RENDERED: APRIL 29, 2011; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NOS. 2009-CA-001611-MR
AND
2009-CA-001612-MR

SUSAN JACKSON AND
PAUL JACKSON — APPELLANTS

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NOS. 08-CR-00094 AND 08-CR-00096

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND KELLER, JUDGES.

KELLER, JUDGE: Carroll Paul Jackson (Paul) appeals from the Letcher Circuit Court's judgment convicting him of first-degree sexual abuse. Consolidated with that appeal is Susan Jackson's (Susan) appeal from the Letcher Circuit Court's

judgment convicting her of tampering with a witness. For the reasons set forth below, we affirm.

FACTUAL BACKGROUND

On April 17, 2008, a Letcher County Grand Jury indicted Paul for two counts of first-degree sexual abuse for allegedly subjecting his seven-year-old daughter, E.J., to digital penetration of her vagina and anus. Susan, Paul's wife and E.J.'s mother, was separately indicted for complicity in the abuse offense and for tampering with a witness. The Commonwealth moved to consolidate Paul and Susan's trials, which the Letcher Circuit Court granted. A jury trial was held on July 14-16, 2009. Prior to trial, the trial court permitted the Commonwealth to amend the charges against Paul to one count of sexual abuse in the first-degree. The following is a summary of the testimony and evidence presented at trial that is relevant to this appeal.

At trial, Brandy Collins (Collins), a social worker for the Kentucky Cabinet for Health and Family Services (the Cabinet), testified that on March 11, 2008, she received a complaint that E.J. had been sexually abused. E.J. was seven years old at the time. Collins testified that on the day she received the complaint, she contacted Kentucky State Trooper Ben McCray (Trooper McCray) for assistance, and the two proceeded to Paul and Susan's home at approximately 10:30 p.m. Collins and Trooper McCray asked to speak to E.J. Collins testified that she took E.J. into Paul and Susan's bedroom and began interviewing her. During the interview, E.J. disclosed the substance of the allegation. Collins then asked

Trooper McCray to come into the room to witness E.J.'s statement, and once Trooper McCray was in the room, E.J. repeated her statement. After the interview, E.J. was taken to Whitesburg Hospital for an examination.

Alicia Cook (Nurse Cook), a Sexual Assault Nurse Examiner (SANE nurse), performed the examination of E.J. at Whitesburg Hospital. At trial, Nurse Cook testified that she began the examination by asking E.J. some questions. After she was satisfied that E.J. was able to respond to questions and distinguish reality from make believe, she asked E.J. what happened to her. Nurse Cook testified that E.J. told her "My daddy puts his tips (holding up her fingers) into my tips (pointing toward the perineal area)[1] at the hole, and I told him to stop. He put his tips into my butt and I told him to stop." Additionally, E.J. told her that the last time this occurred was the previous day when Paul picked her up from school. Nurse Cook testified that she then performed a physical examination of E.J., and that there were physical findings consistent with the digital penetration E.J. had reported. However, Nurse Cook acknowledged that she checked the box indicating "not sure" next to "penetration of vagina" and "penetration of anus" on her written report because some of the physical findings could have resulted from poor hygiene.

Collins testified that after E.J.'s examination, she told Susan that she would need to find another place to take E.J and her other daughter, A.J., or have Paul leave their home. Collins testified that she met Susan the next day at the Letcher

[1] Nurse Cook testified that the perineal area is "the area between the legs."

County courthouse because Susan indicated that she would be willing to pursue an Emergency Protective Order (EPO) against Paul to prevent him from having contact with their children. However, Susan decided not to pursue the EPO. Collins testified that because Susan decided not to pursue the EPO, she pursued removal of the children in the Letcher District Court.

A temporary removal hearing was held in the district court on March 18, 2008, which resulted in the children's remaining with Susan on the condition that they have no contact with Paul. On March 19, 2008, Collins filed an emergency custody petition, and E.J. and A.J. were temporarily placed in the custody of the Cabinet. A hearing was held two days later, and the children were returned to Susan, again with a no-contact order against Paul.

An adjudication hearing was held in the district court on April 1, 2008. E.J.'s testimony at the adjudication hearing, which was played during the trial, became the basis for Susan's being indicted for tampering with a witness. At the hearing, E.J. repeatedly answered questions by stating her desire for her parents to "be together." When asked whether she and her mother had talked a lot about that, E.J. said that they had. When asked whether she remembered telling anyone that someone had touched her bottom, E.J. stated, "My daddy didn't do nothing, but it was an accident." When asked whether she remembered telling Susan about Paul touching her, E.J. stated, "My mom said don't be telling everybody that." She also said that, "I'll just tell you, but I just want my dad to be happy and not be mad at me for saying it."

E.J. later stated that, "It was just an accident. Mommy told me it was just an accident." E.J. was also asked what Susan had told her to tell the judge that day. In response, E.J. stated, "My mom told me that my daddy to be not mad at me because they want my dad to be together and go home." E.J. gave Susan a "thumbs up" signal while making that statement. E.J. was then asked whether she had given Susan the "thumbs up" signal because she was doing what Susan asked her to do, and E.J. answered, "Yeah." E.J. further testified that Paul accidentally touched her butt with "his fingertips." After the adjudication hearing, the district court entered an order placing both E.J. and A.J. in the custody of the Cabinet.

At trial, E.J. testified to the following. When asked whether anyone had ever touched her in an inappropriate way, she answered, "My dad." She then stated that, "He got his finger and he put it back in my butt." E.J. testified that Paul inserted one finger, that it hurt, and that she told him to stop but he did not. E.J. further testified that she and Paul were alone in their car on the way home from school when this occurred. When asked whether these actions by Paul were an accident, E.J. stated: "My mom told me it was an accident. She told me not to tell anybody. When she told me it was an accident, she said [E.J.] don't tell anybody what I did and daddy did." When asked whether she remembered saying the allegations were not true, E.J. responded by saying, "My mom said it was not true."

Patricia Crone (Crone), a psychologist and the State Designated Child Sexual Abuse Coordinator for Kentucky River Community Care, testified that she

has met with E.J. regularly since July 2008 as part of E.J.'s treatment for trauma related to the alleged sexual abuse. Crone testified that, during a session, E.J. told her that Paul had done something bad to her when he picked her up after school, that he touched her butt with his fingers, and that it hurt her.

At trial, Kentucky State Police Officer Vicki Eversole (Officer Eversole) testified that she was assigned to investigate this case. Officer Eversole testified that, with his consent, she interviewed Paul on March 12, 2008. During the interview, Paul continuously denied having sexual contact with his daughter. He also stated during the interview that he took E.J. to and from school, but that his younger daughter, A.J., rode the bus to and from school. Paul further stated that E.J. attended the elementary school, A.J. attended pre-school, and that their buildings were right next to each other.

At the close of the Commonwealth's case, Paul moved for a directed verdict, which was denied by the trial court. Susan also moved for a directed verdict. Thereafter, the Commonwealth informed the trial court that it no longer intended to pursue the complicity charge against Susan, and the trial court dismissed that charge. However, the trial court denied Susan's motion for a directed verdict on the witness tampering charge.

Neither Paul nor Susan presented any witnesses. The jury convicted Paul of one count of sexual abuse in the first degree and convicted Susan of tampering with a witness. The court sentenced Paul to ten years' imprisonment and a $10,000 fine was imposed. The court sentenced Susan to five years'

imprisonment. This appeal followed. Additional facts will be developed as necessary.

Given the common underlying facts and an overlapping legal issue, we address the two appeals in this single opinion.

## STANDARDS OF REVIEW

The issues raised by Paul and Susan have different standards of review. Therefore, we set forth the appropriate standard of review as we address each issue.

## ANALYSIS

### 1. Paul's Appeal

#### a. Trial Court's Failure to Direct a Verdict

On appeal, Paul argues that the trial court erred when it denied his motion for a directed verdict of acquittal. As stated in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), "[o]n appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." With this standard in mind, we address Paul's argument.

Paul alleges the evidence was insufficient to support his conviction of sexual abuse in the first degree. Kentucky Revised Statute (KRS) 510.110(1)(b)(2) states that "[a] person is guilty of sexual abuse in the first degree when . . . [h]e or she subjects another person to sexual contact who is incapable of consent because he or she . . . [i]s less than twelve (12) years old[.]"

In support of his argument that there was insufficient evidence of sexual abuse, Paul points to the inconsistencies in E.J.'s testimony at the adjudication hearing and at trial. Paul argues that because E.J.'s testimony was contradictory, it was unreliable. Paul also notes Nurse Cook's testimony that on her written report, she checked the box indicating "not sure" next to "penetration of vagina" and "penetration of anus," because some of the physical findings could have resulted from poor hygiene.

With respect to the credibility of E.J., we note that "the trial court does not determine the credibility of witnesses when ruling on a motion for directed verdict and instead only determines whether the evidence is sufficient for a jury to find guilt." *Howard v. Commonwealth*, 318 S.W.3d 607, 614 (Ky. App. 2010). At trial, E.J. testified that her dad put his finger in her "butt," and she asked him to stop but he did not. Additionally, although somewhat equivocal, Nurse Cook testified that there were physical findings consistent with E.J.'s allegations. This was "more than a mere scintilla of evidence," and it supported the trial court's determination that it was not "unreasonable for a jury to find guilt." *Benham*, 816 S.W.2d at 188. Thus, the trial court did not err in denying Paul's motion for directed verdict.

b. Joinder

Next, Paul argues that the trial court improperly joined his trial with Susan's. We disagree.

Joinder is appropriate if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Kentucky Rule of Criminal Procedure (RCr) 6.20. To constitute reversible error on the issue of improper joinder, there must be a showing of a clear abuse of discretion and a showing of prejudice. *Rearick v. Commonwealth,* 858 S.W.2d 185, 187 (Ky. 1993). "A significant factor in identifying such prejudice is the extent to which evidence of one offense would be admissible in a trial of the other offense." *Id.*

The evidence presented with respect to the tampering charge would have been admissible in a separate trial of Paul to prove the sexual abuse charge. Specifically, the evidence relevant to the tampering charge included E.J.'s testimony at the adjudication hearing wherein she stated that what Paul did was an "accident," and that Susan told her it was an accident. It also included E.J.'s testimony at trial wherein she stated that what Paul did was not an accident. This evidence would have been admissible in Paul's and Susan's trial had they been separated. Therefore, the trial court did not abuse its discretion in joining Paul's and Susan's trials.

c. Hearsay

Paul also argues that the trial court erred in admitting statements by E.J. to Nurse Cook that identified Paul as the perpetrator. Specifically, Paul contends that the trial court erred when it allowed Nurse Cook to testify that E.J. told her that "My daddy puts his tips (holding up her fingers) into my tips (pointing toward the

perineal area) at the hole, and I told him to stop. He put his tips into my butt and I told him to stop." The Commonwealth argues that this issue is not properly preserved for review.

Having reviewed the record, we believe this issue was properly preserved. Prior to trial, Susan's counsel made a motion in limine to prohibit Nurse Cook from testifying that E.J. identified Paul as the perpetrator because it was inadmissible hearsay and did not fall under the medical diagnosis exception to the hearsay rule. Paul's counsel noted that he joined in that motion. Paul's counsel then went on to state that he was concerned that Nurse Cook would draw inappropriate conclusions from her examination. The trial judge noted that motion was in reference to the medical history given by E.J. to Nurse Cook and not conclusions that Nurse Cook may draw from her examination of E.J. The trial judge then overruled the motion. Because Paul's counsel stated that he joined in the motion raised by Susan's counsel, Paul properly preserved this issue. Additionally, at trial, Paul's counsel objected to the testimony of Nurse Cook regarding the history given to her by E.J. Accordingly, this issue is preserved.

Having determined that this issue was preserved, we note that as a general rule, out of court statements offered to prove the truth of the matter asserted are not admissible. Kentucky Rule of Evidence (KRE) 802. However, "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably

pertinent to treatment or diagnosis" are not excluded by the hearsay rule. KRE 803(4). Generally "the identity of the perpetrator is not relevant to treatment or diagnosis." *Colvard v. Commonwealth*, 309 S.W.3d 239, 244 (Ky. 2010).

In the instant case, the statements made by E.J. to Nurse Cook identifying Paul as the perpetrator were not necessary to treat or diagnose E.J. Thus, these statements do not fall within the exception provided under KRE 803(4), and the admission of this testimony by Nurse Cook was error.

Having concluded that this testimony by Nurse Cook was improperly admitted, we next determine whether the error was harmless. As stated in *Colvard*:

> RCr 9.24 requires us to disregard an error if it is harmless. A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

309 S.W.3d at 249 (internal citations omitted).

Although not cited to by either party, we find the recent opinion of the Supreme Court of Kentucky in *Colvard* to be instructive. In *Colvard*, the appellant was charged with sexually assaulting two girls, ages six and seven, and was convicted of one count of first-degree sodomy and two counts of first-degree rape. On appeal, he argued that the testimony of three medical personnel who testified at trial that the victims identified him as the perpetrator was improper hearsay testimony. The three medical personnel included the EMT who responded to the

emergency call that the victims were sexually assaulted, the physician who evaluated the victims at the hospital after the report was made, and a pediatrician who performed the follow-up examination and treatment of the victims. The Court concluded that the testimony of the three medical personnel was hearsay and improperly admitted. *Id*. at 242-47.

In addition to the testimony of the three medical personnel, the Court noted that the victims' uncle, mother, and a social worker all testified that the victims identified the appellant as the perpetrator. The Court concluded that the testimony of these three witnesses was also hearsay and improperly admitted. *Id*. at 248-49. The Court then concluded that the testimony by all six of these witnesses was prejudicial because their testimony served to bolster the victims' testimony. Thus, the Court determined that, in combination, these errors were not harmless. *Id*. at 249-50.

While the Court in *Colvard* determined that testimony of the medical personnel was prejudicial, it is distinguishable from the instant case. In this case, only Nurse Cook testified that E.J. identified Paul as the perpetrator, whereas in *Colvard*, there were six different witnesses bolstering the testimony of the victims. Thus, having reviewed the record, we conclude that, based on E.J.'s testimony identifying her father as the perpetrator, combined with all the other evidence presented, the error was harmless.

2. Susan's Appeal

a. Trial Court's Failure to Direct a Verdict

First, Susan contends that there was insufficient evidence to support her conviction of tampering with a witness. As noted above, we must analyze the evidence as a whole, and determine if "it would be clearly unreasonable for a jury to find guilt." *Benham*, 816 S.W.2d at 188.

KRS 524.050(1)(b) provides that:

> (1) A person is guilty of tampering with a witness when, knowing that a person is or may be called as a witness in an official proceeding, he:
>
> . . . .
>
> (b) Knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of the witness.

Susan concedes that she knew E.J. might be called as a witness and that she intended to affect E.J.'s testimony; however, she argues that the Commonwealth failed to produce sufficient evidence that she "knowingly" said anything false to E.J. Specifically, Susan contends that because she thought Paul was innocent, she did not "knowingly" make a false statement to E.J.

At the adjudication hearing, when asked whether she remembered telling Susan about Paul touching her, E.J. stated "My mom said don't be telling everybody that." E.J. also stated that what happened to her "was just an accident. Mommy told me it was just an accident." When testifying at trial about what Susan told her to say at the adjudication hearing, E.J. stated: "My mom told me it was an accident. She told me not to tell anybody. When she told me it was an accident, she said [E.J.] don't tell anybody what I did and daddy did."

Based on this testimony by E.J. at the adjudication hearing and at trial, it was not unreasonable for the jury to determine that Susan "knowingly" made a false statement to E.J. Thus, the trial court did not err in denying Susan's motion for a directed verdict.

b. Unfit Mother Evidence

Susan next contends that the trial court erred by allowing evidence that Susan was an "unfit mother" to be introduced because it was irrelevant and highly prejudicial. In order to be admitted, evidence must be relevant. KRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. "A trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard." *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001).

Because some of the testimony Susan complains of was not preserved for our review, we first address the preserved issues. First, Susan points to Collins's testimony regarding her supervised visitation with E.J. and A.J on April 18, 2008. This visitation occurred after the adjudication hearing and after the children were removed from Susan's custody. Collins testified that Susan yawned

throughout this visit, did not interact much with E.J., and talked more with A.J. Collins also testified that Susan seemed to be withdrawn from E.J. Susan's counsel objected to this testimony arguing that it was not relevant to show that Susan tampered with a witness. Susan's counsel further argued that it was prejudicial because it was offered to make Susan appear to be a "bad" person. The Commonwealth argued that it was relevant to show that E.J. was being punished for telling what Paul did to her. The trial court overruled the objection.

Susan also points to the testimony of E.J. and A.J.'s foster mother, Nicky Tyler (Tyler). Tyler testified that E.J. would have accidents after her visitations with Susan and that she does not have accidents as long as there is no visitation or contact with her family. Susan's counsel objected to this testimony and argued that it was prejudicial because "we don't know why she is reacting that way." The Commonwealth argued that it was relevant to show that E.J. felt threatened because she was told not to say what Paul did to her. The trial court overruled the objection.

We agree with Susan that this testimony by Collins and Tyler was irrelevant. The basis for the tampering charge was E.J.'s testimony at the adjudication hearing wherein E.J. stated that Susan told her that what Paul did was an accident. Because the visitation occurred after the adjudication hearing, Collins's testimony regarding Susan's interactions with E.J. at the visitation was not relevant to prove that Susan told E.J. what to say at the adjudication hearing. Likewise, Tyler's testimony that E.J. soiled herself after visits with Susan involved

instances that occurred after the adjudication hearing. Thus, this testimony was also irrelevant. Accordingly, the admission of this testimony by Collins and Tyler was error.

However, as previously noted, RCr 9.24 requires us to disregard an error if it is harmless. "A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Colvard*, 309 S.W.3d at 249. We conclude that, in light of all the evidence, including E.J.'s testimony at the adjudication hearing and at trial, we cannot say that the judgment was substantially swayed by this error. Thus, it was harmless.

Next, Susan argues that the trial court erred in permitting Collins to testify that Susan refused to sign a case plan after it was explained to her that she had to follow the plan before a recommendation could be made by the Cabinet for E.J. and A.J. to be returned to her custody. Susan further argues that Tyler's testimony that when E.J. and A.J. were first placed with her, they did not wear underclothes, did not use toilet paper, had frequent nightmares, bit their nails, and would wet and soil their clothes was irrelevant and prejudicial. Because Susan's counsel did not object to any of this testimony by Collins or Tyler, the alleged errors are not preserved. RCr 9.22; *Edmonds v. Commonwealth*, 906 S.W.2d 343, 346 (Ky. 1995). We accordingly review the alleged errors under the palpable error standard contained in RCr 10.26. A palpable error is one which "affects the substantial rights of a party" and will result in "manifest injustice" if not

considered. *Id*. "Manifest injustice" means that "a substantial possibility exists that the result of the trial would have been different." *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997).

First, we note that any testimony with respect to A.J. was irrelevant because Susan's charge of tampering with a witness only involved E.J. Additionally, Collins's testimony that Susan refused to sign a case plan was not relevant to prove that Susan told E.J. to say what Paul did was an accident. Thus, it should not have been admitted. Similarly, Tyler's testimony that E.J. did not wear underclothes, did not use toilet paper, had frequent nightmares, bit her nails, and would wet and soil her clothes, was not relevant to prove that Susan tampered with a witness. All of these events took place after E.J.'s testimony at the adjudication hearing, which was the basis for the tampering charge. Additionally, any probative value this testimony may have had was substantially outweighed by its prejudicial effect because it was being offered to show that Susan was not a good person or that she was a bad mother. However, absent this testimony, there is not a substantial possibility that the result of the trial would have been different. Thus, these errors do not rise to the level of palpable error.

3. Jurors

Both Paul and Susan argue that the trial court improperly failed to grant their requests to strike three jurors for cause. We disagree.

As stated in *Paulley v. Commonwealth*, 323 S.W.3d 715, 719-20 (Ky. 2010):

> Kentucky Rules of Criminal Procedure (RCr) 9.36(1) provides a juror should be struck for cause "[w]hen there is reasonable ground to believe that . . . juror cannot render a fair and impartial verdict on the evidence . . . ." A trial court generally is given "broad discretion to determine whether a prospective juror should be excused for cause . . . ." Nonetheless, "that discretion does not mean a trial judge's decision not to strike a juror for cause is beyond review by an appellate court." Ordinarily, an erroneous, discretion-abusing failure to grant a motion to strike for cause results in reversible error.

(Citations omitted).

The Commonwealth argues that neither Paul nor Susan preserved this issue because their counsel did not identify on their strike sheets any additional jurors they would have struck. In support of its argument, the Commonwealth points to *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009), wherein the Supreme Court of Kentucky held that "in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." However, as noted in *Paulley v. Commonwealth*, 323 S.W.3d 715, 720 (Ky. 2010), because *Gabbard* became final in October 2009, it would be unfair to hold a party to this standard if it did not exist at the time of trial. Because the trial in the instant case occurred in July 2009, the standard annunciated in *Gabbard* did not apply. Under the state of the law at the time, Paul and Susan were only required to make a motion to strike for cause to properly preserve this issue. *Id*.

a. Prospective Juror W.C.

First, Paul and Susan argue that prospective juror W.C. should have been struck for cause. We disagree.

During *voir dire*, W.C. stated that her granddaughter was ten years' old when someone sexually abused her, and that the case was prosecuted by the same prosecutor and before the same judge approximately five to six years earlier. Caudill stated that the defendant in her granddaughter's case "pled." W.C. further stated "But, I don't, you know, it wouldn't affect me, I don't think, no way on my decision. I just wanted to get it out." Susan's counsel asked W.C. whether the case involving her granddaughter would affect her judgment, and W.C. answered "No." W.C. was then asked whether her granddaughter's case would make her feel strongly toward the defendant. W.C. answered, "No. I believe in being fair to everybody." Paul's counsel moved to strike W.C. for cause due to the similarity of her granddaughter's case to the instant case. Susan's counsel joined in that motion, which the trial court denied.

As stated in *Paulley*, 323 S.W.3d at 720-21:

> A properly qualified juror must be impartial, which former United States Supreme Court Chief Justice Charles Evans Hughes described as comprising a "mental attitude of appropriate indifference . . . ." In order to determine if a juror has the appropriate degree of impartiality, "[t]he test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." Any doubts about the ability of a juror to be fair and impartial should be construed in favor of a defendant.

(Citations omitted).

Paul and Susan contend that W.C. was not qualified to sit as a juror because she did not "unequivocally" state that she would not be affected by her granddaughter's experience. Both Paul and Susan state in their briefs that, when asked what effect her granddaughter's experience might have on her as a juror, W.C. stated "I don't know if it would affect" me. Having carefully reviewed the record, we note that W.C. never made that statement or a similar statement. Instead, she unambiguously stated that her granddaughter's experience would not affect her as a juror. Therefore, that argument is without merit.

Paul and Susan also argue that, because W.C.'s ten-year-old granddaughter was a victim of sexual abuse, she should have been struck for cause. We disagree. The fact that W.C.'s granddaughter's case was similar to the instant case, standing alone, is insufficient to justify removal for cause. Our Supreme Court has held that even "[t]he fact that a prospective juror has been a victim of a similar crime is insufficient, in and of itself, to warrant removal for cause." *Richardson v. Commonwealth*, 161 S.W.3d 327, 330 (Ky. 2005).

As noted in *Hayes v. Commonwealth*, 320 S.W.3d 93, 100 (Ky. 2010), "the trial court is in the best position to evaluate a juror's demeanor and answers during *voir dire*." While a prospective juror's unequivocal statement that she will impartially decide the case is influential, there are no "magic words" a juror must utter "before a trial court can determine the probability of bias or prejudice." *Id*.

Instead, "'[i]t is the *probability of bias or prejudice that is determinative* in a ruling on a challenge for cause,' and we will not disturb a trial court's ruling on this issue absent an abuse of its discretion." *Id*. (*citing Richardson*, 161 S.W.3d at 330) (emphasis in original). Because W.C. unequivocally stated that she could fairly and impartially decide the case, and because the trial court was in the best position to evaluate her demeanor, we cannot conclude that the trial court abused its discretion in refusing to remove W.C. for cause.

b. Prospective Juror C.F.

Next, Paul and Susan argue that prospective juror C.F. should have been struck for cause. We disagree.

During *voir dire*, C.F. stated that she had attended church with E.J. When asked when she last had any interaction with E.J., C.F. indicated that she had seen E.J. the previous Sunday and said "good morning" to her. C.F. said that she did not know anything about the case, and that the previous Sunday was the second time she had seen E.J. at church. C.F. further indicated that her interactions with E.J. were very limited and involved questions such as "Are you ready for school?" and "Did you have a good summer?"

When asked whether attending church with E.J. might influence her, C.F. said "No." C.F. was asked the question again, and C.F. again said "No." C.F. stated that she didn't really know E.J. When asked again whether her acquaintance with E.J. would cause her to give more weight to E.J.'s testimony, C.F. said "I don't think so." Paul's counsel moved to strike C.F. for cause because of her

church relationship with E.J. Susan's counsel joined in that motion, which the trial court denied.

Paul and Susan continue to contend that C.F. should have been struck for cause due to her church relationship with E.J. They also argue that C.F. was not qualified to sit as a juror because she did not "unequivocally" state that she would not be affected by her acquaintance with E.J.

As stated in *Maxie v. Commonwealth*, 82 S.W.3d 860, 862 (Ky. 2002):

> [P]rospective jurors are not automatically disqualified merely because they may have heard something about the case or may be acquainted with the parties. Prospective jurors are still qualified to sit on a case provided reasonable grounds exist to believe they can render a fair and impartial verdict based solely on the evidence adduced.

Further, juror bias "does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate the probability of partiality." *Sholler v. Commonwealth,* 969 S.W.2d 706, 709 (Ky. 1998). Thus, C.F. should not be automatically disqualified merely because she saw E.J. at church on two occasions and had a brief exchange of words.

Additionally, having reviewed the record, we believe that C.F. "unequivocally" stated that she would not be affected by her acquaintance with E.J. Twice, C.F. stated "No" when asked if her church relationship with E.J. would affect her. When asked the third time, she firmly stated "I don't think so." Contrary to Paul and Susan's assertion, we do not believe the way C.F. stated "I

don't think so," was the same as her saying "I don't know for sure." Because the trial court was in the best position to evaluate her demeanor, *Hayes*, 320 S.W.3d at 100, we cannot conclude that the trial court abused its discretion in refusing to remove C.F. for cause.

c. Prospective Juror T.D.

Finally, Paul and Susan argue that prospective juror T.D. should have been struck for cause. Again, we disagree.

During *voir dire*, T.D. stated that he worked in the maintenance department under Twyla Messer (Messer), who was the Director of Buildings and Grounds, and Transportation for the local school district. Messer was a witness in this case. T.D. stated that Messer was not his direct supervisor, but that she was one of his bosses. He also stated that he saw Messer "about every day." T.D. continued by stating, "That won't bias my opinion at all on the trial, but I did feel like I needed to say that." When asked whether he would tend to give Messer's testimony more weight because of that relationship, T.D. replied "No. No. I wouldn't." Paul's counsel moved to strike T.D. for cause because of the economic and occupational relationship he had with Messer, and the trial court denied the motion.

We note that Susan's counsel neither joined the motion, nor made a separate motion to strike T.D. for cause. RCr 9.22 states a party claiming error must "mak[e] known to the court the action which that party desires the court to take or any objection to the action of the court, . . ." Further, "[t]he objection of an

attorney for one codefendant will not be deemed to be an objection for the other codefendant unless counsel has made it clear that in making the objection it is made for both defendants." *Brown v. Commonwealth*, 780 S.W.2d 627, 629 (Ky. 1989). Thus, Susan's claim is not preserved for our review.

However, even if Susan properly preserved this issue, we conclude that the trial court did not err in denying Paul's motion to strike T.D. for cause. At trial Messer testified that she was currently the Assistant Superintendant and the Director of Transportation and Maintenance for the Letcher County School District. However, in March 2008, when the alleged sexual abuse by Paul was reported, she was the Principal of Beckham Bates Elementary. Messer testified that E.J. attended Beckham Bates Elementary in March 2008, and that Paul transported her to school. Messer further testified that the building for Head Start, the pre-school A.J. attended, was directly next to the building for Beckham Bates Elementary. Additionally, Messer testified that she had not received any reports that E.J. had been sexually abused prior to March 11, 2008.

We note that in Paul's interview with Officer Eversole, which was admitted into evidence at trial, he stated that he drove E.J. to and from school and that A.J. rode the bus to pre-school. He also stated that the buildings for E.J.'s school and A.J.'s school were right next to each other. We also note that there was not any testimony or evidence presented at trial to contradict Messer's statement that, prior to March 11, 2008, she had not received a report that E.J. was being sexually abused. Thus, Messer was a peripheral witness.

A prospective juror's work relationship with a peripheral witness is insufficient to establish bias on a challenge for cause. *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998). Therefore, we conclude that the trial judge did not err in denying Paul's motion to strike T.D. for cause.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the Letcher Circuit Court.

ALL CONCUR.

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