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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2021-SC-0485-MR

MICHAEL ROBERTSON **APPELLANT**

APPEAL FROM DAVIESS CIRCUIT COURT
V. HON. JAY WETHINGTON, JUDGE
NO. 20-CR-00641

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLANT

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Certificate required by CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following by U.S. Mail on March 28, 2022: Hon. Jay Wethington, Chief Circuit Judge, Holbrook Judicial Center, 100 E. Second St, Owensboro, KY 42301; Hon. Mike Van Meter, Asst. Commonwealth's Attorney, 117 E Third St, Second Floor, P.O. Box 767, Owensboro, KY 42303; by email to: Hon. Evan Taylor; and by messenger mail to: Hon. Daniel Cameron, Attorney General, 1024 Capital Center Drive Frankfort, Kentucky 40601. I certify that the record has been returned to the Kentucky Supreme Court.

AARON REED BAKER

INTRODUCTION

Appellant, Michael Robertson, was convicted by a jury of two counts of rape for the digital penetration of his stepdaughter. He was sentenced to 20 years in prison.

STATEMENT OF ORAL ARGUMENT

The Appellant requests oral argument because this case presents new issues of law regarding the application of Marsy's Law in Kentucky.

STATEMENT CONCERNING CITATIONS

The record will be cited with volume and page number (e.g. TR II, 15). The proceedings contained on the video will be cited in conformance with CR 98(4)(a).

TABLE OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Keely Robertson, née Cherry, was married to Tyler Stanley, and they had two children together: A.C. and E.C.[1] VR: 6/1/2021; 3:51 – 3:52. Their daughter, A.C., is the alleged victim in this case and was 9 years old at the time of the allegations. VR: 6/1/2021; 2:19. At the time of trial, Keely Robertson was married to the Appellant, Michael Robertson ("Michael"). VR: 6/2/2021; 9:33 – 9:35. They had three additional children together: K.R., B.R., and L.R. Id. In August 2019, all five children were living with Keely, Michael, and Michael's mom in Daviess County. Id.

A.C. and E.C. had only been living with Keely and Michael for around a month, because Tyler was out of a job and had asked them to take custody. VR: 6/2/2021; 9:46 – 9:47.

On August 13, A.C. had a rash on her private area, and needed to go to the doctor. VR: 6/1/2021; 2:19 – 2:27. Her mother was busy with the other children, so her stepfather Michael took her to the doctor. Id. She was wearing a dress, but no underwear. Id. After the doctor's visit, Michael gave her one or two pills while they were in the parking lot in the car. Id. Michael testified that they were generic Benadryl that he had brought from home. VR: 6/3/2021; 10:18 – 10:19. A.C. believed that

[1] For privacy reasons, initials are used to identify minor children in this brief.

the doctor had provided the pills. VR: 6/1/2021; 2:26. Michael then drove to the Meijer pharmacy to pick up the prescription that was prescribed by the urgent care. VR: 6/2/2021; 10:14 – 10:18. The prescription wasn't ready, so they went to Burger King. Id. A.C. got a milkshake. Id. A.C. wasn't drinking her shake, so Michael poured out the shake and filled her cup with Coke. VR: 6/2/2021; 2:44 – 2:46. After that, they went back to Meijer, only to find out that the prescription could not be filled that day. VR: 6/2/2021; 10:14 – 10:18. Michael's testimony was that when they left the Meijer, he turned the car, and A.C. fell over, hit her head on the seatbelt and dropped her Coke, spilling it on herself. VR: 6/3/2021; 10:50 – 10:51. It was also Michael's testimony that A.C. was groggy and tired, and her behavior concerned him enough that he wanted her to get checked out. VR: 6/3/2021; 10:19 – 10:23. He took her to see his friend, Sylvia Walters. Id. Sylvia was a medical assistant at a doctor's office. VR: 6/1/2021; 3:23. When they got to Sylvia's house, she came outside wearing her scrubs and took A.C.'s vital signs. VR: 6/3/2021; 10:19 – 10:23. After that, A.C. testified that they went home. VR: 6/1/2021; 2:30.

A.C. alleged that on the drive home from Sylvia Walters' house, while she was laying down with her eyes closed, Michael pulled her dress up to her chest and stuck his finger inside her vagina. VR:

6/1/2021; 2:30 – 2:35. She testified that the car was moving at the time. Id. A.C. then alleged that the car stopped, that Michael used the straw to drip some Coke onto her private area, and that he again inserted his finger inside her vagina. Id. A.C. denied that she spilled her Coke in the car. VR: 6/1/2021; 2:35.

Once they arrived home, Keely and Michael helped A.C. into the house, where she took a bath and then went to sleep. VR: 6/1/2021; 2:39 – 2:40. Keely testified that by bath, she meant shower. VR: 6/2/2021; 9:58. Keely testified that A.C. was groggy and had to be walked into the house, and that she was having difficulty standing in the shower. VR: 6/2/2021; 9:59 – 10:00.

Other than the source of the pills, the spilling of the Coke, and the sexual assault allegation, Michael and A.C. agreed on the events of August 13, 2019. VR: 6/3/2021; 10:59 – 11:00.

A.C. first made the sexual assault allegations to her father Tyler's girlfriend's daughter, A.R. VR: 6/1/2021; 2:41. At the time, she was staying at her father Tyler's house. VR: 6/1/2021; 2:42. She subsequently told her father Tyler about the allegations. VR: 6/1/2021; 2:45. This was on Labor Day—September 2, 2019. VR: 6/1/2021; 3:02. Tyler drove to Michael's house, confronted him, and then assaulted him. VR: 6/1/2021; 4:00 – 4:02. Michael maintained that the first he

knew of the allegations was when Tyler showed up and confronted him on Labor Day. VR: 6/3/2021; 10:32 – 10:33.

Michael's defense was that the allegations were manufactured because A.C. wanted to return to Tyler's custody and because Tyler owed significant child support to Keely. VR: 6/1/2021; 2:06 – 2:17. Tyler denied asking for the children to return to his custody in August 2019. VR: 6/1/2021; 3:55. He also denied having any child support arrearage. VR: 6/1/2021; 4:12 – 4:13. However, Keely testified that Tyler was not happy that the children were not returned to him before school started in August 2019, and that he had asked for them back. VR: 6/2/2021; 10:32 – 10:34. In addition, Jason Roberts of the child support office testified that Tyler owed $8193.03 in child support arrearage and that Keely could request their assistance in enforcing that obligation. VR: 6/2/2021; 1:32 – 1:37.

In his defense, Michael further testified about the video calls, texts, and phone calls he made while driving home from Sylvia Walters' house, in order to show that he could not have abused A.C. during that time frame. VR: 6/3/2021; 10:24 – 10:26.

There was also testimony from both Keely and Michael that Michael had encouraged A.C. to speak the social worker who lived across the street if she ever felt unsafe. VR: 6/3/2021; 10:28 – 10:32. VR:

6/2/2021; 10:48 – 10:51. The neighbor, Laura Jones, was a social worker who worked in rape prevention. Id. The conversation where Michael told A.C. that Laura Jones was a safe person to talk to happened after August 13, 2019. Id. Michael offered this testimony in his defense under the theory that if he were guilty of sexual assault, he would not have encouraged his stepdaughter to report any safety concerns to a rape prevention social worker. Keely testified that the motivation for talking to Laura Jones was some secondhand information about some potential danger at Tyler's house. VR: 6/2/2021; 11:17 – 11:25.

At the close of the Commonwealth's evidence, the defense moved for a directed verdict on at least one count of rape, because although three counts had been charged, A.C. only testified to two counts. VR: 6/2/2021; 3:35 – 3:37. That motion was granted and one count was dismissed. Id. The direct verdict motions on the remaining counts were denied. Id.

The jury found Michael was found guilty of two counts of rape. TR I, 82 – 83. It recommended a sentence of 20 years on each count, to be served concurrently. TR I, 87 – 88. Michael was sentenced in conformance with the jury's recommendation. TR I, 113 – 117.

This appeals follows.

ARGUMENT

1. THE DAVIESS CIRCUIT COURT ERRED BY MISAPPLYING MARSY'S LAW WHEN IT ALLOWED TYLER STANLEY TO REMAIN IN THE COURTROOM PRIOR TO TESTIFYING.

1.1 Preservation

This issue is preserved. Prior to trial, defense counsel raised the issue of A.C.'s father, Tyler Stanley, remaining in the courtroom as her representative under Marsy's Law. VR: 6/1/2021; 1:34 – 1:40. In addition, prior to Tyler Stanley's testimony, defense counsel objected to him testifying because he had not been sequestered. VR: 6/1/2021; 3:47 – 3:50.

1.2 Facts

The trial court ruled that under Marsy's Law, Tyler Stanley, as the victim's father, would be allowed to stand in her place and remain in the courtroom during the entirety of the case. VR: 6/1/2021; 1:34 – 1:40. Tyler Stanley remained in the courtroom and then testified after having seen the testimony of A.C. VR: 6/1/2021; 3:47 – 3:50; 3:50 – 4:38.

1.3 Legal Argument

This issue implicates the venerated rule for the separation of witnesses, codified under Kentucky Rules of Evidence ("KRE") 615, the

defendant's constitutional presumption of innocence, the defendant's Confrontation Clause rights under the Sixth Amendment, and Marsy's Law.

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion.

KRE 615. The specific purpose of the separation of witnesses rule is "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, FN 42 (Ky. 2021) (citing McGuire v. Commonwealth, 368 S.W.3d 100, 112-13 (Ky. 2012), *Smith v. Miller*, 127 S.W.3d 644, 646 (Ky. 2004) (quoting *Speshiots v. Coclanes*, 224 S.W.2d 653, 656 (Ky. 1949)); *Reams v. Stutler*, 642 S.W.2d 586, 589 (Ky. 1982)).

The defendant's constitutional presumption of innocence arises from the due process rights stated in the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution.

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Taylor v. Kentucky, 436 U.S. 478, 490 (1978) *citing Coffin v. U.S.*, 156 U.S. 432, 453 (1895). In addition, the defendant has a Confrontation Clause right under the Sixth Amendment. Similarly, Kentucky Constitution § 11 provides due process protections and confrontation rights to criminal defendants.

Kentucky Constitution § 26A, commonly known as "Marsy's Law," provides that a victim has "the right to be present at the trial and all other proceedings [...] on the same basis as the accused." Significantly, though, § 26A further states, "Nothing in this section shall [...] be construed as altering the presumption of innocence in the criminal justice system." *See also* KRS 421.500(12) ("Nothing in KRS 421.500 to 421.575 shall be construed as altering the presumption of innocence in the criminal justice system.")

By allowing Tyler Stanley, standing in A.C.'s place, to attend the trial prior to his own testimony, the trial court violated Michael's right to a presumption of innocence, his right to confrontation, and his right to have witnesses separated.

The reason for the rule for the separation of witnesses is to prevent a witness from viewing another witness's testimony and tailoring his own testimony to match. "The purpose of the rule is to elicit the truth, unveil the false and promote the ends of justice." *Moore*

v. Commonwealth, 323 S.W.2d 577, 578 (Ky.App. 1958). Inherent in the right to confront the witnesses against him is the right to confront those witnesses in a manner that allows him to test the veracity of their testimony. KRE 615 accomplishes that by preventing witnesses from tailoring their testimony.

It is especially problematic in this case that Michael's theory of defense was that A.C. fabricated these allegations because she wished to reside with her father, Tyler Stanley, and because Tyler Stanley could be forced to pay child support unless he had custody of A.C. The potential for coordination of their testimonies was high.

Normally, "exclusion of the testimony of the witness who heard or was informed of the testimony would seem the appropriate remedy in most cases." *Smith v. Miller*, 127 S.W.3d 644, 647 (Ky. 2004) *citing* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, note 4, § 11.30[4], p. 892 (4th ed. 2003). This is precisely the remedy that the defense requested: exclude the testimony of Tyler Stanley.

Although Marsy's Law is of recent vintage in Kentucky, other states have dealt with the conflict between victims' rights bills and the defendant's constitutional rights. This Court should find it instructive that other states have found that the right of a victim or victim's representative to be present must not take precedence over a

defendant's right to fair trial. *See People v. Lopez*, 401 P.3d 103, 105–06 (Colo. App. 2016) (finding that although the Colorado Constitution provides for the victim's survivors to be present at trial, there is an exception where the court determines that exclusion of the victim is necessary to protect a defendant's right to a fair trial); *Gore v. State*, 599 So. 2d 978, 986 (Fla. 1992) (despite Florida Constitution allowing victim's survivor to be present at trial, if the witness' presence causes some prejudice to the accused, the witness should not be allowed to remain in the courtroom).

Marsy's Law states it is not to "be construed as altering the presumption of innocence in the criminal justice system...." KRS 421.500(12). In practice, by designating Tyler Stanley as a representative of the "victim," the trial court is acknowledging that A.C. is a victim who had a right to be present in the courtroom. However, because Michael had not yet been convicted, there can be no principled conclusion that A.C. was a victim without also violating Michael's presumption of innocence.

1.4 Conclusion

The application of Marsy's Law in this case violated Michael's constitutional rights to a fair trial, presumption of innocence, and due

process. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; §§ 2, 3, 7, and 11, Kentucky Constitution. Michael's case must be remanded to the trial court for a new trial.

2. THE DAVIESS CIRCUIT COURT ERRED BY ALLOWING A.C. TO BE REFERRED TO AS THE "VICTIM."

2.1 Preservation

This issue is preserved. During *voir dire*, the prosecution referred to A.C. as the "victim" at least three times, at which point defense counsel approached the bench and objected. VR: 5/28/2021; 12:02:45 – 12:03:14. The objection was overruled. Id.

2.2 Facts

During *voir dire*, and subsequently in trial, A.C. was referred to by the prosecutor as the "victim." VR: 5/28/2021; 12:02:45 – 12:03:14; VR: 6/1/2021; 1:48, 1:59.

2.3 Legal Argument

As defense counsel argued to the trial court, before a defendant is convicted, whether a complaining witness is a victim is a "fact in dispute." VR: 5/28/2021; 12:02:45 – 12:03:14. This Court has previously

addressed this issue in *Whaley v. Commonwealth*, 567 S.W.3d 576 (Ky. 2019), and found that the trial court had not abused its discretion by denying a defense motion in limine not to refer to the complaining witnesses as victims. That precedent was wrongly decided and should be overturned. The *Whaley* case was short on legal reasoning and failed to take into account considerable legal discussion on the topic in other jurisdictions.

The Court in *Whaley* concluded that a requirement to refer to the complaining witnesses as "'alleged victims' during the course of the trial would be cumbersome and untenable." *Whaley* at 590. With due respect, that conclusion is unsupportable. First, the addition of one simple adjective is neither cumbersome nor untenable, and defense attorneys employ that exact wording in trials throughout the Commonwealth on a regular basis. If defense counsel is capable of it, so are prosecutors and their witnesses.

Further, there are numerous alternatives to the word victim. If this Court agrees that "alleged victim" is too cumbersome, then it would no doubt also find the alternative "complaining witness" to be a burden on the prosecution. However, the term "accuser" is also accurate and is no lengthier than "victim," while remaining neutral as to the

ultimate conclusion of law. Michael contends that either label would have been both acceptable and preferable.

Labeling A.C. as a "victim" at the start of trial denied Michael his presumption of innocence and invaded the province of the jury. As defined by KRS 421.500(1)(a)(1), a "victim" is someone "directly and proximately harmed as a result of: [t]he commission of a crime classified as a felony...." The label of "victim" explicitly tells the jury that A.C. was someone harmed by a crime. That was the ultimate fact the jury was supposed to determine, and is not permissible. *Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky. 1985) ("an opinion on the ultimate fact, that is, innocence or guilt...invades the proper province of the jury.").

In discussing this topic, it must be noted that there are two classes of cases: those where there is no doubt that there has been a crime committed and the question is who perpetrated it, and those where the very question in dispute is whether a crime even occurred. It might be proper to label the complaining witness as a "victim" in the former, because there is no doubt that *someone* perpetrated a crime against them. However, the case at bar falls into the second category, where a jury must decide whether a crime has even occurred. In such a situation, labeling a witness as a "victim" presupposes that the crime

occurred, and prejudices the jury into the belief that the defendant is guilty.

The logic employed by the Connecticut Supreme Court is instructive:

> Although the state concedes that the trial court's seventy-six references to the complainant as the "victim" in its jury charge were improper, it argues that such references constituted harmless error because the entire charge adequately conveyed that the complainant was merely *alleged* to be the victim of a crime. The state's contention is, at best, dubious. The trial court's seventy-six references to the complainant as the "victim" were neither isolated nor sporadic, but pervasive. The term "victim" commonly is understood to mean the person harmed by a crime or other injurious event. See American Heritage College Dictionary (4th Ed.2002) (defining victim as "[o]ne who is harmed or killed by another"). In the context of the present case, the jury could have drawn only one inference from its repeated use, namely, that the defendant had committed a crime against the complainant. For this reason, we agree with those courts that have deemed references to the complainant as the "victim" inappropriate where the very commission of a crime is at issue. See *State v. R.B.*, 183 N.J. 308, 342–43, 873 A.2d 511 (2005) (violation of presumption of innocence for court to refer to complainant as "the victim" in jury charge); *People v. Davis*, 73 App.Div.2d 693, 693–94, 423 N.Y.S.2d 229 (1979) (trial court's reference to complainant as "victim" and defendant as "perpetrator" constituted impermissible invasion of role of jury); *Talkington v. State*, 682 S.W.2d 674, 674–75 (Tex.App.1984) (reference to alleged victim of sexual assault as "victim" in jury charge constituted reversible error when defendant raised consent as defense), review denied (January 10, 1985); but see *State v. Robinson*, 81 Conn.App. 26, 838 A.2d 243 (where defendant refused trial court's offer of curative instruction, trial court's thirteen references to complainant as "victim" did

> not merit reversal), cert. denied, 268 Conn. 921, 846 A.2d 882 (2004).

State v. Cortes, 885 A.2d 153, 158 fn 4 (Conn. 2005). The dispute in the instant case was of a similar nature: the primary contention was whether A.C. was the victim of a crime or not. In such a context, it is an error of constitutional magnitude to allow the prosecution to refer to the accuser as a "victim."

2.4 Conclusion

Michael's constitutional presumptions of innocence under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution and § 11 of the Kentucky Constitution were violated by the prosecution's references to A.C. as the "victim," and he is therefore entitled to a new trial.

3. The Daviess Circuit Court Erred by Allowing A.C.'s Father to Testify that He Made Sure She was Telling the Truth Before Physically Attacking Michael.

3.1 Preservation

This issue is preserved. During the direct examination of Tyler Stanley, defense counsel made a very timely objection that prevented Tyler Stanley from saying that he had spoken to A.C. to make sure she

was telling the truth before he set out to attack Michael. VR: 6/1/2021; 3:58 – 4:00. Defense counsel stated his objection at the bench that allowing Tyler Stanley to say that he made sure A.C. was telling the truth before attacking Michael would be textbook bolstering. Id. The trial court overruled his objection. Id.

3.2 Facts

During the examination of Tyler Stanley, he said "I spoke with [A.C.] about it, and I made sure that, you know that this wasn't a..." VR: 6/1/2021; 3:58 – 4:00. Following the denial of the defense objection, Tyler testified that "I wanted to make sure that what happened was true." Id. He then said "I wanted to let her know that I was going to confront Michael about the things that were said. So, I wanted to make sure that I was potentially getting in trouble for a real problem, not hearsay." Id. Tyler went on to testify that after this conversation with A.C., he was so upset that he had a friend drive him to Michael's, where he confronted Michael and physically attacked him. Id.

3.3 Legal Argument

Defense counsel's objection was that Tyler's testimony that he wanted to talk to A.C. to make sure that the allegations were true

before confronting and attacking Michael was textbook bolstering. It was. The clear implication of Tyler's testimony is that he was so convinced of the veracity of A.C.'s allegations after speaking with her that he was willing to risk going to jail for assault. The fact that he had confronted Michael could easily have been presented to the jury without the prefatory testimony that he had vetted A.C.'s story first.

> It is well-settled that a witness cannot vouch for the truthfulness of another witness. *Stringer,* 956 S.W.2d at 888; *Bell v. Commonwealth,* 245 S.W.3d 738, 745 (Ky.2008), *overruled on other grounds by Harp v. Commonwealth,* 266 S.W.3d 813 (Ky.2008). In the context of child sex abuse cases, this Court has repeatedly held that no expert, including a medical doctor, can vouch for the truth of the victim's out-of-court statements. *See Hall v. Commonwealth,* 862 S.W.2d 321, 322–23 (Ky.1993) (collecting cases); *Bell,* 245 S.W.3d at 744–45. Indeed, this rule applies even when a witness *indirectly* vouches for the truth of the victim's statement. In *Bell,* this Court stated that it was error to allow a social worker to testify that a child sounded "spontaneous" and "unrehearsed" in describing sexual abuse. *Bell,* 245 S.W.3d at 744–45. Although the social worker in *Bell* did not literally say that she believed the child to be truthful, her opinion about the child's truthfulness was implicit in her statements, and so her testimony was impermissible bolstering. *Id.* at 745 n. 1.

Hoff v. Commonwealth, 394 S.W.3d 368, 376 (Ky. 2011). Tyler's testimony indirectly vouched for the truth of A.C.'s statement by implying that he found her so credible that he was willing to risk imprisonment to confront Michael over the allegations. Just as in *Hoff,* Tyler did not literally say that he believed that A.C. was truth, but that

was implicit in his testimony, and his testimony was therefore impermissible bolstering.

3.4 Conclusion

The evidence in this case was solely the testimony of A.C., and her credibility was therefore the most significant factor that the jury had to weigh. By allowing Tyler Stanley to impermissibly bolster A.C.'s testimony, the trial court prejudiced Michael and denied him a fair trial under the due process clause of the Fourteenth Amendment. This Court must reverse the conviction and remand this case for a new trial.

4. The Daviess Circuit Court Erred When It Allowed the Doctor to Testify as to the Legal Definition of Rape.

4.1 Preservation

This issue will likely be deemed unpreserved. During the testimony of the doctor who conducted the sexual assault medical exam on A.C., she testified repeatedly to the legal definition of penetration or sexual intercourse in Kentucky. VR: 6/1/2021; 4:54 – 4:55, 4:58 – 5:00, 5:04 – 5:06. Although defense counsel raised an objection, it was not raised until after the doctor had testified extensively about the legal definitions. VR: 6/1/2021; 5:05 – 5:06. To the extent that this error is

unpreserved, Michael requests reversal as palpable error under RCr 10.26.

4.2 Facts

Doctor Jennifer Lisle was the physician with the Children's Advocacy Center ("CAC") who examined A.C. VR: 6/1/2021; 4:38 – 4:45. During her direct examination by the prosecution, she was asked if she was familiar with the Kentucky definition of sexual intercourse. VR: 6/1/2021; 4:54 – 4:55. She replied that she was, and said that it was "anything that goes past the labia." Id. During cross-examination, Dr. Lisle was asked by defense counsel about penetration from a medical standpoint. VR: 6/1/2021; 4:58. Dr. Lisle responded that even if you touch on the outside, that would still be considered penetration. Id. A minute later, she seemed to reluctantly acknowledge a difference between touching and penetration, and confirmed that A.C. only mentioned touching and did not specify penetration. VR: 6/1/2021; 4:59 – 5:00. However, when asked if she knew that there was a legal distinction between touching and penetration, Dr. Lisle opined that if the child didn't have on underwear, the touching was under her clothes and the touching was on her vaginal area, that was penetration to her. Id.

During redirect, the prosecution had Dr. Lisle use her tissue box demonstrative aid to show the parts of the vagina, and asked about penetration from a legal standpoint. VR: 6/1/2021; 5:04 – 5:06. At that point, an objection was made and there was a bench conference. Id. The court agreed that she should stay away from the legal definition. Id. Dr. Lisle ultimately testified that penetration meant any touching from the labia inward. VR: 6/1/2021; 5:06 – 5:07.

4.3 Legal Argument

It is the trial court's duty to instruct the jury on the law, and it is not permissible to have a witness opine as to legal definitions.

This Court dealt with a similar situation in an unpublished case where a police officer offered a legal definition of drug trafficking:

> Contrary to Detective Carter's testimony, possession with the intent to transfer does not fall within the definition of trafficking pronounced in KRS 218A.010(40). "Traffic" is defined as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." "Noticeably absent from this statutory definition" is "[possess] with the intent to ... transfer," the language used by Detective Carter. *Commonwealth v. Rodefer,* 189 S.W.3d 550, 552 (Ky.2006). Detective Carter announced an additional form of liability—possession with intent to transfer—on which the jury was not permitted to convict.
>
> Detective Carter's testimony was inadmissible. While KRE 702 permits expert testimony that "will assist the trier of fact to understand the evidence or to determine a

> fact in issue," it does not permit a witness to aid in the determination of a legal issue. *See Gibson v. Crawford,* 259 Ky. 708, 83 S.W.2d 1, 7 (1935) ("The courts never allow a witness to give his conclusion on questions of law...."); *Foster v. Commonwealth,* 827 S.W.2d 670, 678 (Ky.1991) (upholding trial court's "refus[al] to reopen the case so that Foster's expert could testify on the definition of extreme emotional disturbance"). Since it is not the jury's role to determine what the law is, such aid would be unhelpful. It is well-recognized that the judge is charged with determining the law and, in turn, instructing the jury on its application to the case. *See United States v. Zipkin,* 729 F.2d 384, 387 (6th Cir.1984) ("Expert testimony on the law is excluded because the trial judge does not need the judgment of witnesses.... The special legal knowledge of the judge makes the witnesses' testimony superfluous. It is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a jury through the admission of testimony on controlling legal principles."). Simply put, it is error to allow a witness, expert or otherwise, to testify as to the content of the law. In this case, the error was compounded by Detective Carter making not merely an improper statement of law, but an improper *mis* statement of law."

Mash v. Commonwealth, 2008-SC-000951-MR, 2010 WL 1005903, at *6 (Ky. Mar. 18, 2010).[2]

The definition of sexual intercourse in Kentucky "includes penetration of the sex organs of one person by any body part [...] Sexual intercourse occurs upon any penetration, however slight." KRS 510.010. However, there is no legal definition, as the doctor opined, that includes "anything that goes past the labia." VR: 6/1/2021; 4:54 – 4:55. Even

[2] Unpublished case attached hereto in the Appendix in accordance with the rules.

more problematic was Dr. Lisle's opinion that any touching was the equivalent of penetration under these facts. VR: 6/1/2021; 4:58 – 5:00.

Just as in *Mash, supra,* it was improper here to allow a witness to testify about the content of the law. Also as in *Mash*, the error was compounded by Dr. Lisle's significant misstatement of the law.

The prejudice of this error is highlighted by the conflict in the evidence of this case and the jury instructions. The jury was instructed on first-degree rape, which does require penetration, and on sexual abuse, which does not, but would include touching. Although A.C. testified at trial to penetration, her statements to Dr. Lisle did not include penetration, but mere touching. A jury, therefore, could have believed that Michael had touched A.C., so as to constitute the lesser included offense of sexual abuse, but had not penetrated A.C. with his finger, so as to constitute the charged offense of rape. Dr. Lisle's testimony, however, would leave the jury with the impression that Kentucky law and medical science regarded any touching of the female sex organs, including the outer labia, as penetration, and therefore only first-degree rape would be the appropriate verdict. However, that is not the law of the Commonwealth. Even if this Court finds this error to be unpreserved, it rises to the level of a palpable error.

4.4 Conclusion

The false testimony of Dr. Lisle regarding Kentucky law, which is impermissible both for being a misstatement of the law and because witnesses are not permitted to opine on the state of the law to the jury, was a manifest injustice that deprived Michael of a fair trial and denied him due process under the Fourteenth Amendment. His conviction must be reversed and the case remanded for a new trial.

5. The Daviess Circuit Court Erred When It Allowed "Impeachment" Testimony of the CAC Interviewer Where A.C. Had Not Denied Her Statement In the CAC Interview.

5.1 Preservation

This issue is possibly unpreserved. Defense counsel objected to the testimony of the CAC interviewer as bolstering but did not object specifically on improper impeachment grounds. To the extent that it is deemed unpreserved, Michael requests palpable error review under RCr 10.26. However, it should be noted that because this was improper as impeachment testimony, its true purpose was to bolster the testimony of A.C., and the defense objected on those grounds.

5.2 Facts

Michael was indicted for three counts of first-degree rape, alleging that he had digitally penetrated A.C.'s vagina three separate times. TR I, 1 – 2. During her testimony, A.C. testified that it had happened two times. VR: 6/1/2021; 2:35 – 2:38. Realizing that her testimony was different from what she had told the CAC interviewer, the prosecutor asked her if she remembered speaking to that interviewer. Id. A.C. admitted that she recalled telling that interviewer it happened three times, then said she thought it happened two or three times. Id. Ultimately, she was able to recall two specific incidents, but not a third. Id.

On the second day of trial, the prosecution called the CAC interviewer. VR: 6/2/2021; 9:19 – 9:20. The prosecution admitted that he intended to use her testimony to impeach A.C.'s statement that the assault had happened three times. VR: 6/2/2021; 9:21 – 9:23. The CAC interviewer testified that A.C. had disclosed sexual abuse, that it was at the hands of her stepfather, and that it had happened three times in the car. VR: 6/2/2021; 9:28 – 9:29.

5.3 Legal Argument

Under KRE 613, a prior inconsistent statement of a witness may be offered to impeach that witness's testimony, but first

> he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them

KRE 613. Implicit in this rule is the understanding that if a witness is inquired of concerning the prior statement and admits the prior statement was made, the impeachment ends. "Obviously, if the witness unequivocally admits making the prior statement proof of inconsistent statements is inadmissible because it is no longer necessary." § 27:190. Impeachment with prior inconsistent statements—Answers of witness, 9 Ky. Prac. Crim. Prac. & Proc. § 27:190 (6th ed.) *citing Davis v. Commonwealth*, 795 S.W.2d 942 (Ky. 1990) ("the record shows that the witness admitted her prior statements when she was confronted upon cross-examination; thus there was no bona fide inconsistency").

Because impeachment was not a proper purpose for this testimony, the testimony reverts merely to being impermissible hearsay because it was out-of-court statements of A.C. offered by the CAC interviewer, and did not fit within a hearsay exception.

> This court has continuously held that the hearsay testimony of social workers is inadmissible and constitutes reversible error because it unfairly bolsters the testimony of the alleged victim.

Smith v. Commonwealth, 920 S.W.2d 514, 516 (Ky. 1995), *as modified on denial of reh'g* (May 23, 1996).

Michael contends that to the extent that this testimony was improper bolstering testimony, his objection to it was preserved, and he, therefore, is entitled to reversal because the error is not harmless. The testimony bolstered A.C.'s testimony, which was the sole evidence against Michael. It cannot be said not to have had an influence on the jury's deliberations. Further, the scant nature of the evidence in this case makes improper bolstering testimony much more significant. Michael contends that to the extent the Court deems this error unpreserved because the objection was not to the improper impeachment purpose, the error resulted in a manifest injustice that deprived Michael of a fair trial.

5.4 Conclusion

It was clear error for the CAC interviewer to testify as to hearsay statements made to her by A.C. They were not offered for a proper impeachment purpose and served therefore only as improper bolstering of A.C.'s testimony. Michael was deprived of a fair trial and denied due process under the Fourteenth Amendment, and his conviction must be reversed and the case remanded for a new trial.

6. The Daviess Circuit Court Erred When It Allowed

DETECTIVE RAMSEY TO READ DIRECTLY FROM NOTES PREPARED BY THE PROSECUTOR FOR THE MAJORITY OF HIS TESTIMONY ABOUT MICHAEL'S INTERVIEW.

6.1 Preservation

This issue is preserved. Defense counsel objected repeatedly and strenuously to Detective Ramsey being permitted to read verbatim from the prosecutor's notes of the interview. VR: 6/2/2021; 2:39 – 2:42, 2:46 – 2:47, 2:49, 2:52 – 2:59. Despite sustaining several of the objections, the behavior continued unabated and unaddressed by the trial court. Id. After the conclusion of Detective Ramsey's testimony, defense counsel requested a mistrial and was denied. VR: 6/2/2021; 3:37 – 3:38.

6.2 Facts

Detective Jared Ramsey, who interviewed Michael at the sheriff's department, testified regarding that interview. VR: 6/2/2021; 2:26 – 3:03. The interview was recorded. VR: 6/2/2021; 2:31 – 2:33. Rather than play the interview, Detective Ramsey testified about it. During that testimony, he appeared to be reading directly from notes. VR: 6/2/2021; 2:26 – 3:03. The defense had to ask for a copy of the notes during Detective Ramsey's testimony, as the notes had not been provided to the defense previously. VR: 6/2/2021; 2:36 – 2:38. At a

bench conference, defense counsel identified that the notes were in Assistant Commonwealth's Attorney Mike Van Meter's handwriting. VR: 6/2/2021; 2:39 – 2:42. He objected that the detective was not using the notes to refresh his recollection, but instead reading them verbatim. Id. Although the court initially instructed the prosecutor to take the notes from Detective Ramsey and only allow him to use them to refresh his recollection, he reversed his ruling a moment later. Id. The trial court mistakenly got the impression that the prosecution and defense had reached an agreement not to play the interview, and decided that Detective Ramsey could read the "transcript" of his notes, despite the fact that they were not *his* notes, but the prosecutor's. Id.

The verbatim recitation of the notes went on for several more minutes. VR: 6/2/2021; 2:42 – 2:46. The defense again objected that this was "not testimony" and that Detective Ramsey was literally just reading the prosecutor's notes. VR: 6/2/2021; 2:46 – 2:47. The court again overruled the objection. Id.

After another few minutes of verbatim reading, the defense objected that the testimony was narrative and no questions were being asked. VR: 6/2/2021; 2:49. The trial court sustained the objection, and asked the prosecutor if he had any questions for the witness, at which

point the prosecutor boldly instructed Detective Ramsey to "proceed with the interview contents, please." Id.

After several additional minutes, the defense again objected to the narrative nature of the testimony. VR: 6/2/2021; 2:52 – 2:59. The objection was sustained, but the prosecutor was argumentative and a bench conference ensued. Id. The defense clarified for the court that they had *not* agreed not to play the interview, but just discussed that there were parts of the interview that were prejudicial or irrelevant.[3] Id. Defense counsel pointed out that this was not the proper procedure for refreshing recollection, that he had objected repeatedly to the blatant verbatim recitation of the notes, and that a mistrial was possibly the appropriate remedy at that point. Id. The bench conference concluded with the trial court saying that it could not control how Mr. Van Meter presented his case, and the prosecutor indicating that he was not going to capitulate. Id.

On cross-examination, defense counsel confirmed that Detective Ramsey was reading from notes that the prosecutor had prepared in the prosecutor's handwriting, and that they were not Detective Ramsey's notes, although Detective Ramsey had added a few annotations of his own. VR: 6/2/2021; 3:15 – 3:16.

[3] As this Court is aware, such objections are frequently dealt with by redacting the objectionable portions of a defendant's interview and playing the remainder.

Detective Ramsey's testimony concluded the Commonwealth's case, and following his motions for directed verdict, defense counsel also made a motion for a mistrial on the basis that the verbatim reading of the notes was improper. VR: 6/2/2021; 3:37 – 3:38. That motion was denied. Id.

6.3 Legal Argument

The Kentucky Rules of Evidence govern the presentation of evidence in Kentucky courts. KRE 612 is the rule governing the use of a writing to refresh a witness's memory. The proper procedure for refreshing recollection is to 1) ask a witness if he can recall a fact; 2) if he cannot, ask if reading a particular writing would refresh his memory; 3) if it would, have him read the writing; 4) ask the question again with the witness permitted to answer from his now-refreshed memory, not from the writing itself.

> In Kentucky, we recognize that present memory refreshed requires proof "that the witness has a memory to be refreshed," and "that it needs to be refreshed." The rule permits the use of "[a]lmost any kind of writing ... to refresh memory, if the trial judge finds that the witness needs to review the writing to refresh memory and that the writing will likely serve that objective." Because the writing "is only being used to refresh memory ... [it] never acquires independent status as evidence in the case." Rather, "the evidence is the witness's refreshed memory and not the writing that was used to bring that memory to the surface."

Disabled American Veterans, Dept. of Kentucky, Inc. v. Crabb, 182 S.W.3d 541, 551–52 (Ky.App. 2005). That is not what occurred here. What occurred in this case is that Detective Ramsey read the prosecutor's notes of the interview, nearly verbatim, for the majority of his testimony.

> A witness, including a police officer, may not read from a document under the guise of "refreshing his recollection" pursuant to KRE 612. Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure: § 6184,* at 463–64 (1993) ("[C]ourts will not permit a witness to retain the writing during testimony where the circumstances suggest that the writing is merely a script that is being read into evidence under the guise of refreshed recollection.").

McGoffney v. Commonwealth, 2001-SC-0353-MR, 2003 WL 22430268, at *6 (Ky. Oct. 23, 2003).[4] When the format moves past refreshing a recollection with a writing and into the verbatim reading of a writing, it moves out of the realm of KRE 612 and into KRE 803(5).

> We also urge the trial court and the Commonwealth to ensure that Sally does not read from her notes verbatim at retrial. Martin does not raise this issue, but the record reveals some instances where Sally appears to read directly from her notes instead of reviewing them to allow her to testify from memory. As outlined above, when a writing is simply consulted by a witness, KRE 612 controls and the testimony thereafter elicited is a product of the refreshed memory, not the writing. If, on a retrial, Sally slips into reading her notes aloud, KRE 803(5) becomes the controlling evidentiary rule, and a different, more

[4] Unpublished case attached hereto in the Appendix in accordance with the rules.

> burdensome, foundation is required for the reading of her notes to become admissible as substantive evidence. The record makes explicit the Commonwealth's intention was not for Sally to read portions of her notes to the jury. In line with this intention, extra attention should be provided during a retrial to prevent Sally's reciting her notes to the jury unless the trial court finds that practice acceptable under KRE 803(5).

Martin v. Commonwealth, 456 S.W.3d 1, 17 (Ky. 2015). In *Martin*, the Court found that it was not the Commonwealth's intention for the witness to read directly from her notes. By contrast, it is clear from the record here that the prosecutor absolutely believed it was acceptable for Detective Ramsey to read the notes verbatim. Thus, KRE 803(5) is implicated.

> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

KRE 803(5). The dictates of this rule are impossible for Detective Ramsey to satisfy using these notes. It is true that Detective Ramsey once had knowledge but now has insufficient recollection to allow him to testify fully and accurately. However, the notes cannot be shown to have been made by Detective Ramsey because he did not make them.

Further, the notes cannot have been adopted by Detective Ramsey when the interview was fresh in his memory because it was not—he had to compare the notes to the *recording* of the interview that he and the prosecutor reviewed together.[5]

There was a simple and proper way to present this information to the jury: play the recorded interview itself after appropriate redaction of any prejudicial or irrelevant portions. Instead, the court allowed the prosecution to trample all over the evidentiary rules.

6.4 Conclusion

The evidentiary rules exist for good reason and must be followed. The prosecution boldly flaunted those rules here, even going so far as to directly ignore the sustained objections by the trial court. Such flagrant flouting of the rules cannot be sanctioned by this Court. Defense counsel asked for a mistrial, and it was the appropriate remedy. This Court must now reverse this case and remand for a new trial.

7. The Prosecutor Violated his Ethical Duties and Denied Michael his Constitutional Rights When he Improperly Inserted Himself As a Witness During

[5] It is exceptionally problematic that Assistant Commonwealth's Attorney Mike Van Meter asked Detective Ramsey, in front of the jury, if they had prepared the notes *together*. VR: 6/2/2021; 3:33 – 3:34. By asking this question, he was inserting himself into the case as a witness. The unethical nature of this conduct is discussed at length in the following issue.

DETECTIVE RAMSEY'S TESTIMONY.

7.1 Preservation

This issue is unpreserved, and the Appellant requests review under the palpable error standard of RCr 10.26 because the error affected his substantial rights and resulted in a manifest injustice.

7.2 Facts

As noted above, Assistant Commonwealth's Attorney Mike Van Meter improperly asked Detective Ramsey, in front of the jury, if they had prepared the notes *together* that the detective was reading from verbatim. VR: 6/2/2021; 3:33 – 3:34.

Additionally, during the testimony of Detective Ramsey, Assistant Commonwealth's Attorney Mike Van Meter inquired of the detective whether he had driven and timed the routes that Michael had likely taken from Meijer to Sylvia Walters' home and from Sylvia Walters' home to his home. VR: 6/2/2021; 3:04 – 3:07. In doing so, he specifically stated, "You drove it and I was with you. And you did the calculations." Id. He then asked, "How long did it take you, or us?" Id.

7.3 Legal Argument

It defies all logic that Assistant Commonwealth's Attorney Mike

Van Meter would take pains to insert himself into the scene where Detective Ramsey was timing Michael's routes. There was no particular reason for the prosecutor to mention that he was present, and the testimony could easily have been presented without the prosecutor mentioning his presence with Detective Ramsey in the car. More to the point, by inserting himself into the testimony of the case in such a fashion, he crossed a serious ethical boundary.

Likewise, the prosecutor's insertion of himself into the testimony about the preparation of the notes from which the detective read crossed an ethical boundary by using the honor of his office to bolster the validity of the notes.

As this Court reminded the bar in *Holt v. Commonwealth*, 219 S.W.3d 731, 732–33 (Ky. 2007):

> The Kentucky Rules of Professional Conduct, SCR 3.130, *et seq.*, are mandatory for all Kentucky lawyers. SCR 3.130–3.4(e) provides that a lawyer shall not "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." SCR 3.130–3.7 generally prohibits a lawyer from acting as an advocate at trial where the lawyer is likely to be a necessary witness.

And yet, the prosecutor did assert his personal knowledge by placing himself present with the detective while the detective was conducting

his driving experiments and during the preparation of the interview notes. Those actions inserted the prosecutor into the case as a witness.

While such brief references might seem harmless, such an action places the credibility of the prosecutor in front of the jury. As this Court said in *Commonwealth v. Cook*, 7 S.W. 155 (1888), this conduct is "very reprehensible."

> It is the duty of a commonwealth's attorney to represent the interest of the commonwealth fully and fairly, with his utmost ability; but it is not his duty to make a statement of fact, the credence of which is always more or less strengthened by his official position, outside of the record or evidence, which may tend in the least degree to prejudice the rights of the accused.

Cook at 156. Placing himself in the car with Detective Ramsey lent the weight of the office of the Commonwealth's Attorney to the testimony. Placing himself in a room with Detective Ramsey as they reviewed Michael's police interview and made notes in the prosecutor's handwriting lent the weight of the Commonwealth's Attorney's office to that testimony. Without the prosecutor's improper statements, the jury might choose to disbelieve the testimony of a police officer who had just read a substantial portion of his testimony verbatim because of his apparent horrible memory. With the prosecutor's improper statements, the jury would then have had to decide to disbelieve both the detective and the prosecutor himself, whose presence served to bolster the

validity of the detective's note-reading and driving experiments.

This error implicates the constitutional rights of the defendant because the prosecutor's unsworn statements violate the defendant's right to a fair trial under the Due Process Clause of the 5th Amendment. The error is made more egregious because the prosecutor had a ready alternative: just leave his own name out of it. Mentioning that he had been present with Detective Ramsey served no real purpose except to bolster the testimony and perhaps aggrandize the prosecutor as a go-getter who went out into the field to investigate the case himself. Likewise, the prosecutor could have confirmed that Detective Ramsey had compared the notes to the recorded interview without mentioning himself.

It is unfortunate that defense counsel did not leap to his feet and object to this line of questioning, thus requiring this Court to review this matter under the palpable error standard of RCr 10.26. If this error had been preserved, there is no question that it could not be found to be harmless beyond a reasonable doubt—the standard for preserved errors of a constitutional magnitude. However, even unpreserved, the outcome is not different. The constitutional right of the Appellant to a fair trial under the Due Process Clause of the 5th Amendment is a substantial right, and the violation of that right by the prosecution

resulted in a manifest injustice. To show a manifest injustice,

> The required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law. Manifest injustice is found if the error seriously affected the fairness, integrity, or public reputation of the proceeding.

Kingrey v. Commonwealth, 396 S.W.3d 824, 831 (Ky. 2013) (internal citations omitted). Here, the error was a violation of Michael's right to due process, and it affected his right to a fair trial. The violation of the prosecutor's ethical duties under the Rules of Professional Conduct clearly affects the integrity and public reputation of the proceeding. Therefore, a manifest injustice occurred and a reversal of Michael's conviction is mandated.

7.4 Conclusion

Assistant Commonwealth's Attorney Mike Van Meter violated his ethical duties by inserting himself as a witness in Michael's trial. The error was a violation of Michael's constitutional rights as well as the Rules of Professional Conduct. A manifest injustice resulted, and Michael's conviction must be reversed and the case remanded for a new trial.

8. CUMULATIVE ERROR RENDERED THE TRIAL

FUNDAMENTALLY UNFAIR.

The errors in this trial were legion. The trial court misapplied Marsy's Law by failing to sequester witnesses, the complaining witness was referred to as the "victim," both A.C.'s father and the CAC interviewer improperly bolstered her testimony, the CAC doctor gave an incorrect legal definition of rape, the detective read from the prosecutor's interview notes verbatim, and the prosecutor unethically inserted himself as a witness multiple times. The evidence against Michael was far from conclusive, and the foregoing errors, both singly, and when considered for their cumulative effect, rendered Michael's trial fundamentally unfair. Michael believes that each of the foregoing issues individually requires reversal. However, in the event this Court determines the preceding errors are not individually reversible, Michael requests reversal due to cumulative error. Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). "Errors that might be not so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983).

CONCLUSION

The foregoing errors by the Daviess Circuit Court, individually and when considered cumulatively, justify reversal of the conviction in this case.

WHEREFORE, Appellant Michael Robertson respectfully requests that this Court reverse the judgment of the Daviess Circuit Court and remand this case for a new trial.

Respectfully submitted,

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COUNSEL FOR APPELLANT