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**COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2021-SC-000485**

MICHAEL ROBERTSON

APPELLANT

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

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY 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 August 25, 2022: Hon. Jay Wethington, 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. Matthew Krygiel, Assistant Attorney General, 1024 Capital Center Drive Frankfort, Kentucky 40601. I certify that the record on appeal was not checked out for preparation of this brief.


AARON REED BAKER

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

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PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond to the arguments made by the Appellee which required a specific response. As to any argument not directly addressed, the Appellant rests on his original brief.

REPLY BRIEF FOR APPELLANT

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Marsy's Law Preservation

The Commonwealth argues that Michael's Marsy's Law argument is not only unpreserved but waived. The Commonwealth is wrong. The Commonwealth begins by saying that Michael's brief stated that his pretrial motion in limine preserved this issue. That is not correct. The preservation statement on page 6 of Michael's brief does not refer to the TR nor to the written motion in limine referenced by the Commonwealth. It refers to two places in the video record where arguments are made regarding Tyler Stanley's presence in the courtroom. Objections are specifically made at those times. VR: 6/1/2021; 1:34 – 1:40, 3:47 – 3:50. Michael's preservation statement makes no reference to a written motion, and so the Commonwealth's pointing to the written motion and (correctly) stating that it doesn't mention Marsy's Law is a misdirection.

In addition, the Commonwealth argues that defense counsel made an admission that Tyler Stanley was allowed in the courtroom and he "specifically stated he was not objecting from a 'constitutional standpoint.'" Brief for Appellee, p. 6. This was, according to the Commonwealth, a waiver. Defense counsel made no "admission" but instead *asked* whether Tyler Stanley would be allowed to be physically present during the trial. VR: 6/1/2021; 1:34:47 – 1:35:40. Defense

counsel clearly stated that he had to “object to every aspect of Marsy’s Law.” VR: 6/1/2021; 1:35:12 – 1:35:40. When defense counsel said “I understand it’s the constitution, so I don’t object to it from that point,” he was merely acknowledging that Marsy’s Law has been codified as part of the Kentucky Constitution, and therefore cannot be argued to be “unconstitutional.” However, that does not preclude an argument that it stands in conflict to other constitutional rights of the defendant which must take precedence.

The Commonwealth calls this a “failure to object.” Brief for Appellee, p. 7. It is not. Defense counsel *did not* concede that Tyler Stanley was allowed in the courtroom during trial, and defense counsel clearly stated that it *was* an objection and maintained that objection even as the circuit court overruled him. The Commonwealth’s assertions to the contrary are objectively wrong.

This argument is therefore neither waived nor insufficiently preserved so as to justify the palpable error review that the Commonwealth suggests.

Marsy’s Law does not preclude relief by its own terms

The Commonwealth points to Ohio as a jurisdiction that has specifically amended its evidentiary rule for the separation of witnesses

to exclude individuals that have been given Constitutional rights to remain in the courtroom. Brief for Appellee, p. 10. The Commonwealth argues that Kentucky has achieved the same exemption to KRE 615 by including language in Marsy's Law that nothing within it shall create a basis for vacating a conviction or a ground for relief requested by a defendant. *Id.* As clever as this argument might seem, it is logically untenable. Michael's argument is that his federal and state constitutional rights, including those protected by KRE 615, must take precedence over the constitutional rights created by Marsy's Law. A finding by this Court that Michael's constitutional rights are superior to those of a victim cannot be precluded by language contained within Marsy's Law itself. Marsy's Law may, by this language, prevent a defendant from creating a new basis for relief grounded in Marsy's Law itself. It cannot abrogate the existing protections provided to defendants by the federal and state constitutions.

Prejudice by Tyler Stanley's presence

The Commonwealth argues that Tyler Stanley's testimony was not of a nature that he would need to alter his testimony. Brief for Appellee, p. 11. However, KRE 615 is not an evidentiary rule that applies only when the witness's testimony meets certain hallmarks of

significance. It is a rule that exists because the fact-finder cannot know how a witness may have changed or tailored his testimony if he is able to listen to the other witnesses testify. Since Biblical times, people have understood that the best way to ascertain the truth is to separate witnesses and question them separately in order to discover inconsistencies in their testimony. The Commonwealth fails to recognize that its argument is contingent on the idea that Tyler Stanley's testimony was truthful; without separation, we cannot know how his testimony would have differed if Michael's rights had been upheld. Michael's defense, in part, was that Tyler Stanley concocted the allegations with A.C. and under that theory, he had strong motive to tailor his testimony.

The prosecutor should not be permitted to refer to the complaining witness as the "victim"

The Commonwealth responds to Michael's arguments about referring to the complaining witness as the "victim" by arguing that "the prosecutor was permitted to act as an advocate for AC, a role that common sense dictates." Brief for Appellee, p. 16. On that basis, the Commonwealth argues that references by a prosecutor to the "victim" are less serious than references by the court because the prosecutor is

understood to be making inferences about the evidence. However, despite the fact that our justice system is adversarial, “[p]rosecutors have a special role in the judicial system. Unlike other attorneys, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” *Caudill v. Commonwealth*, 374 S.W.3d 301, 309 (Ky. 2012). The prosecutor does not exist to act as an advocate for the complaining witness, but as an advocate for justice. A prosecutor must not be permitted to refer to that complaining witness as a “victim” when the trial presents the jury with the question of whether any crime actually occurred. The prosecutor’s interest is not in winning, but in seeing that “justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Common sense does not dictate that the prosecutor is an advocate for the complaining witness; instead, the ethical rules dictate that the prosecutor is an advocate for the truth and for justice. Presuming that a complaining witness is a “victim” when that fact is in question does not further the pursuit of the truth.

Tyler Stanley’s testimony that he “ma[d]e sure what had happened was true” is prejudicial, improper bolstering.

Tyler Stanley testified, over the objection of the defense, that before he assaulted Michael, he spoke with A.C. to make sure she was

telling the truth. The fact that after this conversation he did assault Michael serves as confirmation that Tyler Stanley believed she was telling the truth. Tyler Stanley further testified that he tested A.C. by telling her that he was going to confront Michael and that he wanted to make sure he'd be getting in trouble for a "real problem."

The Commonwealth acknowledges that a witness cannot vouch for the truthfulness of another witness. It argues that no vouching or bolstering occurred because Tyler Stanley was not a witness to the alleged assaults nor did he have independent knowledge about the incidents. Brief for Appellee, p. 17. According to the Commonwealth, this specific testimony was necessary to show why Tyler Stanley took the action of assaulting Michael. However, that does not logically follow. The Commonwealth could have asked Tyler Stanley if he went to confront and assault Michael after speaking with A.C. about the allegations *without* Tyler Stanley testifying that he specifically quizzed A.C. about whether she was telling the truth and asserting that he would not have assaulted Michael if he did not believe that A.C. was telling the truth.

The specific testimony that Tyler Stanley gave served only one purpose: to bolster A.C.'s allegations by asserting that Tyler Stanley had quizzed her and would not have committed an assault unless he

was satisfied that she was being truthful. That testimony was both unnecessary and a textbook example of vouching. The Commonwealth acknowledges that “this case came down to whether the jury believed AC” or Michael. Brief for Appellee, 18. In such a “he-said, she-said” case, the vouching for the veracity of A.C.’s allegations by Tyler Stanley cannot be said to be harmless.

Conclusion

To the extent that this reply brief does not respond to any specific arguments made by the Commonwealth in its brief, Michael stands on his original brief. Michael asks that this Court grant the relief requested in his brief, and reverse and remand this case for a new trial.

Respectfully submitted,



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