true," which caused an additional objection which was overruled. VR No. 3, 6/1/21, 4:00:10. Tyler then finished his thought by stating that he let AC know he was going to go and confront Robertson and he wanted to be "sure that I was potentially getting in trouble for a real problem, not hearsay." *Id.* At that point Tyler had a friend drive him over to Blueberry Lane and he confronted Robertson (who told him that the allegations were lies). *Id.*

It is well-settled that a witness cannot vouch for the truthfulness of another witness. *Hoff v. Commonwealth*, 394 S.W.3d 368, 376 (Ky. 2011). However, in this instance, Tyler was not a witness to the assaults (or any other events on August 13, 2019), nor did he have any independent knowledge about the incidents. Tyler's only reason for speaking to his daughter was to confirm from her what he had been told by Angela. Tyler was ascertaining that the allegation he heard from Angela was indeed what AC stated, there was no testimony about what AC specifically told any of these people. As noted by the prosecutor prior to trial and during the bench conference, the evidence was offered to explain Tyler's actions, not to prove that the underlying assaults occurred in the manner testified to by AC.

Furthermore, to the extent Tyler stated he wanted to be sure the allegations he heard from Angela were true before confronting Robertson, it would be common sense that a father would want to protect his daughter based on an allegation of this nature. The authority cited by Robertson finding reversible error typically involved an examining physician or investigative official (law enforcement or social worker) vouching for the testimony of an alleged victim, not a parent. *Brief for Appellant*, pp. 17-18. Still, Robertson's authority does not change the

fact that Tyler's testimony was not offered to vouch for AC's testimony, it was necessary to explain Tyler's actions that led to these allegations coming to light. Indeed, the altercation with Tyler was how Robertson became aware of the allegations made against him. VR No. 3, 6/2/21, 3:01:20. It was also the impetus for the beginning of the investigation. *Id.* For these reasons, there was no error.

Ultimately, this case came down to whether the jury believed AC or Robertson. AC's testimony remained largely consistent throughout. To the contrary, during the trial the jury learned that Robertson was having an extra-marital affair with Sylvia Walters (VR No. 3, 6/1/21, 3:24:00), Robertson lied to his own attorney about the affair (VR No. 3, 6/2/21, 9:16:30), he failed to initially disclose to Keeley that he had given Benadryl to AC–lying and saying she had been given something by the doctor (VR No. 3, 6/2/21, 10:01:20), Keeley had found no evidence to back up Robertson's claim that AC spilled Coke on herself (*Id.* at 9:58:20), Robertson's children had been removed from his home because he and Keeley were abusing drugs (*Id.* at 9:44:30), he inexplicably did not recall Keeley's suicide attempt in 2017 (VR No. 4, 6/3/21, 10:53:45), and he was a convicted felon that had been found guilty of manufacturing methamphetamine (*Id.* at 10:35:30).

In addition, his theory of defense regarding AC's motive to fabricate his crimes was contradicted or substantially weakened by documentary evidence from court filings (VR No. 3, 6/1/21, 4:15:30; VR No. 4, 6/2/21, 9:37:40; VR No. 4, 6/3/21, 10:51:01) and records from the child-support office (VR No. 4, 6/2/21, 1:33:10, 1:34:20).

Likewise, the theory also suffered from the very nature of the facts presented. AC did not reveal the assaults for weeks (and her poison ivy, doctor visit, Robertson taking her alone, the lack of underwear, and use of Coke all would have to become convenient parts of the ruse – calculated through details shared between the nine-year-old AC and Tyler), AC would

have had the fortunate luck of Robertson giving her Benadryl and the circumstances around it to aid her story, and Tyler and AC would have had to calculate her telling a peer rather than an adult or authority figure with the hope that AR would navigate AC to tell adults about the assaults. Given the evidence presented, if there was any error regarding Tyler's statement, it was harmless.[7]

IV. There was no error during the testimony of Dr. Lyles.

For this fourth assignment of error, Robertson has asserted that Dr. Lyles was erroneously allowed to testify regarding the legal definition of rape. *Brief for Appellant*, pp. 18-23. This issue was not preserved. Regardless, no error occurred, much less palpable error.

Dr. Jennifer Lyles was a physician at the Child Advocacy Center (CAC) in Henderson, Kentucky, and did an examination of AC. VR No. 1, 6/1/21, 4:45:55. The exam included a verbal history in which AC told Dr. Lyles that Robertson "touched me in my area." *Id.* at 4:48:01. A physical exam of AC did not show any injuries. *Id.* at 4:49:20. However, Dr. Lyles noted that was not unusual, particularly given the length of time between the assault and the examination. *Id.*

When discussing penetration injuries of the hymen during direct testimony, the prosecutor asked Dr. Lyles if she was familiar with the legal definition of "sexual intercourse" in Kentucky. VR No. 3, 6/1/21, 4:54:40. Dr. Lyles responded, "Uh, I think so." *Id.* The prosecutor then made a passing reference to the definition, saying "penetration, however slight." *Id.* Dr. Lyles responded, "yes, anything that goes past the labia." *Id.*

[7] RCr 9.24. A non-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." *Winstead v. Commonwealth*, 283 S.W.3d 678 688-689 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (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.*

No objection was made by defense counsel to this sequence during direct testimony. Instead, defense counsel highlighted the fact that, given her training and education related to sex-abuse cases, Dr. Lyles understood the legal definition of sexual intercourse and the legal distinction between touching versus penetration. VR No. 3, 6/1/21, 4:57:20. A great deal of time was spent on this topic, as defense counsel clearly wanted to highlight AC's use of the term "touching" during her interview with Dr. Lyles to suggest there was no penetration. *Id.* During this lengthy line of questioning, defense counsel was able to get Dr. Lyles to acknowledge she never asked AC whether Robertson's finger went inside her vaginal area. *Id.* at 5:00:00. However, when pressed about her documentation, Dr. Lyles indicated that because AC was not wearing underwear, it was under her clothes, "he touches her vaginal area, that is penetration to me, past the labia." *Id.* at 5:00:50.

Defense counsel did not object or assert that Dr. Lyles was invading the province of the jury until the prosecutor attempted to clean up the confusion about female anatomy on re-direct. *Id.* at 5:05:01. During a bench conference the trial judge stated that the lawyers should stay away from further mention of the legal definition, however, it was aptly pointed out that it was defense counsel that extensively questioned Dr. Lyles about the legal definition (with the trial judge noting, "Haven't you asked her to [define "sexual intercourse" and "penetration"] throughout your cross?") that caused Dr. Lyles to make the alleged offensive remark. *Id.* On recross-examination, defense counsel was able to get Dr. Lyles to concede that AC's use of the term "touching" meant that she could not say if AC meant outside or inside the labia majora. *Id.* at 5:08:15.

Notably, Robertson's defense was that AC's allegations did not happen, therefore, any perceived prejudice from Dr. Lyles's testimony would be minimal to non-existent–and certainly not palpable error. Dr. Lyles did not provide incorrect information with regard to

the definition or otherwise confuse the jury in a manner that would have interfered with the jury instructions. Further, as noted as an alternative to his denial, Robertson was able to highlight that AC described Robertson's actions as a "touching" and that Dr. Lyles never asked if Robertson's finger entered AC's vagina or definitely went past her labia–all of which supported the sexual abuse lesser-included instructions. Based on these circumstances, no palpable error occurred.

V. No error occurred by calling the CAC interviewer to testify regarding AC's prior inconsistent statement.

Robertson has alleged error because a forensic interviewer from the CAC was allowed to testify regarding a prior inconsistent statement by AC, wherein AC stated she was assaulted on the drive home three times–rather than the two times she recounted during her trial testimony. *Brief for Appellant*, pp. 23-26. This error was not preserved. *See* Argument I for discussion of RCr 10.26 palpable-error review. For the reasons noted herein, no error occurred, much less palpable error.

This alleged error has an odd beginning. During the testimony, the prosecutor and defense counsel approached the bench and agreed that the witness, Jamie Hargiss, was being called at that time as a courtesy to defense counsel. VR No. 4, 6/2/21, 9:23:20. Still, defense counsel objected based on his pretrial motion to prevent improper bolstering. *Id.* at 9:21:01. The Commonwealth responded that she was being called for impeachment of AC with regard to the number of times AC stated that the assaults occurred (3 versus 2). *Id.* Hargiss would not be testifying to any other statements made by AC. *Id.* Hargiss then testified very briefly, laying a foundation for her testimony before stating that AC recounted three instances of assault during the interview. *Id.*

Robertson's contention that AC's testimony did not make the CAC interview a prior inconsistent statement is incorrect. Inconsistency may be found in an evasive answer, the inability to recall, silence, or changes of position. *Meece v. Commonwealth*, 348 S.W.3d 627, 672 (Ky. 2011). Inconsistent testimony is not limited to diametrically opposing answers. *Id.* The trial judge has considerable discretion when deciding whether a statement is inconsistent. *Id.* AC clearly changed her position. She testified at trial to two specific instances of sexual assault. That was not consistent with her CAC interview detailing three instances.

During AC's testimony, before bringing up the CAC interview the prosecutor asked to approach the bench. VR No. 3, 6/1/21, 2:37:10. The prosecutor explained his intent to inquire about the interview for impeachment purposes. *Id.* All parties were on the same page when the trial court noted, due to the fact the witness was 11 years of age testifying about her stepfather raping her, the prosecutor should utilize a "soft impeachment." *Id.* When asked if she remembered going to the interview in Henderson or speaking to a lady about what happened, AC responded in the negative. *Id.* However, she did state she recalled a video being taken of her talking to someone. *Id.* at 2:37:15. The prosecutor then asked a leading question as to whether she remembered telling the person in the video that "this happened three times." *Id.* AC took a long audible pause before saying, "I think, I think it happened two or three times." *Id.* She did not state that she remembered telling the lady it happened three times. The prosecutor then followed up by telling her that they were trying to learn what she remembered, and AC again recounted two instances of assault–not three. *Id.* Based on this testimony, the CAC interviewer's testimony was a prior inconsistent statement and was clearly admissible.

Further, the most peculiar facet of this assignment of error is that the introduction of the CAC interview testimony was beneficial to Robertson's defense. Robertson claimed the

assaults never happened and that AC could not be trusted because she had motivation (and was coached) to lie. During her trial testimony, AC identified only two instances where she was sexually assaulted by Robertson. VR No. 3, 6/1/21, 2:35:40. Through the interviewer, the jury learned that AC told the interviewer that she was assaulted three times. VR No. 4, 6/2/21, 9:23:20.

The Commonwealth presumably wanted to utilize the CAC testimony to attempt to save the third count of the indictment, however, the prosecutor eventually conceded a directed verdict on that count. VR No. 3, 6/2/21, 3:34:09. The jury deliberated on two counts of first-degree rape after initially being told there were three. TR 75, 77. Defense counsel used the fact that the number of counts fell from three to two to argue to the jury that AC's allegations couldn't be trusted. VR No. 4, 6/3/21, 1:37:58, 1:58:20. The discrepancy between what she told the CAC interviewer versus what she said during her trial testimony was a major theme in defense counsel's closing argument. *Id.* This testimony did not bolster AC's credibility or believability, in fact it undercut it. The sole purpose of this claim of error seems to attempt to create a potential technical error (if the statements were to somehow be deemed consistent).

In sum, no error occurred, however, if it did it would certainly not be palpable error.[8]

[8] Harmless error analysis is inappropriate because the error is unpreserved. As explained in *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky.2006): "[R]eviewing courts should endeavor to avoid mixing the concepts of palpable error and harmless error. One is not the opposite of the other." The proper inquiry, therefore, is whether the erroneous instruction at hand is a palpable error under RCr 10.26. *Stewart v. Commonwealth*, 306 S.W.3d 502, 508 (Ky. 2010)

VI. Detective Ramsey's use of notes from Robertson's recorded interview was not error.

In his brief, Robertson has alleged that the trial court erred by allowing Detective Ramsey to testify from notes regarding his recorded interview of Robertson. *Brief for Appellant*, pp. 26-33. For the reasons noted herein, this claim must fail.

As part of his investigation, Detective Jared Ramsey interviewed Robertson on November 22, 2019. VR No. 4, 6/2/21, 2:31:20. Detective Ramsey provided context as to the date and location, who was present, and the process he used when conducting the interview (including going over Robertson's signed waiver of his *Miranda* rights). *Id.* at 2:32:10. Detective Ramsey stated that he documented the interview (via a recording) and that he had notes in front of him that would refresh his recollection regarding Robertson's answers. *Id.* at 2:35:55. Bear in mind that at the time of the trial, Robertson's interview would have been approximately one and one-half years prior to Detective Ramsey's testimony.

It was at this point that defense counsel asked if the notes were made contemporaneously during the interview or if they were prepared in anticipation of trial. *Id.* at 2:36:01. Detective Ramsey indicated that the notes were created in preparation for trial (and defense counsel was provided with a copy). *Id.* While reviewing the notes, defense counsel can be heard asking the prosecutor if the notes were "his notes or yours?" *Id.* at 2:36:30. The remainder of the discussion at defense counsel's table is mostly inaudible, other than the prosecutor noting his belief that defense counsel had his own transcription of the interview done. *Id.* After a long pause in which defense counsel examined the notes, Detective Ramsey returned to his testimony and stated that the notes had been compared to the interview and were accurate. *Id.* at 2:38:10. The prosecutor then began his questioning regarding the contents of the interview. *Id.*

After several answers defense counsel objected to the testimony, telling the trial court at the bench that the notes were in the prosecutor's handwriting and that Detective Ramsey was reading from them verbatim. VR No. 4, 6/2/21, 2:39:10. The prosecutor responded that they were not his notes, rather they are a handwritten transcription of the interview that he prepared together with Detective Ramsey and that Detective Ramsey had compared the notes to the interview and found them to be accurate. *Id.* It was also indicated at that time that the interview itself was not being played for the jury because the prosecutor believed that it contained inadmissible evidence. *Id.* at 2:40:30, 2:54:10. Defense counsel also agreed, noting his belief that the recording contained inadmissible and irrelevant evidence. *Id.* After hearing the arguments, the trial court ruled that the testimony could continue. *Id.*

Additional testimony was provided for some time before defense counsel objected again on the same grounds (that Detective Ramsey was reading the notes into the record). VR No. 4, 6/2/21, 2:46:36. The trial court overruled the objection. *Id.* Defense counsel followed with multiple objections to narrative testimony that were sustained (*see Id.* at 2:52:10), before again approaching the bench and causing the trial judge to ask the prosecutor to better guide the narrative testimony. *Id.* at 2:58:30. At no time during Detective Ramsey's testimony was the jury aware that the notes he was using had been jointly prepared by the prosecutor.

Immediately upon beginning his cross-examination, defense counsel attacked Detective Ramsey regarding the fact that the notes he was using were primarily in the prosecutor's handwriting and prepared by him. VR No. 4, 6/2/21, 3:15:20. The line of questioning on this topic continued for several minutes before defense counsel got into the substance of the interview. *Id.* Eventually, defense counsel and Robertson both admitted that the testimony from Detective Ramsey accurately reflected what was said during Robertson's interview. VR No. 3, 6/2/21, 2:56:20; VR No. 4, 6/3/21, 10:37:20.

At the close of the Commonwealth's case, defense counsel moved for a mistrial regarding the alleged reading of the notes by Detective Ramsey. VR No. 3, 6/2/21, 3:37:45. The motion was denied. *Id.*

In his brief, Robertson has alleged that KRE 612 and 803(5) were violated because the proper procedure for refreshing recollection was not utilized. *Brief for Appellant*, pp. 30-33. In particular, Robertson has alleged that the Commonwealth didn't use the proper procedure, such that Detective Ramsey should have had to show that he did not have sufficient recollection of the interview before the notes could be used under KRE 612. *Id.* Further, if the notes were being read verbatim, the hearsay rule in KRE 803(5) applies and a more burdensome foundation was required. *Id.*

As this Court has stated, the purpose of the KRE is to ascertain the truth without unjustifiable expense or delay, such that the rules generally lean toward the admissibility of relevant evidence. *Martin v. Commonwealth*, 456 S.W.3d 1, 16 (Ky. 2015). Specific, repetitive recitations of foundation are not required to allow a witness to refresh his recollection pursuant to KRE 612. *Id.* Rather, a showing that Detective Ramsey once had personal knowledge of the interview, and that his memory needed to be refreshed is sufficient. *Id.*

Here, as already noted, Detective Ramsey indicated that he conducted an interview of Robertson on November 22, 2019. VR No. 4, 6/2/21, 2:31:20. Detective Ramsey provided the location (describing the layout of the interrogation room at the sheriff's office), the parties present in the room (Detective Ramsey and Robertson only), and the process he used when conducting the interview. *Id.* at 2:32:10. Detective Ramsey stated that the interview was recorded and that he had notes in front of him that would refresh his recollection regarding the interview. *Id.* at 2:35:55. This testimony was a sufficient foundation to allow Detective Ramsey to use the notes. Further, there is nothing in the rule that would require the written

transcription of Robertson's interview to have been prepared by Detective Ramsey or in his own handwriting. Provided that the writing is given to defense counsel, as it was here, and that defense counsel has the opportunity to cross-examine Detective Ramsey about the writing (which was done in detail), the writing can be any writing that refreshes the recollection of the witness. The fact it was in the prosecutor's handwriting does not matter.

Further, one needs only to review the testimony of Detective Ramsey to see that he was not reading from the notes verbatim during his testimony. VR No. 4, 6/2/21, 2:38:20-3:33:45. Robertson's contention otherwise is inaccurate. When asked if he was reading the notes verbatim, Detective Ramsey stated that he was paraphrasing from the notes, however in some cases he was repeating exactly what was in the notes because that was exactly what Robertson said and he remembered it. *Id.* at 3:16:40. The fact that his testimony tracked the notes (which also tracked the interview itself) would not be surprising. Still, it did not mean that Detective Ramsey was reading verbatim from the notes. Given this fact, KRE 803(5) was not implicated.

Notably, Robertson also fails to cite how the procedure prejudiced him in any way. Robertson and his attorney both stated that the recitation of the interview by Detective Ramsey was accurate. VR No. 3, 6/2/21, 2:56:20; VR No. 4, 6/3/21, 10:37:02. The testimony about the interview contained information that Robertson would have wanted before the jury, since it was compatible with his defense. This was not a case where a defendant gave an interview and then changed his story. Rather, Robertson testified at his trial in a manner that was consistent with what he said during the interview. Detective Ramsey's testimony showed that Robertson's story had remained consistent–including that Robertson made multiple denials of his criminal conduct. VR No. 4, 6/2/21, 2:59:30, 3:18:20. The interview testimony had no impeachment value for the prosecution. Defense counsel also highlighted that

Robertson voluntarily spoke to Detective Ramsey–he "cooperated," he did not have an attorney present, he did not stay silent, and he "didn't hide." *Id.* at 2:31:20, 3:17:20. Detective Ramsey stated that Robertson indicated he was nauseated and disgusted just thinking about the allegations and stated that he didn't fault Tyler Stanley for confronting him in light of the allegations AC made. *Id.* at 3:18:30. Detective Ramsey also repeatedly stated that he believed Robertson was telling the truth with regard to many facets of his statement–in particular all of the events prior to the alleged criminal conduct (the doctor visit, the time at Burger King, and taking AC to see Sylvia Walters). *Id.* at 3:22:45.

Given the foregoing, no error occurred. Further, if there was error, because there was no prejudice, it would be harmless.

VII. Robertson has overstated the prosecutor's actions, he did not inject himself into testimony at trial.

In his seventh claim, Robertson has asserted an unpreserved error that the prosecutor, Assistant Commonwealth's Attorney Mike Van Meter, violated his ethical rules (Supreme Court Rule 3.130(3.4)(e)) by inserting himself into the testimony of Detective Jared Ramsey, thereby violating Robertson's constitutional rights and constituting palpable error. *Brief for Appellant*, pp. 33-38. For the reasons noted herein, this claim must fail. *See* Argument I for RCr 10.26 palpable error standard of review. Also, in order to avoid repetition, the Commonwealth would incorporate herein the factual recitation concerning Detective Ramsey's testimony at Argument VI.

Robertson asserts that Van Meter improperly inserted himself into witness testimony in two ways: (1) by highlighting to the jury that he assisted Detective Ramsey with taking notes during an interview of Robertson; and (2) by noting that he was with Detective Ramsey in a

vehicle when Ramsey conducted timed experiments of the route Robertson likely took on the day of his crimes. *Brief for Appellant*, pp. 33-38.

Pursuant to SCR 3.130(3.4)(e), "[a] lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." Contrary to Robertson's assertion, the actions of the prosecutor in this case did not violate this rule.

First, with regard to the notes used by Detective Ramsey, it was defense counsel that put the fact that Detective Ramsey and the prosecutor collaborated on the notes in front of the jury. The citation in Robertson's brief (at p. 34) where he alleged that the prosecutor committed an ethical violation occurred during redirect testimony after this issue was raised by defense counsel on cross-examination. It was not until defense counsel disclosed this fact that the jury was aware of the prosecutor's involvement regarding the notes. A defendant can't invite an error into a trial and then attempt to use it for relief. *Rudd v. Commonwealth*, 584 S.W.3d 742, 745-746 (Ky. 2019). In sum, the alleged ethical violation by the prosecutor is pure fiction.

As was noted in Argument VI, despite multiple objections by defense counsel, at no time during Detective Ramsey's direct testimony was the jury aware that the notes he was using had been jointly prepared by the prosecutor. It was after that, at the very start of his cross-examination, that defense counsel attacked Detective Ramsey regarding the fact that the notes he was using were primarily in the prosecutor's handwriting and presumably prepared by him. VR No. 4, 6/2/21, 3:15:20. The prosecutor's reference to them working together on the notes occurred on redirect. *Id.* at 3:33:10. The basis for the prosecutor's question was to reaffirm that Detective Ramsey had compared the notes to the interview and that the notes (and his

testimony) were an accurate representation of Robertson's pretrial statement. *Id.* In fact, defense counsel admitted he had his own transcript made of the interview when he indicated nothing inaccurate had been testified to. *Id.* Regardless, the supposed unethical question by the prosecutor would have never been asked if not for defense counsel making an issue of it during cross-examination.

In addition, as previously noted in Argument VI, Robertson suffered no prejudice. The testimony about the interview was beneficial to Robertson.

Next, with regard to the timed experiments, one of the elements of Robertson's defense was that there was insufficient time between Sylvia Walters's home and Robertson's home for these alleged crimes to occur. VR No. 4, 6/3/21, 1:46:01. Robertson contended that he texted with Walters after he left her house and then called Keeley and spoke to her until they arrived home. *Id.* at 10:25:45. As part of Detective Ramsey's testimony, he conducted an experiment and timed the distance between the two locations using the most likely route. VR No. 4, 6/2/21, 3:04:30. Ramsey indicated he did the calculations with a stopwatch and his vehicle's odometer. *Id.* The drive was 4.8 miles and took 8 minutes and 45 seconds to complete. *Id.* at 3:05:45. It was during this testimony that the prosecutor stated that he was with Detective Ramsey in the vehicle when the calculations were done. *Id.*

Despite the prosecutor's presence, none of the information from Detective Ramsey testimony would have given the impression the prosecutor was also testifying or corroborating his conclusions. The nature of the reference was in passing and it was doubtful the jury gave it any thought. Also, it is noteworthy that Detective Ramsey's calculation benefitted Robertson, as Sylvia Walters estimated it would take 10-15 minutes depending on traffic to get from her house to Robertson's. VR No. 3, 6/1/21, 3:36:20. Robertson never asserted that it should have taken less time or in any way suggested that the timed experiment was inaccurate.

Robertson has not identified any manner in which this information prejudiced him. And, in assessing any fairness concerns, it is significant that defense counsel also told the jury that he drove the routes between the relevant locations in preparation for the trial–and he never disputed the accuracy of Detective Ramsey's calculation.

In sum, no error occurred here, much less palpable error.

VIII. Cumulative Error Does Not Apply.

In his final claim, Robertson has asserted that his case should be reversed based on cumulative error. *Brief for Appellant*, pp. 38-40. Robertson is incorrect.

Cumulative error analysis is not applicable when there are no errors to accumulate. Likewise, "[i]f an error is sufficient on its own to warrant reversal, a court need not rely on cumulative error to overturn the case." *Elery v. Commonwealth*, 368 S.W.3d 78, 101 (Ky. 2012). The doctrine of cumulative error is "limited;" it is "necessary only to 'address multiple errors, [which] although harmless individually, may be deemed reversible if their cumulative effect renders a trial fundamentally unfair.'" *Id.* (quoting *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010)). The errors must be "substantial, bordering, at least, on the prejudicial," and "if the errors have not 'individually raised any real question of prejudice,' then cumulative error is not implicated." *Id.*

In this case, no errors occurred, therefore there is nothing to accumulate.

CONCLUSION

For these reasons, Robertson's convictions and sentences should be affirmed.

Respectfully submitted,

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