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Supreme Court of Kentucky

2023-SC-0467-MR

JAMIE BOGGS — APPELLANT

V.

ON APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
NO. 21-CR-00150

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE CONLEY

AFFIRMING

This case is before the Court as a matter of right from the Appellant's, Jamie Boggs, conviction for several sexual offenses, including one count each of sexual abuse in the first degree (continuing course of conduct), rape in the first degree (continuing course of conduct), sodomy in the first degree (continuing course of conduct), and sodomy in the first degree. For each count the victims were under twelve years of age. Boggs was sentenced to forty years in prison. On appeal, Boggs alleges multiple errors including improper bolstering of the victims' testimony through the testimony of the forensic interviewer from the Child Advocacy Center (CAC) and through hearsay statements from other witnesses. Boggs also alleges error in the improper

admittance of prior bad acts testimony in violation of KRE[1] 404; and, finally, unanimity and Double Jeopardy violations regarding the jury instructions.

As evidenced by the several opinions in this decision, the issue most concerning to the Court is the testimony of the forensic interviewer. The Court is convinced her testimony did constitute improper bolstering, but a majority concludes it was harmless. For all other alleged errors, we disagree with Boggs and affirm his conviction and sentence.

I. Facts

Between 2011 and 2016 Boggs was in a relationship with Retta H.[2] Retta had five children, none biologically related to Boggs, including three boys and two girls. The girls were Betty and Susan,[3] aged approximately eight and five, respectively, in 2011 when Boggs and Retta began living together. The house contained three bedrooms and was shared by Boggs' parents. The girls slept in the same bedroom as Boggs and Retta though in a separate bed.

In 2021, Boggs was indicted for several sex crimes against the girls, and he went to trial in 2023. Betty was nineteen at the time of trial and Susan was sixteen. Both testified that Boggs' abuse began shortly after they began living with him. Both testified Boggs frequently kissed them on their mouths and would insert his tongue in their mouths when doing so. Boggs would also

[1] Kentucky Rules of Evidence.

[2] We omit the last name of the mother to protect the identity of the victims.

[3] The victims have similar initials which can be confusing when referred to as such. We adopt the Commonwealth's pseudonyms for the victims to protect their identity.

frequently demand they kiss him before they left the house. Both girls also testified to frequently being touched upon the intimate parts of their bodies. For example, Betty testified he "would grab my boobs or he would grab my butt. He would put his hands down my pants sometimes." She testified this occurred daily. Susan likewise testified to the same conduct though she said Boggs more often kissed her than touched her.

Both girls also testified to more egregious instances of abuse. For example, Susan testified on at least one occasion while tending horses with Boggs, that he lifted her up on his shoulder, took her to the bedroom of a nearby trailer, undressed her, and penetrated her vaginally with his penis. She also testified to multiple instances of being woken up face down, her shorts pulled down, and Boggs penetrating her vaginally with his penis. She further testified Boggs penetrated her anally with his penis, and on at least one occasion compelled her to engage in oral sex upon his penis.

Betty testified that in May 2014, Boggs once followed her into the bedroom, pushed her on the bed, stripped her shorts, put his hand over her mouth, and engaged in oral sex with her vaginally. She stated he "put his head down there and I was just begging, and I was just trying to get him off of me, and I just laid there for a while and eventually he got off and he told me that he loved me." Betty testified to another instance in 2016 when Boggs compelled her to strip naked and sleep with him while her mother was also in the bed, and that Boggs touched and rubbed her body as well as forcing her to grab his penis.

Retta also testified at trial. Although she disclaimed knowledge of the abuse until 2016, she corroborated Betty's account of the 2016 incident. According to Retta, Boggs came into the bedroom, ripped off Betty's shirt and compelled her to strip the rest of her clothing. Boggs then stripped naked as well and lay next to Betty. Retta laid there awake the rest of the night, but testified Boggs had threatened her with his pistol so felt helpless to act. Retta further testified to general acts of physical abuse perpetrated against her and the girls to explain the fear instilled by Boggs which prevented her from helping her children. When she did intervene to stop Boggs from hitting the children, he would turn upon her. Specifically, Retta recounted at least one instance where Boggs beat her with his pistol resulting in a cracked jawbone and nose. Beatings with either a belt or horsewhip were frequent and, according to Retta, were not always because Boggs felt the children had done anything wrong.

The 2016 incident detailed by both Betty and Retta proved to be the final straw. Retta testified the next morning she observed a naked Boggs put Betty's legs up behind her neck, preparing to have sexual intercourse with her. Retta grabbed Boggs' gun but did not know how to use it. She then began screaming wildly around the house, gaining the attention of Iva Boggs, Boggs' mother. Boggs eventually grabbed the gun from Retta and promptly beat her to the point of immobility. Retta testified the following day while Boggs was at the dentist she took the kids and moved out.

Both Betty and Susan testified their mother was more or less aware of the abuse, and that the abuse would occur when she was both in and out of

the home. Retta indeed testified to her knowledge that Boggs frequently watched the girls while bathing. Initially he would do this with the bathroom door open but at some point, she noticed the door would be closed. Susan specifically testified she informed her mother of the abuse when she was ten years old, approximately around 2015 or 2016. This seems to be confirmed by Retta who testified she did not learn of the sexual abuse until 2016. Retta also testified the girls begged her not to tell anyone of the abuse. Betty at an undisclosed point in time did inform a friend of hers, which prompted school authorities to question both girls. Both denied any abuse to the school authorities, however, each testified Boggs frequently threatened to kill them or their mother if they disclosed the abuse to anyone.

Iva testified on behalf of her son, denying she ever saw him kiss either of the girls on their mouths or that he ever threatened anyone with a gun. Indeed, she testified there were no guns in her home as far as she knew. She did concede, however, that just prior to Retta and the children moving out, she recalled Retta coming out of her bedroom declaring Boggs was trying to get Betty pregnant. Iva testified she never saw Betty naked in Boggs' bedroom. Boggs himself took the stand in his own defense and denied all allegations of abuse or misconduct towards the girls or their mother. Upon his conviction and sentence, he filed his appeal. Further facts will be developed below as necessary. We now address the merits.

II. Analysis

A. Alleged Errors with Jury Instructions Waived

Regarding Boggs' claims of error regarding juror unanimity and double jeopardy, we conclude these issues were waived at trial and are not properly before the Court. Specifically, Boggs alleges impropriety with Instruction No. 4 (sexual abuse in the first degree, victim under twelve, continuing course of conduct) and Instruction No. 6 (sodomy in the first degree, victim under twelve). Both these instructions pertained to the alleged crimes against Betty. Boggs concedes his objections to these instructions were not preserved at trial and requests palpable error review. The Commonwealth argues Boggs told the trial court he had no objection to those instructions, therefore argument to the contrary is now waived.

Our rules state,

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

RCr[4] 9.54(2). This rule "operates as a bar to appellate review unless the issue was fairly and adequately presented to the trial court for its initial consideration[,]" because "[t]he trial judge cannot be expected to distinguish a neglectful omission from a deliberate choice." *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013). When the issue is that a specific instruction

[4] Kentucky Rules of Criminal Procedure.

should have been given but was not, or that an instruction given should not have been given, then RCr 9.54 imposes a duty upon the defendant to make his desire known to the trial court; it is unreasonable to expect the trial court to divine the wishes of the defendant, or to otherwise "anticipate a party's strategic preferences and act upon them *sua sponte*." *Id.*[5]

There is a difference between failing to object and waiver—at least in the context of juror unanimity and double jeopardy issues. *Sexton v. Commonwealth*, 647 S.W.3d 227, 231 (Ky. 2022) (juror unanimity); *Kelly v. Commonwealth*, 655 S.W.3d 154, 162 (Ky. 2022) (double jeopardy).[6] The question is not merely whether Boggs failed to object to erroneous instructions but whether he knowingly relinquished the right. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011). This may occur either by "expressly agreeing" to the trial court's instructions, *Sanchez v. Commonwealth*, 680 S.W.3d 911, 930 (Ky. 2023), or by tendering "instructions that are substantially similar to those ultimately given by the trial judge." *Rudd v.*

[5] This rule does not apply to those instances in which a given instruction is allegedly defective. "[U]npreserved allegations of defects in the instructions that were given may be accorded palpable error review under RCr 10.26." *Martin*, 409 S.W.3d at 346.

[6] It is not a generally true statement of law that failure to object never equates to waiver. We quite obviously equate the two in other areas of the law. *See Tackett v. Commonwealth*, 445 S.W.3d 20, 42-43 (Ky. 2014) (failure to object to juror's continued service on venire resulted in waiver); *Staples v. Commonwealth*, 454 S.W.3d 803, 828-29 (Ky. 2014) (failure to object to misallocation of peremptory strikes resulted in waiver); *Crutcher v. Commonwealth*, 500 S.W.3d 811, 813-16 (Ky. 2016) (failure to object regarding denial of right to public trial resulted in waiver); *Elam v. Commonwealth*, 500 S.W.3d 818, 827 (Ky. 2016) (failure to object to deficiency in indictment resulted in waiver); *Commonwealth v. B.H.*, 548 S.W.3d 238, 245 (Ky. 2018) (failure to object to particular-case jurisdiction at trial court resulted in waiver).

Commonwealth, 584 S.W.3d 742, 746 (Ky. 2019) (quoting *Webster v. Commonwealth*, 438 S.W.3d 321, 324 (Ky. 2014)). When a defendant does either of the above, any alleged error is deemed to have been invited, and invited errors "are not subject to appellate review." *Webster,* 438 S.W.3d at 324.

The trial court gave both parties a copy of its proposed instructions and, on the last day of trial, asked both if "any objections or changes needed to be made?" Boggs responded in the negative. This brings his argument firmly within the ambit of *Sanchez*, which held "[b]y expressly agreeing to the jury instructions . . . Sanchez waived his ability to now challenge those instructions on appeal." *Sanchez*, 680 S.W.3d at 930. Insofar as his arguments encompass a claim of double jeopardy, that right is generally subject to waiver. *See, e.g., Couch v. Maricle*, 998 S.W.2d 469, 470-71 (Ky. 1999). We agree with the First Circuit that "[t]he protection embodied in the Double Jeopardy Clause is a personal defense that may be waived or foreclosed by a defendant's voluntary actions[.]" *United States v. Newton*, 327 F.3d 17, 21 (1st Cir. 2003). Accordingly, double jeopardy claims are subject to an invited error analysis. Boggs' claim is barred from appellate review because he informed the trial court he had no objections nor desired any changes to its proposed jury instructions.

B. No Palpable Error in Admittance of Prior Bad Acts Testimony

Boggs argues the several witnesses' testimonies regarding his beating of Retta and her children were admitted in violation of KRE 404's prohibition

against prior bad acts testimony. This argument is conceded to be unpreserved, and he requests palpable error review. RCr 10.26. Palpable error is focused upon manifest injustice; requiring the reviewing court to ask, "whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). It must be "easily perceptible, plain, obvious and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Finally, because it is unpreserved, the reviewing court "must plumb the depths of the proceeding," considering the weight of the evidence "to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin*, 207 S.W.3d at 4.

Boggs has explained in detail each piece of evidence he contends violated KRE 404. Generally speaking, all the evidence can be summarized as tending to show Boggs routinely physically abused Retta and the children, particularly with a belt or horsewhip. KRE 404(b) prohibits "evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Evidence of such other crimes, wrongs, or acts may be admitted, however, when "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(1).

Typically, we engage in a three-part analysis to determine whether KRE 404 has been satisfied. *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994). That analysis is unnecessary here because the law states "that other bad acts of

threats or violence are admissible to explain why a victim delayed reporting a crime." *Leach v. Commonwealth*, 571 S.W.3d 550, 558 (Ky. 2019); *see also Clark v. Commonwealth*, 267 S.W.3d 668 (Ky. 2008). Since the victims' sexual abuse began in 2011, there was roughly a nine-year gap from the time the abuse began to when it was first reported to civil authorities. From the time Retta learned of the abuse, whether in 2016 or earlier, there would be another gap in time to explain. Therefore, it is not a "manifest, fundamental and unambiguous" error which "threatens the integrity of the judicial process" for the trial court to have allowed such evidence to be heard. *Martin*, 207 S.W.3d at 5. Indeed, Boggs made the delayed reporting a focal point of his defense.

C. Harmless Error for Kayla Byrd's Improperly Bolstering Testimony

Boggs next argues the testimony of Kayla Byrd, the CAC forensic interviewer, improperly bolstered the victims' testimony. This argument is preserved. "Generally, a witness may not vouch for the truthfulness of another witness." *Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997). Nor can "[a] witness . . . vouch for the truthfulness of another witness either directly or indirectly." *Stephens v. Commonwealth*, 680 S.W.3d 887, 900 (Ky. 2023). We have applied this rule to doctors, holding physicians may not directly or indirectly vouch for the truthfulness of their patients. *King v. Commonwealth*, 472 S.W.3d 523, 531 (Ky. 2015) (*citing Hall v. Commonwealth,* 862 S.W.2d 321, 323 (Ky. 1993) and *Hoff v. Commonwealth,* 394 S.W.3d 368 (Ky. 2011)). We have applied it to a Multidisciplinary Task Force on Child Sexual and Physical Abuse. *King*, 472 S.W.3d at 530-32. We have also applied the rule to social

workers, finding error when a social worker testified the victim's statements regarding abuse sounded to her to be "spontaneous" and "unrehearsed" and that the victim's demeanor during the interview was consistent with a sexual abuse victim. *Bell v. Commonwealth*, 245 S.W.3d 738, 744 (Ky. 2008), *overruled on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008). The law is well-established that "psychologists and social workers are not qualified to express an opinion that a person has been sexually abused." *Id.* at 745. This rule amounted to blackletter law more than thirty years ago when this Court observed,

> Despite the fact that in seven recent cases, this Court has reversed convictions for alleged sexual offenses against children because of improper and prejudicial expert testimony, this issue continues to resurface. By this time, the law in Kentucky should be clear.

Hall, 862 S.W.2d at 322 (internal footnote omitted).

At trial, Boggs objected to Byrd's testimony by informing the trial court, "I can't see what relevance she has to the information here other than bolstering the children[.]" The judge informed counsel that it would "take it a question at a time[.]" Byrd's qualifications to conduct a forensic interview were not challenged, so we omit information regarding her education and experience. Byrd testified a forensic interview "is a developmentally sensitive and legally sound method of gaining factual information regarding allegations of abuse and/or exposure to violence. The interview is conducted by a neutral professional using practice and research informed techniques as part of a larger investigate process." She testified she received special training in interviewing children. She testified her purpose as an interviewer is "to gather

information on allegations of abuse; exposure to wit—witness or exposure to violence. The interview is non-leading, non-suggestive interview techniques." She testified she interviewed Betty and Susan in connection with the case. Prior to questioning about these interviews, the Commonwealth reminded Byrd not to repeat any statements made by the children. To the objected portion of her testimony, we quote it directly as well as the testimony immediately preceding and following for proper context.

> Commonwealth: Did you interview these girls together?
>
> Byrd: No.
>
> CW: So separately?
>
> Byrd: Yes.
>
> CW: And did you interview them close in time?
>
> Byrd: Yes.
>
> CW: How close?
>
> Byrd: It was the same day.
>
> CW: Okay. Do you know if they came together?
>
> Byrd: They did not.
>
> CW: Okay. From your interview of the children, could you determine where each child was living at the time?
>
> Byrd: Yes.
>
> CW: And were they living together?
>
> Byrd: No.
>
> CW: Are you trained to—are you trained to identify any kind of indicators, such as if children have been coached, can you look for indicators like that from your training?

> Byrd: Yes, and I found none of those factors to be present in the interview of either girl.

At this point Boggs lodged an objection, arguing Byrd had given an improper opinion and improperly bolstered "what the children are gonna say." The trial court overruled the objection, holding "we don't know what the girls are going to say, it's not in evidence." The Commonwealth's questioning continued:

> CW: Do you document these interviews?
>
> Byrd: Yes, each interview is recorded.
>
> CW: Okay, and that was done in this case?
>
> Byrd: Yes.
>
> CW: Now, the purpose of your forensic interview is what?
>
> Byrd: To gather information about abuse from the children.
>
> CW: Okay, so you're gathering information, and then is it your job, do you provide any diagnosis, any treatment, anything like that to the children you interview?
>
> Byrd: No.
>
> CW: So strictly the gathering information?
>
> Byrd: Yes.
>
> CW: Okay, so you did that for both—both of the children in this case?
>
> Byrd: Yes.
>
> CW: Once you have completed an interview, what do you do next?
>
> Byrd: We can recommend therapy if we feel like that's something that's needed, but other than that I just provide a summary to investigators.

CW: Okay.

The Commonwealth's questioning concluded shortly thereafter. Boggs' cross-examination did little but reveal that Byrd's interviews with the victims only lasted forty minutes each.

We review the trial court's decision for an abuse of discretion. *Sanchez*, 680 S.W.3d at 920. Under our precedents, Byrd's testimony is manifestly improper, and the trial court clearly abused its discretion in admitting it. The trial court's conclusion that the victims' testimony was not yet in evidence, so no one knew what they were going to say is too narrow. True, the exact content of their testimony was not yet known but it was clear the victims would be testifying to the abuse they suffered by Boggs. There was no medical evidence in this trial. There was no physical evidence of abuse such as videos or photographs. The trial court would have been well aware of this since all such evidence requires pretrial disclosure. Aside from Retta's testimony regarding the May 2016 incident with Betty, the charges against Boggs could not be sustained concerning Susan without her testimony, and most of the charges against Boggs concerning Betty could not be sustained without her testimony. Barring a surprise recantation from the stand or an equally surprising refusal to testify by either of the girls, it is common sense the Commonwealth intended to put the victims on the stand to testify to their abuse. Byrd's testimony was a preemptive attempt to bolster that testimony. We make clear that bolstering is not dependent on the chronological order of the witnesses. A witness can be

bolstered before he or she testifies just as much as he or she can be bolstered after testifying.

The Commonwealth's intent to bolster is demonstrated by the recital of Byrd's experience and expertise in the beginning of her testimony, emphasizing that she is specially trained to interview children. Byrd further declared she was a "neutral professional" whose interview was not for the purpose of medical treatment or diagnosis but had as its sole object the gathering of factual information to aid the "larger investigative process." She further declared her methods were "non-leading" and "non-suggestive" thus, were a "legally sound method of *gaining factual information* regarding allegations of abuse and/or exposure to violence." (emphasis added). All this testimony conveyed to the jury that she is a professional aiding the investigative process whose only job is to neutrally gather factual information.

She was then asked whether she had training to identify "indicators" in children that would lead her to conclude the child was coached. She testified unequivocally, "Yes, and I found none of those factors to be present in the interview of either girl." That is improper bolstering. Like the social worker in *Bell* who testified the child's statements to her were "spontaneous" and "unrehearsed" or the psychologist's statements in *Hall* that a child's account of abuse was "most likely accurate[,]" testimony that a victim did not display indicators of coaching is indirect testimony that the victim's out of court statements regarding their abuse were truthful. *Bell*, 245 S.W.3d at 745; *Hall*, 862 S.W.2d at 322-23. We also find *King* to be instructive. In *King*, the

Multidisciplinary Task Force on Child Sexual and Physical Abuse was a collegium of the Commonwealth Attorney, the County Attorney, victim's advocates, social workers, school guidance counselors, and police officers. *King*, 472 S.W.3d at 530-31. In brief, it was "a committee of esteemed local officials and respected sex abuse experts," whose sole purpose was to aid in the investigatory process by reviewing individual cases and recommending whether the case should proceed to seeking an indictment. *Id.* at 531. By allowing testimony that the Task Force did approve seeking an indictment in King's case, we held

> [t]he clear implication is that such an august body would not have recommended Appellant's prosecution if they did not believe Thomas's [the victim's] testimony. Thus, by testifying that the Task Force approved the charges, the Commonwealth was permitted to vouch for Thomas's credibility as having been verified by a panel of respected experts.

Id. While one forensic interviewer is not a committee of experts or professionals, the same purpose is achieved. Byrd's testimony explicitly stated her sole purpose was to gather facts regarding abuse, and she found no indication the children were "coached[,]" i.e., lying. Implicit in such testimony is that had she found indicators of coaching, or otherwise did not believe the children were being truthful, then a prosecution based largely on their testimony would not have gone forward.

Sophism about the definition of "coaching" and the practice of witness coaching for trial is utterly irrelevant in this case for the simple fact that Byrd is not a private individual hired by the Commonwealth to help prepare the girls for trial, but repeatedly stated her sole purpose was to gather factual

information to aid the investigative process which occurred long before trial was even contemplated. She explicitly stated that beyond interviewing the girls and filing her report she had no further involvement in the case. It is clear from the context of the Commonwealth's examination that the word "coached" was meant as it would be colloquially understood by an average juror: that the girls were in some way trained or induced to testify to abuse that did not in fact occur. Indeed, the Commonwealth's questioning about how the girls arrived at the interview, whether they were interviewed together, or even if they lived together, only makes sense in this context; the information is irrelevant otherwise. By establishing the girls were not interviewed together, did not arrive at the interview together, and were indeed living separately from one another, the Commonwealth was attempting to establish that the girls were not in close contact prior to or during the interview as such to concoct a mutually consistent account of abuse.

We have spoken strongly on this issue because we declared more than thirty years ago that "the law in Kentucky [on improper bolstering] should be clear." *Hall*, 862 S.W.2d at 322. Yet here we are. A perusal of the cases cited above demonstrates this case is not unique; we have had to address this issue time and again since 1993. Obstinacy is not a virtue in this matter. Bolstering a witness' testimony, especially in sex crimes cases that have no medical or physical evidence but are solely based on the testimony of victims, is prohibited; it cannot be done by lay witnesses, not by ostensible professionals,

and certainly not by experts purporting to speak definitively on whether another person is being truthful.

Nevertheless, improperly bolstering a witness is not a structural error. It is subject to harmless error review. RCr 9.24; *Sanchez*, 680 S.W.3d at 925. "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 v. Commonwealth*, 309 S.W.3d 239, 249 (Ky. 2010). This test is not whether there was sufficient evidence aside from the improper bolstering to support the verdict. It is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* (quoting *Kotteakos v. United States,* 328 U.S. 750, 765 (1946)).

We cannot evaluate the magnitude of harm this error caused without proper context. Bolstering a witness is obviously an attempt to establish credibility, and credibility is "within the unique province of the jury." *McDaniel v. Commonwealth*, 415 S.W.3d 643, 654 (Ky. 2013). At trial, Boggs put the issue of the delayed reporting of the crimes front and center, declaring in his otherwise brief opening statement, that the girls had years to tell themselves their stories regarding the abuse. We have firmly rejected the use of "delayed reporting" testimony when it is offered as evidence to establish that an alleged victim is acting consistently as would be expected of a victim of sexual crimes. Delayed reporting is one of the five symptoms of Child Abuse Accommodation Syndrome and "we have reversed a number of cases because of trial error in

permitting the use of testimony regarding the so-called 'child abuse accommodation syndrome' to bolster the prosecution's case." *King*, 472 S.W.3d at 528 (quoting *Hellstrom v. Commonwealth,* 825 S.W.2d 612, 613 (Ky. 1992)). But we noted in *Miller v. Commonwealth* that such evidence has one of either two bases: (1) that the victim "had, in fact, been abused because, like other abused children, she delayed reporting the abuse; or (2) to disprove an inference of fabrication arising from the delay in reporting." 77 S.W.3d 566, 571 (Ky. 2002). The first is illegitimate but the second, where it is put in issue by the defense, is not. There was no allegation in *King* that the delayed reporting in that case was evidence of fabrication. *King*, 472 S.W.3d at 527. Here, however, the delayed reporting as evidence of fabrication was one of two defenses raised by Boggs.[7]

Therefore, the Commonwealth had a legitimate interest in establishing the credibility of the children so as to rebut the allegation of fabrication. The Commonwealth went about this the wrong way, certainly. The sole legitimate means to rebut the allegation that the delayed reporting evidenced fabrication was to put the questions to Betty, Susan, and Retta, and leave the credibility of themselves and their answers to the jury. *McDaniel*, 415 S.W.3d at 654. But given the legitimate interest in rebutting the accusation, we cannot say the Commonwealth was acting from purely improper motives. The

[7] The second, based on his closing statement, was that Retta had encouraged the children to lie about the abuse so as to deflect attention away from her as a purported suspect in an arson which resulted in the deaths of three people. To our knowledge from the record, Retta has never been charged with said crimes nor is it an established fact that she was indeed a suspect in the specific incident.

Commonwealth's motivation in offering this evidence is not a part of the analysis—improper bolstering does not cease to be improper merely because the Commonwealth's heart was in the right place. We mention the motivation only to demonstrate the overall context of how this testimony was introduced, and to clarify prospectively that improper bolstering cannot be tolerated merely because of legitimate motivations.

Byrd's testimony was approximately ten minutes long with only one objectionable line of dialogue. While this was an obvious abuse of discretion, Byrd never testified to any details of abuse, nor did she repeat any identification of Boggs by Betty and Susan as their abuser. To quote *Sanchez*,

> These facts are drastically dissimilar to *Colvard*, *Alford* [*v. Commonwealth*, 338 S.W.3d 240 (Ky. 2011)], and *Hoff*. In *Colvard*, six witnesses, both medical and lay, were permitted to repeat various statements of identification, and were additionally permitted to repeat highly inflammatory details of the abuse. In *Alford*, a member of law enforcement and a medical expert similarly testified both to the child's identification of her abuser and to details of the abuse. In *Hoff*, a single medical expert testified to the child's identification of her abuser, to details of the abuse, and to an uncharged bad act that the defendant had taken the child to be sexually abused by another individual.

Sanchez, 680 S.W.3d at 925. In *Sanchez*, we found the CAC nurse's repeating of the victim's statement identifying Sanchez as her abuser to be harmless because the "litany of sexually explicit text messages sent to Jane by Sanchez were highly probative of the fact that he raped her repeatedly and frequently, as were the videos she recorded." *Id.*

Admittedly, this case is a much closer call due to the aforementioned lack of any physical or medical evidence. Nonetheless, we conclude the fleeting

declaration that the girls were not coached combined with the lengthy, detailed, and consistent testimony of Betty and Susan, which was partially corroborated by Retta, was harmless. The conclusion of harmless error is limited to the facts of this case.

Before proceeding further, however, we take one last opportunity to express our concern that Byrd's testimony below did nothing to substantially contribute to the facts of the case. She testified to no information that tended to prove the charges against Boggs. While Boggs correctly objected to Byrd's testimony on bolstering grounds, a basic objection on grounds of irrelevancy would not have been incorrect. "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.'" *Cunningham v. Commonwealth*, 501 S.W.3d 414, 422 (Ky. 2016) (quoting KRE 401). "[A] trial court has absolutely no discretion to admit irrelevant evidence." *Id.* We put bench and bar on notice that the use of CAC forensic interviewers at trial, which we believe to be a common practice, should be more rigorously scrutinized. Even when, like here, there is a legitimate interest to rebut an argument of fabrication, the use of CAC forensic interviewers to bolster the victim is inappropriate. The victim's credibility must stand or fall on his or her own merits as the jury sees fit to determine. *McDaniel*, 415 S.W.3d at 654. Where the CAC forensic interviewer's testimony will offer nothing else that tends to make a fact of consequence to the elements of the case more or less probable, then trial courts should not feel squeamish

in refusing to sit the forensic interviewer. A trial court has authority to control the course of trial; claims that the Commonwealth has a right to put on its case as it sees fit, fall flat when the Commonwealth seeks to introduce irrelevant, improper, or cumulative evidence. *Branham v. Rock*, 449 S.W.3d 741, 749 (Ky. 2014).

D. No Palpable Error in Hearsay Statements Made by Retta and Iva

Finally, Boggs argues several statements made by Retta and Iva constituted hearsay and improper bolstering. None of the arguments are preserved so are reviewed for palpable error. Concerning the first statement, Iva testified in response to defense counsel's questions:

> Counsel: Did you see Jamie beat Retta with a gun?
>
> Iva: Not with a gun, but [inaudible] fighting.
>
> Counsel: They were fighting?
>
> Iva: The night Retta came out of the bedroom and said he was bothering . . .
>
> Counsel: He was bothering her?
>
> Iva: Yeah, she come out and said that he was in there trying to get her pregnant.
>
> Counsel: Get who pregnant?
>
> Iva: [Betty].

"We have long held, 'one who asks questions which call for an answer has waived any objection to the answer if it is responsive.'" *Sheets v. Commonwealth*, 495 S.W.3d 654, 669 (Ky. 2016) (quoting *Estep v. Commonwealth*, 663 S.W.2d 213, 216 (Ky. 1983)). Iva's answer was obviously responsive to the question, "he was bothering her?" as it explained the context

of precisely how Boggs was bothering Retta or Betty. Because asking the question and receiving a responsive answer constitutes waiver, we will not review this piece of testimony.

As for Retta, she testified Betty told Boggs the night of the May 2016 incident "please don't, please don't. Not in front of my mommy. Don't. Do it any other time. Not in front of Mommy because I don't want her seeing you killing me." We agree this statement is hearsay.[8] We acknowledge, however, that our rules allow for the admission of excited utterances. KRE 803(2). An excited utterance is one "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* We have identified eight general points to consider for the excited utterance exception:

> (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Souder v. Commonwealth, 719 S.W.2d 730, 733 (Ky. 1986) (quoting Lawson, *Kentucky Evidence Law Handbook,* 8.60(B) (2d ed. 1984)), *overruled on other grounds B.B. v. Commonwealth*, 226 S.W.3d 47, 51 (Ky. 2007). We have also recognized that each case presents different circumstances thus, no precedent

[8] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c).

is likely ever to be precisely on point. *Id.* Consequently, "whether the circumstances in which a particular statement was made qualify as (sufficiently) 'spontaneous' to admit the evidence, is sometimes an arguable point, and when this is so the trial court's decision to admit or exclude the evidence is entitled to deference." *Id.*

Given the factors which are to be balanced and weighed not merely checked off as a list, we conclude this statement qualifies as an excited utterance. It was made while an episode of abuse was occurring so there was no lapse in time between the main act and the declaration nor was there an opportunity or inducement to fabricate the statement. The place of the statement and the excitement of Betty at the prospect of being abused are obvious. The statement is not against her interest or self-serving. *See Hartsfield v. Commonwealth*, 277 S.W.3d 239, 245-46 (Ky. 2009) (holding victim's out of court statement to passer-by that "he raped me" immediately after attack qualified as excited utterance). Lastly, we cannot help but note Betty was available for cross-examination and could have been questioned on this statement. Consequently, we find no palpable error.

The other disputed testimony is again hearsay by Retta of a statement made by Betty, to wit: "Mommy, I ain't going to school . . . I ain't going to school mommy. He'll find me. He'll come and get me[,]" and of both girls: "they told me, 'Mommy, if you tell I'm not talking to you no more. I hate you.'" First, we do not agree these statements were intended to bolster Betty and Susan. The first statement was made on direct examination in the context of Retta

explaining the contact Boggs made with her after she and the family had moved out, generally testifying to constant threats against them if they did not come back. The second statement came in during re-direct examination after Boggs' cross-examination of Retta which focused on her delayed reporting of the crimes.

The Commonwealth generally asserts these statements fall within the state of mind exception to hearsay. KRE 803(3). We agree but for a different reason than offered by the Commonwealth. "[O]rdinarily, statements about a victim's fear of the defendant are not relevant . . . [except] where the defendant claims self-defense or accidental death[.]" *Dillon v. Commonwealth*, 475 S.W.3d 1, 22 (Ky. 2015). While we have held "evidence of . . . [a victim's] emotional injury was directly relevant to prove that she was sexually assaulted[,]" said holding concerned testimony regarding a witnesses' personal observations of behavioral changes in the victim; it did not obviate the hearsay rules. *Dickerson v. Commonwealth*, 174 S.W.3d 451, 471-72 (Ky. 2005). Instead, we conclude the state of mind of Retta and the girls was relevant because fear was an issue in this trial related to Boggs' defense regarding delayed reporting. The climate of fear instilled by his routine physical beatings and the threats to harm or kill the girls or Retta is obviously relevant to counter the accusation that Retta and the girls fabricated their story. Therefore, we find no palpable error.

III. Conclusion

For the aforementioned reasons, we affirm Boggs' convictions and sentence.

All sitting. Lambert, C.J., and Thompson, J., concur. Nickell, J., concurs in part and dissents in part by separate opinion in which Goodwine, J., joins. Keller, J., concurs in result only by separate opinion in which Bisig, J., joins.

NICKELL, J., CONCURRING IN PART AND DISSENTING IN PART: I agree with much of the majority's well-reasoned analysis, but part ways relative to its determination that the improper vouching error may be disregarded as harmless. Therefore, I concur in part, dissent in part, and would reverse and remand for a new trial.

In *Stephens v. Commonwealth*, 680 S.W.3d 887, 905 (Ky. 2023), we observed that improper vouching "by a respected professional gives extra weight to the child victim's testimony and serves to unfairly prejudice the defendant." (Quoting *Hoff v. Commonwealth*, 394 S.W.3d 368, 379 (Ky. 2011)). Contrary to the Commonwealth's argument, Byrd's status as a forensic interviewer, as opposed to a medical professional, does not diminish the prejudicial effect of improper vouching. *Hellstrom v. Commonwealth*, 825 S.W.2d 612, 614 (Ky. 1992). In similar circumstances, we have explicitly held the prohibition on vouching by a medical expert "applies with much greater force to the testimony of a social worker, however well qualified." *Id.*

Additionally, the brevity of Byrd's remark does not offset its prejudicial impact in this instance. This Court has consistently "recognized that such an error has the most impact and is at its apex where the victim's in-court and out-of-court statements are the only evidence linking the defendant to the commission of the sexual assault and the resolution of the case" turns on the

jury's assessment of witness credibility. *Stephens*, 680 S.W.3d at 900 (citing *Chavies v. Commonwealth*, 374 S.W.3d 313, 323 (Ky. 2012); *Alford v. Commonwealth*, 338 S.W.3d 240, 246-47 (Ky. 2011); and *Hoff*, 394 S.W.3d at 377). In such circumstances, we have observed "[t]here can be little doubt that" improper vouching "had the effect of making the jury more likely to believe" the victim's testimony. *Hoff*, 394 S.W.3d at 379. In other words, the prejudicial effect of vouching results, not from direct proof of guilt, but instead from the exertion of an improper influence upon the jury's perception of the victims' account "by suggesting that [a] knowledgeable and reputable [witness] had already accepted his [or her] testimony as truthful." *King v. Commonwealth*, 472 S.W.3d 523, 532 (Ky. 2015).

Here, the trial court permitted a trained and respected professional to essentially vet and validate the truth of the victims' allegations for the jury in advance. Additionally, Byrd's use of quasi-scientific jargon, particularly the unidentified "factors" she used to determine whether the victims had been coached, amplified the prejudicial effect of her otherwise fleeting remark. Such specious testimony is particularly misleading here because "there is no such thing as expertise in the credibility of children." *Newkirk v. Commonwealth*, 937 S.W.2d 690, 693 (Ky. 1996).

Indeed, as the Supreme Court of Michigan aptly observed, "in cases hinging on credibility assessments . . . the jury is often 'looking to "hang its hat" on the testimony of witnesses it views as impartial.'" *People v. Musser*, 835 N.W.2d 319, 332 (Mich. 2013) (quoting *People v. Peterson*, 537 N.W.2d

857, 868 (Mich. 1995)). Because the proof at trial centered on witness credibility, I simply cannot be certain the improper vouching error did not affect the ultimate outcome in the present matter. *Colvard v. Commonwealth*, 309 S.W.3d 239, 250 (Ky. 2010).

Kentucky law "entrust[s] to the wisdom of the twelve men and women who comprise the jury the responsibility to sort between the conflicting versions of events and arrive at a proper verdict." *Newkirk*, 937 S.W.2d at 696. Because Byrd's improper testimony invaded the exclusive province of the jury and otherwise unfairly "tipped the scales" in the Commonwealth's favor, I believe our precedents compel reversal for a new trial. Therefore, I must respectfully concur in part and dissent in part.

Goodwine, J., joins.

KELLER, J., CONCURRING IN RESULT ONLY: I agree with much of the Majority's well-written opinion. I write separately, however, because I would affirm the admission of Byrd's testimony regarding Betty's and Susan's prior interviews at the Children's Advocacy Center. Byrd's testimony did not amount to impermissible vouching or bolstering.

There are a few well-established techniques that litigants routinely employ in their attempts to fortify a witness's credibility in the eyes of the jury. Parties regularly attempt to introduce evidence of a witness's general character for truthfulness; *see Fairrow v. Commonwealth*, 175 S.W.3d 601, 605–06 (Ky. 2005); attempt to introduce evidence that a witness has previously made in an out-of-court statement consistent with their trial testimony; *see Hoff v.*

Commonwealth, 394 S.W.3d 368, 379–80 (Ky. 2011); and even attempt to induce one witness to comment on the veracity of another witness's statements. *See Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997). When a party's attempts to accredit or preemptively rehabilitate a witness run afoul of the rule of law, however, those attempts are often referred to as improper "bolstering." *See* Robert G. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK § 4.00[2] (2024); *see also Bolster*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("To enhance (unimpeached evidence) with additional evidence.").

I write first to clarify that to "vouch" for the truthfulness of another witness's prior statements is a distinct form of improper "bolstering" or preemptive rehabilitation. *See Vouch*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("To answer for (another); to personally assure[.]"). Here, the Commonwealth did *not* attempt to bolster Betty's and Susan's credibility by eliciting their prior hearsay statements from Byrd, *nor* did the Commonwealth invite Byrd to testify as to the victims' general character for truthfulness. Rather, at issue today is whether Byrd improperly bolstered Betty's and Susan's credibility by "vouching" for the veracity of Betty's and Susan's prior statements at the Children's Advocacy Center, thereby invading the jury's province as the sole arbiter of witness credibility. *See Johnson v. Commonwealth*, 405 S.W.3d 439, 459 (Ky. 2013), *overruled on other grounds by, Johnson v. Commonwealth*, 676 S.W.3d 405 (Ky. 2023). Boggs specifically asserts, and the Majority holds, that to express an opinion as to whether another witness has been "coached" amounts to improper vouching.

As the Majority correctly recognizes, a witness generally may not "vouch for the truthfulness of another witness either directly or indirectly." *Stephens v. Commonwealth*, 680 S.W.3d 887, 900 (Ky. 2023) (citing *Hoff*, 394 S.W.3d at 376). To "vouch" for the truthfulness of another witness's prior statements is a distinct form of improper "bolstering." *See Vouch*, BLACK'S LAW DICTIONARY (12th ed. 2024). The broad prohibition on vouching extends to preclude statements that the testifying witness "believed" another witness's prior statements or allegations, *Stephens*, 680 S.W.3d at 902; testimony that the testifying witness found another witness's statements to be "credible," *id.* at 903; testimony that the testifying witness had "no reason not to believe" another witness's prior statements, *Hoff*, 394 S.W.3d at 376; and even testimony that the testifying witness found another witness's prior statements to be "spontaneous" and "unrehearsed," thereby implying that the testifying witness believed those statements to be "truthful." *Bell v. Commonwealth*, 245 S.W.3d 738, 744–45 (Ky. 2008), *overruled on other grounds by, Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008).

In cases specifically involving allegations of childhood sexual abuse, the error in admitting this type of evidence primarily arises from the reality that a witness's endorsement of the veracity of the victim's prior out-of-court statements amounts to an equal and improper endorsement of the victim's consistent testimony at trial. Further, commenting on the veracity of one or more of the victim's prior out-of-court statements may lend credence to that witness's general character for truthfulness. That is not, however, what

transpired here. The general prohibition on vouching does not serve to exclude testimony that has no bearing on another witness's credibility.

Byrd's isolated statement that she had not personally observed any "factors" or "indicators" that Betty and Susan had been "coached" prior to their forensic interviews does not necessarily bear on Betty's and Susan's credibility. The Majority mistakenly conflates evidence of coaching with evidence of untruthfulness, but that is a logical leap which I am unwilling to make. While a victim may perhaps have been "coached" to lie or give false statements, a victim may have equally been coached to confidently deliver true statements, coached to anticipate certain lines of questioning, or coached to control his or her emotions during an interview. In a legal context, an act of coaching is not per se nefarious, and to have been coached is not necessarily to have been untruthful. *See Coaching*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("1. The training and drilling of someone to improve performance. 2. The practice or an instance of working with a witness before testimony on what questions to expect.").

Furthermore, rather than directly or indirectly express an *opinion* as to the ultimate *truth* of the statements Betty and Susan made during their interviews at the Children's Advocacy Center, Byrd only explicitly testified to her own personal *observations* that the victims failed to exhibit any signs they had been "coached" to give those statements. Admittedly, this is quite nuanced, but in my mind the distinction is crucial. Indeed, by speaking only to her qualifications to identify signs that a child has been coached, and her own

failure to identify any of those signs, Byrd's testimony fell short of delivering any ultimate opinion as to whether the victims had, in fact, been coached. Rather, Byrd's testimony left ample room for the jury to draw its own conclusions as to whether the victims had been "coached" and whether the victims' unknown out-of-court statements were truthful. More simply, Byrd's testimony allowed the jury to "connect the dots" itself. This is not improper vouching. To further emphasize this nuanced situation, Byrd's testimony occurred prior in the trial to Betty's and Susan's testimony, and specifically was referring to their forensic interviews, not testimony that had been or was anticipated to be given at trial.

Accordingly, I urge this Court to join the jurisdictions that have affirmed the propriety of allowing trained witnesses to testify that they failed to observe evidence indicating that an alleged victim of childhood sexual abuse has been "coached." *See State v. Maday*, 892 N.W.2d 611, 621–22 (Wis. 2017); *Ward v. State*, 836 S.E.2d 148, 156 (Ga. App. 2019); *State v. Collins*, 886 S.E.2d 185, 187 (N.C. App. 2023). Byrd's isolated statement did not invade the jury's province as the sole arbiter of Betty's and Susan's credibility. The trial court did not err in this instance, and I would therefore affirm its admission of Byrd's testimony. Because the Majority reaches the correct result in upholding Boggs's convictions, I concur in result only.

Bisig, J., joins.

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