Commonwealth of Kentucky
Supreme Court
No. 2013-SC-291

ETHAN THOMAS HUGHES — **APPELLANT**

V.

On Discretionary Review
From Court of Appeals
2012-CA-264

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify a copy of the Brief for Appellee has been mailed, postage prepaid, to Hon. Rene Williams, Judge, Crittenden Circuit Court, P. O. Box 127, Dixon, Kentucky 42409; by e-mail to Hon. Zac Greenwell, Commonwealth's Attorney, P. O. Box 341, Marion, Kentucky 42064; and by Messenger Mail to Hon. Gene Lewter, Assistant Public Advocate, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, Counsel for Appellant, this 14th day of March, 2014. I further certify the record on appeal was not removed from this court.

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INTRODUCTION

This is an appeal from a judgment of the Crittenden Circuit Court, convicting him of rape in the second degree. He was sentenced to imprisonment for a total of ten years.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal, as the issues are plainly set forth in the briefs and the circuit court record.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

C. H. was born July 25, 1996, and she was 12 years old both at the time she conceived a child and gave birth. (DVD: 01/27/12, 01:11:30). At the time of delivery, hospital personnel realized that she was underage, so they reported possible sexual abuse to the Department for Social Services. A DNA test confirmed that the appellant, Ethan Hughes, is the father of the child. Hughes was charged, tried, and convicted of rape in the second degree. He was sentenced to imprisonment for ten years.

The Sexual Encounters

In early August, 2008, Hughes and C. H. spoke to each other on the telephone, while C. H. was at the home of her friend Brittany Stone, and this occurred before Hughes and C. H. met in person. (DVD: 01/27/12, 01:22:20). Hughes and Stone had been arguing, and at some point, C. H. began to talk to him. (DVD: 01/27/12, 01:22:40). C. H. left Stone's residence and went home, but she was surprised that Hughes was at her house when she arrived. (DVD: 01/27/12, 01:23:45). There, they met for the first time, in person, and this was the same day that she became pregnant. (DVD: 01/27/12, 01:21:43). Hughes told C. H. that his name was Bradley Frazier, which he later explained was his name prior to having been adopted. (DVD: 01/27/12, 01:21:18, 03:16:18). Also present were Laura Copeland, the girl whom Hughes was dating, and C. H.'s mother. (DVD: 01/27/12, 01:23:55).

That night, at about 10:00 or 11:00 p.m., Laura, C. H., and C. H.'s mother went to bed. (DVD: 01/27/12, 01:24:25, 01:25:12). C. H. slept in her mother's room. (DVD: 01/27/12, 01:25:22).

During the night, C. H. got up to go to the bathroom and to get something to eat and then walked in and sat down beside Hughes on the couch. (DVD: 01/27/12, 01:25:39). Hughes was watching television. (DVD: 01/27/12, 01:25:39). Hughes invited her to watch a movie, and then "one thing led into another," including kissing, and they engaged in sexual intercourse. (DVD: 01/27/12, 01:26:20). C. H. believed that her son was conceived at that time, although they engaged in intercourse three different times over the next two days. (DVD: 01/27/12, 01:27:20, 01:27:46). Over the three-day weekend, Hughes stayed there but left and returned at various times. (DVD: 01/27/12, 01:27:38).

Hughes was born September 16, 1989, so at the time of intercourse, he was 19 years of age. (DVD: 01/27/12, 01:42:00). C. H. claimed that she told Hughes that she was sixteen years of age, even though she was only 12. (DVD: 01/27/12, 01:29:13). She testified that she thought Hughes believed her.[1] (DVD: 01/27/12, 01:32:40). During an *in camera* hearing, the prosecutor told the trial judge that he questioned whether C. H. really did tell Hughes that she was 16 years old.[2]

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[1]While Hughes makes much of the fact that C. H. testified that she thought Hughes believed her. (Appellant's Brief, pp. 1, 2), this evidence, while beneficial to the defense, should not have been admitted at trial because the defense did not lay a foundation as to how C. H. could have known what Hughes was thinking at the time. Although defense counsel asked this question during his cross-examination of C. H., the prosecutor did not object, so it is not an issue in this appeal. (DVD: 01/27/12, 01:32:40).

[2]The prosecutor explained that he believed, "She's [C. H. is] trying to protect him, like she tried to protect her momma." (DVD: 01/27/12, 02:43:24). The prosecutor was referring to the fact that C. H. testified that she had previously claimed that intercourse took place at Brittany's house so that her mother would not get into trouble. (DVD: 01/27/12, 01:39:15).

D. H., the child conceived by Hughes and C. H., was born July 21, 2009 — four days before C. H.'s 13th birthday. (DVD: 01/27/12, 01:12:40). Sometime during C. H.'s pregnancy, C. H. heard her mother tell Hughes during a telephone conversation that she was pregnant. (DVD: 01/27/12, 01:36:47). Afterward, C. H. spoke with Hughes about her pregnancy, and Hughes "seemed mad." (DVD: 01/27/12, 01:37:20).

Child Sexual Abuse Report

Neither C. H. nor anyone in her family advised authorities that C. H. had been sexually abused. (DVD: 01/27/12, 01:47:30). When C. H. was admitted to the hospital to give birth, medical personnel noticed that a 12-year-old had delivered a baby. (DVD: 01/27/12, 01:47:30). Hospital employees notified Child Services. (DVD: 01/27/12, 01:47:30). Child Services notified Marion City Police Officer Jerry Parker. (DVD: 01/27/12, 01:47:35). Officer Parker then interviewed Hughes, during which Hughes admitted having had sexual intercourse, more than once, with C. H. but claimed the thought she was 16 years old at the time. (DVD: 01/27/12, 01:42:40, 01:45:15, 03:32:30). Based upon this information, Officer Parker filed a criminal complaint against Hughes, charging him with rape in the second degree. (DVD: 01/27/12, 01:45:30).

On August 11, 2009, Officer Parker took swab samples from Hughes for a DNA test. (DVD: 01/27/12, 01:46:01). Officer Parker afterward took swab samples from both C. H. and D. H. (DVD: 01/27/12, 01:46:23). Officer Bobby West delivered the swabs to the Kentucky State Police Crime Laboratory in Madisonville, where they were examined by Shane Hardison, a forensic biologist. (DVD: 01/27/12, 01:59:28). On September 16, 2011, Hardison hand delivered the swabs to Steve Barrett, a forensic

biologist at the KSP Lab in Frankfort. (DVD: 01/27/12, 02:01:40, 02:01:43, 02:01:57). Barrett extracted the DNA profiles from the swabs and generated profile tables. (DVD: 01/27/12, 02:08:15, 02:09:35). Once the DNA profiles were extracted, Whitney Collins, the supervising forensic biologist at the KSP Lab in Frankfort, forwarded the profile results to the Forensic Science Center at Marshall University, for a statistical analysis. (DVD: 01/27/12, 12, 02:07:20, 02:10:27). Mary C. Fannin, a DNA analyst at Marshall University, determined that Hughes is in fact the father of D. H., with a probability of 99.9999 percent. (DVD: 01/27/12, 02:15:40, 02:20:37; T.R., Vol. I, p. 118).

Indictment and Trial

On August 2, 2010, the grand jury of the Crittenden Circuit Court indicted Hughes, charging him with rape in the second degree. (T.R., Vol. I, p. 17). In a motion filed January 9, 2012, Hughes' trial counsel complained that the Commonwealth's Attorney had told the grand jury, during the indictment proceedings, that an erroneous belief in the victim's age "Is no defense to the crime. Better be right." (T.R., Vol. I, p. 69). As a result of Hughes' motion and complaint, on January 23, 2012, the Commonwealth's Attorney re-presented the case to the grand jury without making this reference, and the grand jury again indicted Hughes for rape in the second degree. (12-CR-2).

On January 27, 2012, Hughes was tried before a jury of the Crittenden Circuit Court. Hughes testified in his own defense. (DVD: 01/27/12, 03:15:45-03:50:04). Hughes did not deny that he had engaged in sexual intercourse with C. H. and did not deny that, at the time, he was 19 years old or that she was 12 years old.

(DVD: 01/27/12, 03:19:19, 03:19:46). Essentially, Hughes attempted to avail himself of KRS 510.030 by testifying that he actually believed C. H. was 16 years old. Hughes claimed C. H. "acted older." (DVD: 01/27/12, 03:18:10). He claimed, after speaking with her on the telephone, he looked her up on "My Space," which posted she was 17 years old. (DVD: 01/27/12, 03:19:03). Hughes said she sounded older on the telephone, although he could not tell much of a difference. (DVD: 01/27/12, 03:19:33). Hughes said that he met C. H. over a weekend and, for that reason, did not realize C. H. was still in school. (DVD: 01/27/12, 03:36:09). While disavowing that he was drunk the entire weekend over which sexual intercourse occurred two to three times, Hughes stated that he might have been wearing "beer goggles," indicating that his judgment might have been too impaired to realize her age. (DVD: 01/27/12, 03:21:53, 03:22:21, 03:49:23). Hughes claimed that C. H.'s mother told him C. H. was 16 years old. (DVD: 01/27/12, 03:19:20, 03:20:23, 03:49:46). However, C. H.'s mother testified as a defense witness and denied she had told Hughes how old her daughter was prior to the pregnancy. (DVD: 01/27/12, 03:55:10-03:55:50).

At the conclusion of the trial, the jury found him guilty of rape in the second degree. (T.R., Vol. I, pp. 121-26). On March 8, 2012, the Crittenden Circuit Court entered judgment against Hughes, sentencing him to imprisonment for a total of ten years. (T.R., Vol. I, pp. 147-49). From this conviction, Hughes appealed to the Kentucky Court of Appeals, but on April 5, 2013, that court affirmed. (2012-CA-628).

On November 13, 2013, this court granted discretionary review.

Other relevant facts will be set forth in the argument portion of this brief.

ARGUMENT

Before proceeding further, it should be emphasized that DNA evidence proved that Hughes was the father of C. H.'s baby. (DVD: 01/27/12, 02:15:40, 02:20:37; T.R., Vol. I, p. 118). Hughes did not dispute (a) that he had engaged in intercourse with C. H.; (b) that C. H. was 12 years of age at the time of conception and at the time the child was born; or (c) that he was 19 years old at the time of conception. In fact, Hughes acknowledges in his brief, "The only question to be determined in the trial was whether appellant believed CH was 16 years old." (Appellant's Brief, p. 2). Thus, the only defense available to Hughes at trial would have been (and was) for him to claim that he did not know that C. H. was less than 16 years of age, thereby invoking the lack of knowledge defense contained in KRS 510.030[3], which states, "In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, . . . the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent."

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[3]KRS 500.100 states, "The commentary accompanying this code may be used as an aid in construing the provisions of this code." The 1974 Official Commentary to KRS 510.030 states, in pertinent part, "**The prosecution is not required affirmatively to establish knowledge of incapacity to consent because this would place an unduly heavy burden on the state. The defendant must raise lack of knowledge of the particular condition as a defense. . . .** The statute does not expressly require that the mistake be 'reasonable.' **Since the accused must raise the defense and since usually there is no source of information about his mistake other than the accused himself, this means that as a practical matter the accused will need to take the stand to testify in his own behalf. At this point the factfinders should be competent to judge his credibility, so that no express requirement of 'reasonable mistake' is necessary.**"

As noted by the Kentucky Court of Appeals, "The jury had the choice to believe him or not to believe him, and they chose not to believe him." (Slip Opinion, p. 5).

I.

THE TRIAL JUDGE PROPERLY OVERRULED HUGHES' OBJECTION TO THE INTRODUCTION OF A PHOTOGRAPH OF C. H. THE DAY AFTER SHE GAVE BIRTH.

Hughes argues that the trial judge erred by permitting the Commonwealth to introduce "a photograph of C. H. taken at the hospital on the day after she gave birth." (Appellant's Brief, pp. 3-8). More specifically, Hughes claims that the photograph was prejudicial because "it had no probative value whatsoever." (Appellant's Brief, p. 19). The Commonwealth disagrees because the photograph was both relevant and probative.

Correctly anticipating[4] that Hughes would claim that he thought the 12-year-old victim was 16 years of age, the prosecutor introduced a photograph of the victim, with her baby, to show how she appeared in the hospital the day after the baby was born, i.e., some nine months after conception and the date of the crime. (DVD: 01/27/12, 01:13:29). Hughes' trial counsel objected on the ground that the photographs do not reflect the type of makeup that C. H. was wearing at the time they engaged in intercourse. (DVD: 01/27/12, 01:13:41). However, as will be shown, neither the testimony of C. H. nor Hughes substantiated defense counsel's argument that makeup caused Hughes to believe she was older than she was.

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[4]During his testimony, Hughes claimed that he believed C. H. was 16 years old. (DVD: 01/27/12, 03:17:54, 03:18:04).

The prosecutor explained that the photograph was not made anticipating litigation and that he was introducing it because he knew that Hughes' defense would be that he believed C. H. was 16 years old and that the jury could decide whether C. H. appeared to be 16 years old — even nine months after Hughes had committed the crime. (DVD: 01/27/12, 01:14:05). Hughes' trial counsel argued that the photographs did not adequately depict the way she looked at the time of the sexual encounter, again specifying that the makeup would have been different. (DVD: 01/27/12, 01:14:53).

The prosecutor stated, "I think it's self-evident from the picture in the hospital that she is underage, clearly." (DVD: 01/27/12, 01:15:05). The trial judge overruled Hughes' objection. (DVD: 01/27/12, 01:15:26). The prosecutor proceeded to ask C. H. to identify the photograph, and C. H. testified that one photo was made in September of 2008 while the second photo was made in the hospital the day after her son, D. H., was born. (DVD: 01/27/12, 01:15:50, 01:16:16). C. H. testified that both photos fairly and accurately depicted how she looked at the time. (DVD: 01/27/12, 01:16:30). C. H. also explained that, at the time of intercourse, she was wearing makeup, but only eyeliner and eye shadow. (DVD: 01/27/12, 01:33:52). The trial judge admitted the photographs into evidence. (DVD: 01/27/12, 01:16:53).

It should be emphasized that Hughes' trial counsel did not raise the objection on any grounds other than the argument that C. H.'s makeup might have been different. (DVD: 01/27/12, 01:13:47). To the extent that Hughes' argument might be construed to complaint of any other issue, it was not raised at trial.

It is quite significant that defense counsel's argument, that C. H.'s makeup might have been different during the sexual encounter than what it was in the photographs, was not borne out by the testimony of the witnesses. During his testimony, Hughes did not claim that the makeup which C. H. was wearing at the time of the sexual encounters convinced him that she was 16 years old. (DVD: 01/27/12, 03:15:47-03:50:04).[5] During cross-examination, the prosecutor presented the photographs to Hughes and asked him, with no objection from Hughes' counsel, whether C. H. looked like the first photograph at the time, to which Hughes responded, "Similar." Hughes also acknowledged that the second photo looked like C. H. at the time they had sex. (DVD: 01/27/12, 03:31:15-03:31:50). Furthermore, it should be again emphasized that C. H. testified that, at the time of intercourse, she was wearing makeup, but only eyeliner and eye shadow. (DVD: 01/27/12, 01:33:52).

So Hughes' own trial testimony indicates that the photograph accurately depicted C. H. at the time they engaged in intercourse. It logically follows that if the photos were accurate, they were relevant and probative. Yet on appeal, Hughes now claims (despite his trial testimony) that the photograph lacked "probative value" because, "It is indisputable that the pictures of C. H. in the hospital with her child did not accurately depict how she looked at the time of the sexual encounter with Hughes."

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[5]In its opinion, the Court of Appeals summarized Hughes' defense by stating, "Hughes testified in his own behalf. He provided several reasons for not realizing C. H.'s age. He testified that (1) he did not realize that she was in sixth grade because their encounter occurred on a weekend; (2) he had 'beer goggles'; (i.e., he had been drinking too much to make a sound judgment); and (3) C. H.'s mother had told him that she was sixteen." (Slip Opinion, p. 5).

(Appellant's Brief, p. 4). Somewhat ironically, Hughes concedes, "the issue was how she looked when Hughes had been with her, nine months previously . . ." (Appellant's Brief, p. 4).

As to this issue, two judges of the Kentucky Court of Appeals ruled as follows:

> In order to be admissible, photographs must be relevant, and their probative value must outweigh their prejudicial effect. Chestnut v. Commonwealth, 250 S.W.3d 288, 302 (Ky. 2008). 'Mere prejudice alone will not exclude a relevant photograph; the prejudicial effect must be substantial. In this regard, a trial judge has broad discretion in determining the admissibility of photographic evidence.' Id. (*citing* Woodall v. Commonwealth, 63 S.W.3d 104, 130 (Ky. 2001)).
>
> Hughes suggests that because C. H. was not wearing makeup in the photograph, it was extremely prejudicial and did not have probative value. We disagree. When she testified, C. H. was fifteen years of age. The only issue at trial was whether Hughes had believed that she was sixteen when she was twelve; her appearance at the time that Hughes met her had probative value. C. H. testified that she was only wearing eye makeup when she and Hughes met. Furthermore, the photograph depicted C. H. nine months after Hughes met her — a substantial period of time in adolescent development. If anything, a photograph taken that much later could only have benefitted Hughes because of the added maturity of nearly another year of age. Additionally, we note that Hughes admitted that he had fathered the child. We cannot agree that the court abused its discretion in allowing the jury to view the photograph.

(Slip Opinion, pp. 7-8).

KRE 401 states, "'Relevant evidence' means 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 402 states, "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible." As previously noted, Hughes acknowledged during his testimony that the photograph was similar to how C. H. looked at the time of intercourse.

Applying KRE 401 and KRE 402, the prosecutor's reasoning was that if C. H. appeared to be less than 16 years of age at the time she gave birth, the jury could certainly conclude that she appeared to be less than 16 years of age at the time of conception. During his closing argument, the prosecutor told the jury that the photo of C. H. in the hospital depicts a young girl whom Hughes could not have actually believed was 16 years old. (DVD: 01/27/12, 06:16:15). Ultimately, the jury concluded that Hughes did not actually believe C. H. to be 16 years of age, or that Hughes' defense was even reasonable.

In his dissenting opinion, Judge Caperton states, "Curiously, make-up often has the effect of making the old look younger and the young look older." (Slip Opinion, Dissent, p. 11). The dissent then concluded that the probative value of the photographs was "outweighed by the extreme undue prejudice to Hughes." (Dissent, p. 11). Respectfully, the Commonwealth will note that this was not a case in which Hughes denied having sexual intercourse with the victim or that he was indeed the father of the child. For that matter, Hughes was provided an opportunity to testify that C. H.'s appearance in the photo differed significantly from the time of intercourse, but he

declined to do so. As the majority opinion aptly notes, the only issue was whether Hughes actually believed that the twelve-year-old child was actually 16 years of age. For this reason, it was relevant for the jury to understand how the victim appeared, notwithstanding the question of whether she was or was not wearing make-up. The dissent seems to overlook the fact that C. H. explained during her testimony that she looked similar to the photograph at the time she had sexual intercourse with Hughes. (DVD: 01/27/12, 01:33:52). To reiterate, Hughes himself agreed that the photographs were similar to C. H.'s appearance at the time of intercourse. (DVD: 01/27/12, 03:31:15-03:31:50). The defense offered nothing to contradict C. H.'s explanation, and as noted above, Hughes himself told the jury that the photograph of C. H. was "similar" to the way she appeared at the time of their sexual contact.

The trial judge properly admitted the photographs because they were relevant to the jury's determination as to whether Hughes actually believed that C. H. was 16 years old at the time of the crime.

II.

THE TRIAL JUDGE PROPERLY REFUSED TO PERMIT HUGHES TO INTRODUCE TESTIMONY THAT C. H. HAD TOLD ANOTHER PERSON THAT SHE WAS 16 YEARS OLD.

The trial judge properly refused to permit Hughes to introduce a prior consistent statement because Hughes made no claim that C. H. had recently fabricated evidence. As previously noted, the victim testified at trial that she told Hughes that she was 16 years of age. (DVD: 01/27/12, 01:29:13).

During an *in camera* discussion at trial, Hughes' counsel advised the trial judge and the prosecutor that he intended to introduce the testimony of Brian Brown [sic Reynolds] whom counsel claimed would confirm that C. H. told him, in an unrelated incident, that she was 16 years of age. (DVD: 01/27/12, 02:39:40). When asked why the defense intended to introduce this testimony, defense counsel stated that "it reinforces the impression that she is in fact 16, at least as far as Ethan . . ." (DVD: 01/27/12, 02:42:35).

As to this issue, the Kentucky Court of Appeals ruled as follows:

> Hughes's final argument is that he should have been allowed to testify about C. H.'s previous sexual activity because the Commonwealth asked him if he had suspected that he was the child's father. There is no merit to this argument. As we already pointed out, the official commentary to KRS 500.030 prohibits reference to the previous sexual activity of a person who is under sixteen years of age. KRE 412(b)(1) provides the following exceptions as to the admissibility of the sexual history of a victim:
>
> > (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;
> > (C) any other evidence directly pertaining to the offense charged.
>
> None of the exceptions applies in this case. There was no question that Hughes had a sexual relationship with C. H. when she was twelve years old. The trial court did not err by preventing him from discussing any other putative fathers.

(Slip Opinion, p. 9).

"Reinforcing the impression" of a prior consistent statement of a witness is exactly what KRE 801A(a) prohibits, which states, in pertinent part, as follows:

> (a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:
>
> (1) Inconsistent with the declarant's testimony;
>
> (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
>
> (3) One of identification of a person made after perceiving the person.

(Emphasis added.)

As previously stated, Hughes' trial counsel made it clear that he wanted to introduce Brian Reynolds' testimony "to reinforce the impression" that C. H. had been telling different people that she was 16 years of age. There was no claim that C. H. had recently fabricated any evidence. Since this defense strategy is prohibited by the Kentucky Rules of Evidence, the trial judge properly excluded Reynolds' proffered testimony.

III.

HUGHES DID NOT OBJECT WHEN THE TRIAL JUDGE CONDUCTED A SHORT CONFERENCE IN CHAMBERS OUTSIDE HIS PRESENCE.

Next, Hughes argues that the trial judge erred by "conducting a pseudo-deposition[6] in chambers of a defense witness without the presence of appellant." (Appellant's Brief, p. 21). The Commonwealth disagrees because (a) it appears that Hughes' trial counsel requested the *in camera* testimony of Jeffrey "Stretch" McNary and (b) there has been no sufficient showing of how this event somehow prejudiced Hughes' defense.

As to this issue, the Kentucky Court of Appeals ruled as follows:

> Hughes next contends that his rights to due process were compromised by the examination of a potential witness outside his presence. After the Commonwealth rested its case, the court met with both counsel in chambers. Hughes's counsel wanted to present testimony from Geoffrey McNary, a friend of Hughes. Counsel intended for McNary to testify that he (McNary) had believed that C. H. was sixteen around the time that Hughes met her. The court summoned McNary to chambers. There, under oath, he previewed his testimony with counsel and the court. After questioning McNary, Hughes's counsel made a strategic decision not to proffer McNary's testimony.
>
> Hughes now claims that he was unduly prejudiced by his absence from the in camera hearing, which he has characterized as a 'deposition.' Depositions are governed by Kentucky Rule[s] of Civil Procedure (CR) 27. According to CR 27.01, a party must petition the court and serve each person named in the petition according to CR 4.

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[6]In his brief to the Court of Appeals, Hughes referred to this as a "deposition." (Appellant's Brief to the Court of Appeals, p. 12). However, throughout his brief to the Supreme Court, he re-characterizes this proceeding as a "pseudo-deposition."

All parties are present at a deposition — as well as a court reporter. In contrast, what happened in court in the course of the trial itself was an in camera review for the purpose of determining if McNary's testimony would be admissible as a matter of law. We cannot agree with its characterization as a deposition.

Additionally, Hughes did not preserve this claim of error. At the time of the conference, his counsel informed the court that Hughes did not need to be present. analysis for palpable error pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 10.26.

Our Supreme Court has held that a palpable error is one that results in 'manifest injustice' affecting a party's substantial rights. Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). It explained that an appellate court may recognize palpable error as one that 'seriously affects the fairness, integrity, or public reputation of judicial proceedings' and thus that an appellate court should probe the record to determine if the error was 'shocking or jurisprudently intolerable.' Id. at 4.

Hughes is correct that a defendant has the right to be present at every critical stage of proceedings. RCr 8.28(1). He has cited Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003). In Caudill, the Supreme Court held that a defendant did not have to be present when only matters of law are being determined. Hughes argues that in this case, he was prejudiced by not being present because his counsel ultimately decided not to present the testimony. We cannot agree. We have reviewed the in camera hearing. Its purpose was to determine if a witness's proffered testimony was admissible. The trial court found that it was admissible. However, McNary's testimony directly contradicted Hughes's arguments. McNary said that C. H. did not act as if she were sixteen and that he thought she might have been fifteen at the most. Therefore, Hughes's counsel declined to present McNary to the jury for the obviously prejudicial impact that it would have produced. Hughes does not offer any proof of how his presence would have caused a different outcome. The integrity of the proceedings was not affected by Hughes's absence from the court's chambers. No manifest error occurred; nor did the trial court abuse its discretion.

(Slip Opinion, pp. 6-8).

A. This argument was not properly preserved for appellate review. Hughes' trial counsel waived his presence during the hearing.

In his brief, Hughes states, "the court permitted the Commonwealth to conduct a pseudo-deposition in chambers of another of Hughes's planned witnesses, a juvenile referred to as Stretch McNary. . . . However, Hughes was not brought in for the pseudo-deposition." (Appellant's Brief, p. 27). Omitted from Hughes' brief is the fact that, at the beginning of an *in camera* hearing, the trial judge asked Hughes' trial counsel whether Hughes should be present, "Do you want Ethan in here?" (DVD: 01/27/12, 02:39:24). Hughes' trial counsel responded, "No. He doesn't need to be in here for this." (DVD: 01/27/12, 02:39:26). At no time did Hughes' counsel request that Hughes be present.

As the hearing progressed, Hughes' trial counsel explained that he wanted to call Jeffrey "Stretch" McNary as a witness because McNary would testify that C. H. had told him that she was 16 years old and that he believed her "for a while." (DVD: 01/27/12, 02:46:30). The prosecutor questioned the relevance of McNary's testimony, noting that C. H. had already admitted during her testimony that she told Hughes that she was 16 years old. (DVD: 01/27/12, 02:46:18, 02:48:23). Hughes' counsel explained that McNary's testimony would show "it is even more likely that he believed" that C. H. was 16 years old (DVD: 01/27/12, 02:47:28) and "here's someone else who believed her." (DVD: 01/27/12, 02:48:36). The trial judge suggested that McNary testify, *in camera,* as to what he knew about C. H.'s representations regarding her age. (DVD: 01/27/12,

02:49:50). At that point, Hughes' counsel left the judge's chambers to request McNary to come into chambers. (DVD: 01/27/12, 02:52:53 through 02:54:33).

In his brief, Hughes states, "The entire pseudo-deposition was conducted without his presence and obviously completely without his knowledge." (Appellant's Brief, p. 22). The record, however, does not bear out, one way or the other, whether McNary testified *in camera* without Hughes' knowledge. It is equally plausible that Hughes' trial counsel discussed this with him during the time frame while he was outside chambers (about 100 seconds).

Hughes then argues, "When McNary was brought into chambers and the deposition began, it was absolutely required that Hughes be present." (Appellant's Brief, p. 22). What Hughes characterizes as a "pseudo-deposition"[7] was merely an *in camera*[8] hearing in which McNary testified, under oath, that he and a friend, D. J. Morris, had met C. H. only once as they were walking toward McDonald's, at which time, he spoke with C. H. and she told him she was "around about 16" years old." (DVD: 01/27/12, 02:55:25,

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[7]Black's Law Dictionary, (8th Ed. 2003) defines "deposition" as "A witness's out-of-court testimony that is reduced to writing & usu. by a court reporter) for later use in court or for discovery purposes. See Fed.R.Civ.P. 30, Fed.R.Crim.P. 15)." Perhaps Hughes has characterized the hearing as a "deposition" (or a "pseudo-deposition") so his case might more squarely fit into the analysis of Snyder v. Massachusetts, 291 U.S. 97 (1934) which stated that the Confrontation Clause "was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination." *quoting,* Dowdell v. United States, 221 U.S. 325, 330 (1911).

[8]The trial judge referred to the proceeding as simply "*in camera.*" (DVD: 01/27/12, 02:49:50). Hughes' counsel's purpose for having an *in camera* hearing was to avoid unduly surprising the Commonwealth, or the trial judge, with testimony that was of questionable admissibility. (DVD: 01/27/12, 02:39:05).

02:56:18, 02:56:31). Four times, McNary admitted that he was intoxicated at the time. (DVD: 01/27/12, 02:55:58, 02:57:13, 03:05:25, 03:06:25). Later that day, Morris told McNary that C. H. was 12 years old. (DVD: 01/27/12, 02:56:20). McNary testified that, once he learned C. H. was underage, he no longer wanted to have anything further to do with C. H. (DVD: 01/27/12, 02:56:28, 03:02:42). McNary testified that he told Hughes "to keep his nose clean and stay out of trouble." (DVD: 01/27/12, 02:58:45). When the prosecutor showed McNary the photographs which had already been admitted at trial, McNary seemed to equivocate on whether C. H. appeared to be as young as she appeared in the photographs. (DVD: 01/27/12, 03:05:45).

Hughes correctly notes that RCr 8.28(1) states, "The defendant shall be present at the arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence." The rule does not address whether the defendant himself, or his counsel, may waive his presence. In Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003), the trial judge offered to have two co-defendants present for a pretrial hearing, but both counsel waived their client's presence. On appellate review, Caudill argued that the trial judge violated RCr 8.28. The Kentucky Supreme Court, however, ruled that the hearing was not a "critical stage of the trial" and disagreed that RCr 8.28 required reversal of the convictions. In the case at bar, Hughes' counsel waived Hughes' presence. Since the defense decided to not even call McNary as a witness, it is difficult to conceive how the *in camera* hearing could be described as a "critical stage of the trial." Indeed, the defense used the information acquired during the *in camera* hearing to make a reasonable, well-informed, strategic

decision not to call McNary, apparently out of fear that if McNary were to be called as a trial witness, he might provide testimony that would either damage the defense.

B. Hughes has failed to show how he was prejudiced. In fact, the *in camera* hearing appeared to benefit Hughes to the extent that he learned that McNary might provide damaging testimony if he were called to testify at trial.

Hughes argues, "It is certainly a reasonable conclusion that his presence could have made a significant difference."[9] (Appellant's Brief, p. 26). Hughes also broadly claims, "This constitutional violation was catastrophic to Appellant's chances at trial." (Appellant's Brief, p. 23). As previously noted, the trial judge certainly disagreed with this characterization and noted that calling McNary as a trial witness could be a "double edged sword." (DVD: 01/27/12, 03:10:03). The Commonwealth disagrees because McNary's *in camera* testimony actually assisted the defense in deciding whether to call him to testify during the trial.

Based upon what transpired in the *in camera* hearing, defense counsel's strategy is obvious from the record. Counsel likely decided (and might have even recommended to Hughes) not to call McNary as a witness for several reasons: (1) that the Commonwealth might make use of McNary's testimony because he would testify that the previously-admitted photographs did not accurately depict her appearance as he remembered it (DVD: 01/27/12, 03:05:48); (2) McNary thought she might have been 15 years old (which would have still be underage) (DVD: 01/27/12, 02:56:45); and

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[9]Hughes' argument differs from what he stated in his brief to the Court of Appeals, wherein he made the conclusory statement that "his [Hughes'] presence would have been extremely helpful in the hearing, and the decision whether to call McNary to testify." (Appellant's Brief to the Court of Appeals, p. 13).

(3) McNary would testify that he was suspicious that C. H. was 16 because of the way C. H. dressed "and the way she would giggle." McNary stated that C. H. would "do like what we call teeny-boppers." Furthermore, McNary stated, "The maturity just wasn't there, you could see it." (DVD: 01/27/12, 02:57:00 through 02:57:15); and (4) McNary admitted he was intoxicated during his brief encounter with C. H.

At the conclusion of the *in camera* hearing, the trial judge ruled that McNary may testify, but noted it might be "a double edged sword." (DVD: 01/27/12, 03:10:03). The record does not reflect, one way or the other, whether Hughes' trial counsel conferred with Hughes about calling McNary as a trial witness; the video only reflects that neither the Commonwealth nor the defense chose to call McNary.

While Hughes alludes to the idea that he might have wanted to call McNary as a witness if he (Hughes) had been present at the hearing to hear McNary's testimony, the law is clearly established that a criminal defense lawyer is not required to call every witness whom the defendant might want. Defense counsel may make a deliberate, strategic choice that such testimony would not be beneficial. Harrison v. Motley, 478 F.3d 750, 759 (6th Cir. 2007). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

With all things considered, Hughes has made an insufficient showing that he was in any way prejudiced by not being present during the *in camera* hearing. McNary

did not testify in front of the jury, but even violations of the Confrontation Clause are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S.673, 679, 684 (1986). See also Greene v. Commonwealth, 197 S.W.3d 76, 83 (Ky. 2006), *citing,* Coy v. Iowa, 487 U.S. 1012, 1021-22 (1988). "Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial." Gosser v. Commonwealth, 31 S.W.3d 897, 903 (Ky. 2000).

IV.

HUGHES DID NOT OBJECT TO THE JURY INSTRUCTION THAT STATED THAT A DEFENDANT BEARS THE BURDEN OF PROVING THAT HE BELIEVED THE VICTIM TO HAVE BEEN OF LEGAL AGE. IN ANY EVENT, THE JURY INSTRUCTION WAS CORRECT BECAUSE KENTUCKY LAW REQUIRES A DEFENDANT TO PROVE HE BELIEVED THE VICTIM TO HAVE BEEN OF LEGAL AGE.

In another unpreserved claim of error, Hughes argues that the trial judge erroneously instructed the jury, to the extent that the defendant bears the burden of proving the defense that he believed C. H. was at least 16 years of age. (Appellant's Brief, p. 26). Hughes further argues, "There is no authority for the inclusion in the instruction on this defense to tell the jury that Appellant has the burden of proof for the defense." (Appellant's Brief, p. 29). The Commonwealth disagrees because (a) Hughes has made an insufficient showing of "palpable error" as required by RCr 10.26 and (b) there was no error at all because the defendant *does* bear the burden of proving that he believed that the victim was at least 16 years of age.

As to this issue, the Kentucky Court of Appeals ruled as follows:

Hughes next argues that the trial court and the Commonwealth improperly informed the jury that the defendant bore the burden of proving his defense; i.e., that he believed C. H. was sixteen years old. In addressing this argument, we again turn to the pertinent statute. KRS 510.030 provides that ignorance of lack of capacity to consent may be proven as exculpatory by the defendant. The accompanying commentary elaborates as follows:

> The prosecution is not required affirmatively to establish knowledge of incapacity to consent because this would place an unduly heavy burden on the state. The defendant must raise lack of knowledge of the particular condition as a defense. . . . The statute does not expressly require that the mistake be "reasonable." Since the accused must raise the defense and since usually there is no source of information about his mistake other than the accused himself, this means that as a practical matter the accused will need to take the stand to testify in his own behalf. At this point the factfinders should be competent to judge his credibility, so that no express requirement of "reasonable mistake" is necessary.

Thus, the statute itself shifts the evidentiary burden as to exculpation to the defendant. The jury's instructions duly reflected the commentary: 'You shall consider what he actually believed and not whether it was a reasonable belief. The burden of proof for this defense is on the Defendant.'

In this case, Hughes testified in his own behalf. He provided several reasons for not realizing C. H.'s age. He testified that (1) he did not realize that she was in sixth grade because their encounter occurred on a weekend; (2) he had 'beer goggles'; (i.e., he had been drinking too much to make a sound judgment); and (3) C. H.'s mother had told him that she was sixteen. The jury had the choice

> to believe him or not to believe him, and they chose not to believe him. There was no error committed by the court.

(Slip Opinion, pp. 4-5).

A. This issue was not properly preserved for appellate review.

When the trial judge was discussing the jury instructions with counsel, Hughes' trial counsel seemed to acknowledge that the defendant bore the burden of proving that he actually believed the defendant was 16 years old. (DVD: 01/27/12, 02:42:44). So what Hughes now claims was error did not escape his trial counsel's attention — counsel knew of the wording of the instructions and declined to object, apparently believing that the instructions adequately reflected Kentucky law.

RCr 9.54(2) requires, "(2) 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." In Martin v. Commonwealth, 409 S.W.3d 340, 346 (Ky. 2013), the Kentucky Supreme Court drew a distinction between wholly omitted jury instructions and erroneous instructions. The court ruled that alleged jury instruction errors as "palpable error" only if the instruction omitted an element of the offense causing manifest injustice, as follows:

> We do not expect the trial judge to anticipate a party's strategic preferences and act upon them *sua sponte*. The trial judge cannot be expected to distinguish a neglectful omission from a deliberate choice. Thus, RCr 9.54 imposes upon the party the duty to inform the trial court of its preferences regarding 'the giving or the failure

> to give' a specific jury instruction. Therefore, when the allegation of instructional error is that a particular instruction should have been given but was not or that it should not have been given but was given, RCr 9.54 operates as a bar to appellate review unless the issue was fairly and adequately presented to the trial court for its initial consideration.
>
> We contrast the foregoing circumstances with the situation in which a defendant's assignment of error is not that a particular instruction should not have been given, but that the instruction given was incorrectly stated. Once the trial judge is satisfied that it is proper to give a particular instruction, it is reasonable to expect that the instruction will be properly given. While a timely objection in the trial court is always necessary to preserve the right of appellate review of a defectively phrased instruction, review under RCr 10.26 is appropriate when an unpreserved error is palpable and when relief is necessary to avoid manifest injustice resulting from a defective instruction. In summary, assignments of error in 'the giving or the failure to give' an instruction are subject to RCr 9.54(2)'s bar on appellate review, but unpreserved allegations of defects in the instructions that were given may be accorded palpable error review under RCr 10.26.

The burden created by KRS 510.030 that the defendant "may prove in exculpation" has not yet been reviewed under the palpable error analysis of RCr 10.26. In any event, there was no error in the jury instructions. "Of course, for the matter to be palpably erroneous, it must be erroneous." Martin, 409 S.W.3d at 346-47.

B. Even if this court were to elect to address this question, the jury instruction correctly reflected Kentucky law.

The underlying assumption of Hughes' argument is that he does not have to prove that he believed the victim to have been at least 16 years of age. (Appellant's Brief, pp. 26-31). By deduction, Hughes claims that the Commonwealth would be required to disprove that he believed she was 16 years of age. Hughes incorrectly

describes Kentucky law because KRS 510.030 states, "In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, . . . the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent." (Emphasis added.) It should be noted that the statute does not identify mistake of age as an affirmative defense but only one which the defendant "may prove in exculpation."

The 1974 Official Commentary to KRS 510.030 states, in pertinent part, as follows:

> The prosecution is not required affirmatively to establish knowledge of incapacity to consent because this would place an unduly heavy burden on the state. The defendant must raise lack of knowledge of the particular condition as a defense. For example, if the victim had an established but not marked mental retardation and the defendant was unaware of such condition, he should be given an opportunity to exculpate himself by asserting that fact as a defense. The statute does not expressly require that the mistake be 'reasonable.' Since the accused must raise the defense and since usually there is no source of information about his mistake other than the accused himself, this means that as a practical matter the accused will need to take the stand to testify in his own behalf. At this point the factfinders should be competent to judge his credibility, so that no express requirement of 'reasonable mistake' is necessary.
>
> This position appears to be consistent with former Kentucky law which in a prosecution for rape of an insane person or idiot required that the accused know and take advantage of that fact. Wilson v Commonwealth, 160 S.W.2d 649 (Ky 1942). However, KRS 510.030 provides a defense for mistake as to the age of the victim. Former Kentucky law did not provide for such a defense.

(Emphasis added.) The Commonwealth acknowledges that it has the burden of proving every element of an offense. KRS 500.070 and In re Winship, 397 U.S. 358, 364 (1970). However, disproving Hughes' defense is not an element of rape in the second degree.

KRS 510.303 is constitutional. In Patterson v. New York, 432 U.S. 197 (1977), the United States Supreme Court approved a New York statute which required a criminal defendant to prove extreme emotional disturbance in exculpation of a murder charge, stating as follows:

> But even if we were to hold that a State must prove sanity to convict once that fact is put in issue, it would not necessarily follow that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment. Here, in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. It has been said that the new criminal code of New York contains some 25 affirmative defenses which exculpate or mitigate but which must be established by the defendant to be operative.

(Emphasis added).

Thus, the jury instructions conformed with Kentucky law, and the Kentucky procedure does not violate any federal or state constitutional provisions.

CONCLUSION

For the above-stated reasons, this court should affirm the judgment of the Crittenden Circuit Court.

Respectfully submitted,

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