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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001166-MR

GREGORY HINES

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 02-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, KELLER, AND WINE, JUDGES.

KELLER, JUDGE: On August 26, 2002, Greg Hines was indicted by the Casey County grand jury for one count of first-degree rape for having sexual intercourse with R.C.,¹ aged fifteen (15) years, through the use of forcible compulsion. The case proceeded to trial and the jury found Hines guilty of first-degree rape and

¹ Due to the age of the victim, this Court will identify her only by her initials.

recommended a sentence of 13 and one half years' imprisonment. Hines was sentenced on May 27, 2003, to ten (10) years in prison to run consecutively with the sentence he was already serving on another felony statutory rape case. On May 30, 2006, Hines sought a belated appeal of his conviction. This Court ordered an evidentiary hearing to be conducted on the issue of whether or not Hines had waived his right to an appeal. At the close of the hearing, the trial judge recommended that the appeal be granted. This Court then ordered that this matter proceed on April 24, 2007. We now reverse and remand.

FACTS

On July 12, 2002, R.C. was invited by her friend, Kim Brown, to spend the night with her at Kim's home.² Kim was Hines's girlfriend at that time. Kim went with Hines's grandmother, Maye Gillock (Maye), to pick up R.C. and drive her to the party that was being held at Hines's home, a trailer. Hines's trailer was located in very close proximity to his mother's and grandmother's trailers.

Once she arrived at the party, R.C. put her belongings in Maye's trailer and then joined the party. Witnesses testified that R.C., Hines, and Kim, were drinking alcohol and smoking marijuana. R.C. testified that she had two or three non-alcoholic Pepsi-Colas that evening, all served to her by Hines. She testified that she did not smoke marijuana, but admitted that she had consumed alcohol on previous occasions. As the party continued into the morning hours,

² There was conflicting testimony as to whether R.C. knew they were going to Hines's party or to Kim's home initially.

R.C. claimed she felt dizzy and went to Maye's trailer where she attempted to use the phone to call her mother. She alleged that Hines then pulled the phone from the wall. She was given some bedding and directed by Maye to a back bedroom. Later, Hines and Kim came into that bedroom and argued about an earlier fist fight between Hines and his uncle. R.C. said the argument became violent when Hines grabbed Kim by the neck and shoved her from the bedroom. According to R.C., Hines then tied the bedroom door shut by using a rope to secure the bedroom door to the closet door handles.

R.C. testified that Hines removed her clothing, choked her and hit her in the chest knocking her on the bed. He then raped her without using a condom. R.C. was unsure if Hines ejaculated. R.C. said she resisted and managed to kick over a mirror which made a noise. During the attack R.C. stated that Hines told her "you're so pretty. You're making me do this to you just like the other girl did. Go ahead and tell, tell them. I'm already going to jail over one." R.C. testified Hines only stopped when Maye heard the noise made by the mirror and opened the door, whereupon Hines attempted to hide. R.C. said she was then driven to her home by Maye, and that as they left, Hines brandished an axe and threatened to kill R.C. should she tell anyone about the rape. We note that R.C. testified that she did not tell Maye about the rape on the drive to her home.

After arriving home, R.C. told her mother what had happened. She was then taken to the hospital where she underwent a sexual assault examination. Blood samples were taken and both the doctor and nurse documented bruises to the

front and side of R.C.'s neck, upper arms, and right inner thigh. Furthermore it was noted in the records that R.C.'s hymen was not intact, and that she stated that she had engaged in consensual sex prior to the rape, but not with Hines.

The examination did not reveal the presence of semen. A pubic hair foreign to R.C. was discovered, but it was never compared to Hines or tested for DNA. A sample of R.C.'s blood was taken; but, no analysis was performed for alcohol content. The amount of the sample was deemed insufficient for testing by the forensic laboratory for drug content.

During the trial, the prosecution sought to admit the hospital admission assessment record (hereinafter hospital record), excluding any mention of R.C.'s prior sexual behavior. Citing Kentucky Rules of Evidence (KRE) 412's prohibition regarding the admission of the victim's character and behavior in rape cases, the prosecution sought to exclude that portion of the hospital record that indicated R.C. had been sexually active prior to this event. Defense counsel objected, arguing that, if any portion of the hospital record was admitted, it should all be admitted. The court permitted the prosecution to submit the record into evidence but only after redacting that portion of the record that discussed R.C.'s prior sexual activity.

Detective Hammond from the Kentucky State Police investigated the incident, and testified, at the behest of the prosecutor, that Hines would not voluntarily provide samples of his pubic hair for purposes of comparison. He further testified that Maye refused to allow him into her trailer when he had asked

her permission at the police station. Hammond admitted under cross-examination that he failed to obtain a warrant or court order for any samples of Hines's hair, and did not photograph or otherwise investigate the crime scene at any time.

Hammond also testified as to what R.C. told him had occurred at Hines's party.

Both the emergency room doctor and nurse testified as to the examination, and to the statements R.C. made to each of them. However, neither was permitted to testify regarding R.C.'s prior sexual activity. R.C.'s mother testified as to what R.C. told her had happened. Hines's attorney did not object to the admission of any of the above "prior consistent statement" testimony.

Furthermore, R.C.'s handwritten journal describing the incident was admitted into evidence and then read to the jury by R.C. at the behest of Hines's trial counsel.

Witnesses for the defense included Hines, his mother and grandmother, Kim, and two young cousins who attended the party. The testimony of the defense witnesses chiefly indicated that R.C. was falling down drunk, bragged she was pregnant, and told others of a recent altercation with her boyfriend that had left the bruises noted by hospital staff.

Kim testified that she had been with Hines the entire night, thus it was impossible for the rape to have occurred. Maye contradicted R.C.'s statement that a telephone had been torn from the wall in her home, and further averred that the closet doors in the bedroom R.C. claimed were tied with rope were sliding mirrored doors with no handles. Maye also testified that Detective Hammond had

never requested her permission to enter her home. No photographs or diagrams of Maye's home were introduced by either the Commonwealth or the defense.

Hines testified that he was 19 years old at the time, had three children, was on disability for diabetes, and was a convicted felon. He stated that he was exceedingly intoxicated and had passed out at some point during the party. Nevertheless, he stated that he was in control of his actions and that despite the large amount of marijuana and alcohol he had consumed, his memory of the night was intact. He engaged in fistcuffs with an uncle earlier in the evening and once that fight was finished he argued with Kim and then told Kim and R.C. to go home. He denied ever being alone with R.C.

ANALYSIS

Hines assigns a number of errors regarding the admission of prior consistent statements made by R.C. through the witnesses noted above. He complains about the admission of the hospital record and argues that the attorney for the Commonwealth aggravated the error and then committed prosecutorial misconduct by telling the jury in closing argument that R.C.'s lack of a hymen was consistent with rape. Hines disputes the testimony by Hammond that he refused to give a pubic hair sample arguing that any refusal was privileged conduct that cannot be considered as evidence of criminality.

Hines also argues numerous allegations of error which were not preserved by defense counsel during the trial. In fact, the only error properly preserved for our review is the admission of the hospital record with the statement of prior consensual sex by R.C. redacted. Because of the necessary distinction between preserved and unpreserved error in our analysis, we will address each standard of review as it arises.

A. HOSPITAL ADMISSION ASSESSMENT FORM

Hines raises several issues with regard to the hospital record, one of which he preserved, several of which he did not. This Court's standard of review for the admission of evidence is whether the trial court abused its discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* This error was preserved by defense counsel’s objection to the prosecutor’s request to introduce the hospital record in its redacted form *i.e.*, without mention of R.C.’s statement regarding previous sexual encounters.

Defense counsel argued that, if admitted, the hospital record should be introduced in its entirety. As to its general admissibility, the court ruled that the hearsay record was admissible as a “business record”³ and further, pursuant to

³ Much is made by the appellant that the hospital record is not admissible as a business record under KRE 803(6), as R.C. was not under a business duty to report information to the nurse. While this is a correct statement of the law, no contemporaneous objection was made and the error does not rise to the level of palpable error. Furthermore, the document was not admissible pursuant to KRE 803(5) as the nurse never indicated that she had insufficient recollection, nor was the document offered by an adverse party. However, it is clear from the record that R.C.

KRE 412, the notation regarding R.C.'s past sexual predisposition was to be redacted prior to admission. No mention was made by anyone as to the exception contained in KRE 412(b)(1)(A): Prohibition Regarding the Admission of the Victim's Character and Behavior in Rape Cases:

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

KRE 412(c)(1) outlines a procedure that the parties and the court must follow to determine admissibility of the evidence:

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

made the statements for the purpose of medical treatment or diagnosis, and they may have been admissible under the exception to the hearsay rule contained in KRE 803(4).

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

The above procedure was not followed by either party despite the fact that the court specifically referenced KRE 412 when making its ruling disallowing any mention of an alternate explanation of the state of R.C.'s hymen. Indeed, neither the defense nor the prosecution questioned the doctor regarding this finding presumably due to the trial court's admonition to stay away from the subject entirely. What is clear is the trial court was put on notice of the rule contained in KRE 106 by defense counsel. KRE 106 does not require that the entire recorded statement be admitted,

but only so much thereof 'which ought in fairness to be considered contemporaneously with it,' *i.e.*, that portion which concerns the specific matter introduced by the adverse party. *White v. Commonwealth*, 292 Ky. 416, 166 S.W.2d 873, 877 (1942). The issue is whether 'the meaning of the included portion is altered by the excluded portion.' *Commonwealth v. Collins*, Ky., 933 S.W.2d 811, 814 (1996). The objective of KRE 106 'is to prevent a misleading impression as a result of an incomplete reproduction of a statement.' *Id.* (quoting R. Lawson, *The Kentucky Evidence Law Handbook* § 1.20, at 48 (3d ed. Michie 1993)).

Young v. Commonwealth, 50 S.W.3d 148, 169 (Ky. 2001).

Hines now argues that the redaction mislead the jury into concluding that an otherwise innocent girl had been raped by him and that no alternate source of the foreign pubic hair or injury to the hymen could be inferred.

We agree that the admission of the redacted medical record by the trial court resulted in a misleading and ultimately prejudicial picture of the physical evidence admitted against Hines. To allow the misperception created by the redaction to be taken by the jury as evidence of rape, and not of prior consensual sexual experience, does not aid the jury in its search for the truth. Given the reality, that R.C. had engaged in prior acts of sexual intercourse, the condition of her hymen was irrelevant and should also have been redacted or, if presented to the jury, her statement regarding her past sexual activity should have been admitted into evidence as well.

B. Prosecutorial Misconduct

Hines also contends that he is entitled to a new trial because of prosecutorial misconduct. During closing argument the prosecution argued that the absence of a hymen was consistent with R.C.'s testimony that she had been raped and impliedly argued that the pubic hair found, but never identified, necessarily came from Hines. The criteria we follow when reversing solely on the basis of prosecutorial misconduct is outlined in *Barnes v. Commonwealth*, 91 S.W.3d 564 (Ky. 2002):

Following the Court of Appeals for the Sixth Circuit, we reverse for prosecutorial misconduct in a closing

argument only if the misconduct is “flagrant” *or* if each of the following three conditions is satisfied:

- (1) Proof of defendant's guilt is not overwhelming;
- (2) Defense counsel objected; and
- (3) The trial court failed to cure the error with a sufficient admonishment to the jury. *United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994); *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979).

Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002).

Defense counsel did not object to any of the above closing arguments, thus the trial court was not asked to rule on the misleading quality of those arguments; nor to admonish the jury in order to cure the prejudice caused by the closing arguments. Therefore, we must use the palpable error standard. “[W]e review claims of prosecutorial misconduct to determine whether the alleged misconduct is so egregious, improper, or prejudicial, as to have undermined the overall fairness of the proceedings.” *Hood v. Commonwealth*, 230 S.W.3d 596, 600 (Ky. App. 2007), citing *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Due to the rulings made by the trial court, the Commonwealth maintains that the prosecution was merely commenting on the documentary evidence which would be reviewed by the jury. “The prosecutor may draw all reasonable inferences from the evidence and announce his own theory to explain the evidence and why it supports the guilt of the defendant.” *Bills v. Commonwealth*, 851 S.W.2d 466, 473 (Ky. 1993).

The key phrase in the above is that the prosecutor may draw all *reasonable inferences* from the evidence. Herein, the prosecutor knew full well that the reason R.C.'s hymen was not intact likely had nothing to do with the alleged rape. The prosecutor's deliberate lack of candor lead the jury to believe otherwise. The argument to the jury contained an improper insinuation and assertion calculated to mislead. This undermined the fairness of the proceeding.

Prosecutors have a unique position in our system of justice. Unlike other attorneys, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."⁴ The prosecutor,

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 633 79 L.Ed. 1314 (1935).

⁴ Model Rules of Professional Conduct R. 3.8 comment 1.

The Commonwealth is correct when it maintains, “[g]reat leeway is allowed to *both* counsel in a closing argument. It is just that - *an argument*. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position.” *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987). What he may not do is consciously deceive. Taken together with the inference that the foreign pubic hair also belonged to Hines, the insinuation of physical evidence of rape due to the status of R.C.’s hymen is a “foul blow”.

The reality is that the prosecution did not test an important piece of evidence in an otherwise circumstantial case. The prosecutor decided not to test the hair, which was his prerogative. However, he cannot then argue as if he is in possession of information that the hair belonged to Hines. A definitive determination of the source of the hair may have been had through scientific testing, but without testing, the hair was not determinative and the inference it belonged to Hines was prejudicial, especially when coupled with other errors, which we will discuss further below.

Standing alone, the preceding errors may not lead to a reversal in every instance, however, in this case, “they cumulatively operate to deprive the defendant of fundamental fairness. Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively

produce a trial setting that is fundamentally unfair.” *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984). (Internal citations omitted).

C. PRIOR CONSISTENT STATEMENTS

As mentioned above, Hines objects to the witnesses, who, through their testimony, reiterated for the jury what R.C. told them following the incident. R.C.’s mother, the doctor, the nurse, and Detective Hammond all testified, without objection, to prior consistent statements made by R.C.⁵ The hospital records reiterated the statements R.C. made to the doctor and nurse during her examination and R.C.’s handwritten, unsworn, and undated journal entry was read into the record by R.C. at the behest of Hines’s attorney.⁶

KRE 801A(a)(2) prohibits the admission of such evidence merely to bolster a witness. “It is improper to permit a witness to testify that another witness has made prior consistent statements, absent an express or implied charge against the declarant of recent fabrication or improper influence.” *Dickerson v. Commonwealth*, 174 S.W.3d 451, 472 (Ky. 2005). The record reveals that the theory of the defense was that R.C. did not recently fabricate her testimony, but that she had been lying about the incident from the beginning. Therefore, the

⁵ In fact, the prosecutor asked the detective if the information he had heard R.C. testify to in the trial was the same information she had related to him at the hospital. The detective answered in the affirmative.

⁶ While trial counsel initially asked R.C. if she had correctly written the statement, he then appeared to object to the journal entry’s admission; he later capitulated saying he had no objection to its admission to impeach R.C., which he then attempted to do. While we cannot be certain, it clearly appears that this was perhaps an ill-advised trial strategy to show R.C.’s statements to be inconsistent.

prosecution's introduction of these prior consistent statements did not fall within KRE 801(A)(a)2, but was improper bolstering of R.C.'s testimony.⁷ See *Reed v. Commonwealth*, 738 S.W.2d 818, 821 (Ky. 1987).

However, because these alleged errors were not objected to at the trial level, we must review them using the palpable error standard set forth in Rule of Criminal Procedure (RCr) 10.26. In order for such errors to be deemed palpable they must affect the substantial rights of a party and constitute a manifest injustice. Only then may they be considered by a court upon a motion for a new trial or by an appellate court on appeal. The degree of prejudice which must be shown in order to meet the standard is analyzed within the context of the entire case; a substantial possibility must exist that the result would have been different had the evidence not come before a jury. The Supreme Court of Kentucky explained in *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006):

A better understanding is gained from an examination of RCr 10.26 with emphasis on the concept of “manifest injustice.” While the language used is clear enough, we further explain that 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.

. . .

⁷ An excerpt of the testimony given by R.C.'s mother is of a similar quality as that illicit of the doctor, nurse and detective in terms of the reiteration of prior consistent statements:

Prosecutor: What was she saying about those marks on her arms?

Mother: She said that he had been beating on her, choking her.

Prosecutor: And anything other than beating on her and choking her?

Mother: She told me that he had raped her.

Prosecutor: Did she say who had done that?

Mother: She told me it was Greg Hines. I ask [sic] her who Greg Hines was. She said Kim's boyfriend.

‘[A]n appellate court may then exercise its discretion to notice a forfeited error but only if . . . the error seriously affects the fairness, integrity or public reputation of judicial proceedings.’ *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

. . .

To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.

Martin v. Commonwealth, 207 S.W.3d 1, 3-4 (Ky. 2006).

We cannot say that the consistent statements made by the various witnesses bolstering R.C.’s testimony, or the admission of the journal entry, constitute manifest injustice in the abstract. It also seems apparent that Hines could not cross-examine R.C. on the theory that her various statements were inconsistent, but argue herein that they are consistent and therefore inadmissible. “Having employed that strategy, Appellant cannot be heard to complain after the strategy failed.” *Tamme v. Commonwealth*, 973 S.W.2d 13, 32-3 (Ky. 1998). A new theory of error cannot be presented on appeal. *Ruppee v. Commonwealth*, 821 S.W.2d 484 (Ky. 1991); *Wilson v. Commonwealth*, 601 S.W.2d 280 (Ky. 1980); RCr 9.22. *Harrison v. Commonwealth*, 858 S.W.2d 172, 177 (Ky. 1993).

However, under the cumulative error doctrine by which multiple individually harmless errors can be deemed to have the same deleterious effect as one prejudicial error we find that the combination of the bolstering evidence, the medical records, and the prosecutor’s statement during closing argument

undermines our confidence in the fairness of the trial Hines received. See

Peters v. Commonwealth, 477 S.W.2d 154, 158 (Ky. 1972).

D. TESTIMONY BY DETECTIVE HAMMOND OF HINES'S REFUSAL TO SUBMIT TO A WARRANTLESS SEARCH OF HIS PERSON

The lack of scientific testing on the foreign pubic hair found on R.C. was dealt with by the prosecution on two occasions. On re-direct examination, Hammond admitted that he had not requested the forensic lab to compare the foreign pubic hair found on R.C. to Hines. The prosecutor then asked why that had not occurred, at which point Hammond responded “[b]ecause he refused to submit to my request for his hair.” In his closing argument, the prosecutor requested of the jury “I ask you to ask yourself why he would not give Officer Hammond a sample of his hair to compare it to.”

At the outset, we note two things from the record: no warrants or orders were requested requiring a sample of Hines's hair for an analysis by either the prosecution or the defense; and testimony as to why it was not tested was elicited from Hammond by both sides. The prosecution insinuated in his closing argument that an innocent person would not have refused to supply the hair to be tested. Once again, this issue was not preserved by objection during the trial of this matter. Therefore, the standard of review contained in RCr 10.26 is one of palpable error resulting in manifest injustice.

Hines correctly asserts that he has a right under the United States Constitution and Section 10 of the Kentucky Constitution to be free from

warrantless searches. His legitimate refusal to consent to a warrantless search and seizure was presented to the jury as evidence of guilt, and argued as such, violating this right. The case of *Deno v. Commonwealth*, 177 S.W.3d 753 (Ky. 2005), is directly relevant.

[P]assive refusal to consent to the warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing. The prosecution's repeated reference to [] refusal to provide blood and urine samples violated [] Fourth Amendment rights.

Id. at 762.

The Commonwealth argues that during the trial, defense counsel attempted to portray Hammond's investigation as sloppy and incomplete. The Commonwealth maintains that this is why he did not object to the line of questioning at the time or to the prosecution's comments referencing the refusal during closing argument. The record also reveals that defense counsel was alerted in advance of the prosecutor's intention to ask Hammond why he did not test the hair on more than one occasion, and still counsel did not object. Moreover, Hines testified that Hammond had never requested any sample from him.

What we conclude from this series of events is that this was trial strategy and therefore inappropriate for review as palpable error. "It is not the function of this Court to usurp or second guess counsel's trial strategy." *Baze v. Commonwealth*, 23 S.W.3d 619, 624 (Ky. 2000). Nonetheless, when the analysis of whether the right undermined by the prosecution is one of constitutional magnitude, we must review the matter further. In the case of *Coulthard v.*

Commonwealth, 230 S.W.3d 572 (Ky. 2007), the Supreme Court of Kentucky

resolved the question of review in a similar circumstance.

‘In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice.’ *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980). The facts in this case differ from those set forth in *Deno, supra*, in that Appellant's refusal to consent to fingerprint sampling was relevant for purposes other than to simply penalize him for the exercise of a legal privilege. Rather, the government utilized this evidence for the legitimate purposes of rebuttal and impeachment of a self defense claim advanced by Appellant at trial.

Specifically, the Commonwealth argued that Appellant's claim of self defense was not credible in light of the circumstances which transpired in this case. These circumstances included evidence which tended to show that Appellant initially did everything in his power to deny involvement, destroy evidence, and avoid prosecution. Only when these attempts failed, the Commonwealth argued, did Appellant change his story and claim self defense. The evidence regarding Appellant's refusal to consent to fingerprint sampling was introduced during a string of testimony which suggested that not only did Appellant fail to come forward with his claim of self defense despite several opportunities to do so, but also he took affirmative steps to undermine the investigation.

Id. at 582-83.

In this case, the prosecution was attempting to explain away its failure to test particularly relevant evidence, by impermissibly shifting the burden of this failure to the accused. This is not the legitimate governmental purpose of rebuttal and impeachment referenced in *Coulthard, supra*. In and of itself, the prosecutor's

questioning of Hammond and argument regarding Hines's refusal to provide a sample hair, might not rise to the level of palpable error. However, when combined with the errors noted above, the cumulative effect denied Hines the due process guaranteed to him by the United States Constitution as well as the Kentucky Constitution. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 89 L.Ed.2d 674 (1986), *Funk v. Commonwealth*, 842 S.W.2d 476, 483 (Ky. 1992).

CONCLUSION

Hines raised issues regarding both preserved and unpreserved errors. The accumulation of those errors undermines the overall fairness of the proceedings; therefore, we reverse the circuit court's judgment and remand this matter for a new trial.

ALL CONCUR.

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