ORIGINAL

No. 23-7115

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Timothy D. Hinkle — PETITIONER
(Your Name)

vs.

Commonwealth of Kentucky — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Kentucky
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Timothy D. Hinkle
(Your Name)

P.O. Box 16
(Address)

Lagrange Ky. 40031
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

Petitioner was found guilty of rape first-degree, tampering with a witness and assault fourth-degree during trial. The facts of the case, however, logically Timothy-Hinkle and Lizeth Perez was in a romantic relationship for 6 months and during their relationship there was sexual contact that was consented by both parties. However there was a physical altercation between the two.

Undisputed facts are initially Lizeth Perez wanted to press assault-fourth charges on Timothy Hinkle so he would get incarcerated, however she was unsuccessful when a police officer explained to her that she would have to file and epo/dvo complaint. Lizeth then added to the initial story and said Mr. Timothy Hinkle had sexual assaulted her. She had eventually changed her mind and dropped the sexual assault charges but proceeded with the assault-fourth degree and tampering charges. Lizeth eventually moved away to Mexico, for some months and moved back to Louisville Kentucky. When she moved back, she had gotten incarcerated for a felony burglary and some other charges.

Lizeth Perez was incarcerated for the following charges when suddenly she wanted to pursue with pressing a rape charge on Timothy Hinkle.

The undisputed facts are that Timothy Hinkle was found guilty based off of hearsay allegations. The other facts are that the timing of Lizeth being incarcerated for her own charges and the improper order of her story during trial, Timothy was not allowed to question Lizeth's motives.

Also sexual abuse wasn't presented to the jury instruction as a lesser charge from Rape first-degree.

Petitioner presents the following related questions:

1. DID THE COURTS ALLOW HIM TO HAVE A FAIR AND AN IMPARTIAL TRIAL?

2. WHEN MUST THE COURTS SHOULD FOLLOW THE GUIDE LINES OF THE HEARSAY RULE?

3. WHY ARE THE COURTS ALLOWING KNOWINGLY MISLEADING STATEMENTS TO BE PRESENTED TO THE JURY?

4. WHY WASN'T THE JURY INSTRUCTED A LESSER CHARGE THEN RAPE FIRST-DEGREE?

LIST OF PARTIES

1. Timothy Donell Hinkle, Petitioner, Inmate Number 204416, 1612 Dawkins Road, P.O. Box 6 Lagrange Kentucky, 40031

2. Honorable Annie O'Connell, Circuit Court Judge, Division Two, 700 West Jefferson Street, Louisville Kentucky, 40202.

3. Honorable Russell Coleman, Attorney General Office of the Attorneys 1024 Capital Center Drive, Frankfort Kentucky, 40601.

4. Honorable Danielle Yanelli, Assistant Commonwealth Attorney, 514 West Liberty Street, Louisville Kentucky, 40202.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY D. HINKLE, PETITIONER

V.

COMMONWEALTH OF KENTUCKY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. SUPREME COURTS

Timothy Donell Hinkle, Petitioner, a Kentucky inmate, respectfully petitions for a writ of Certiorari to review the Opinion of the Kentucky Supreme Court of Appeals denying his collateral attack On his conviction and sentence from the Jefferson County Circuit Court, Louisville, Kentucky.

OPINIONS BELOW

The Opinion of the Kentucky Supreme Court of Appeals denying the direct appeal is attached in the Appendix, Appendix-A. The Judgement and sentence from the Jefferson Circuit Court, Louisville, Kentucky.

JURISDICTION

The Supreme Court of Kentucky denied the Direct Appeal September 28, 2023.

See Appendix-1. This court's Jurisdiction is invoked under 28 U.S.C. Sec 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Fifth and Fourteenth Amendments of the Constitution of the United States.

The Sixth Amendment to the united states constitution provides as follows:

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defence.

The 14th Amendment to the United States Constitution provide as follows:

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United Stated, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts of this case as found by the panel of the Kentucky Supreme Court of Appeals

This case as follows:

Timothy Hinkle and Lizeth Perez was in a romantic relationship for 6 months. On June 5,2018, L.P.O. (Lizeth Perez) picked up her boyfriend, Timothy Hinkle, from The Community Corrections Center (CCC) in Louisville, where he was incarcerated. Timothy Had job search privileges authorized by a judge, so he could leave the jail on weekdays to Search for employment. L.P.O. allowed Hinkle to drive her car. While stopped at a red light, Hinkle asked L.P.O. a question about sex. At trial L.P.O. could not remember the exact question Or her exact answer but testified that he became angry. Hinkle became physical with L.P.O. After stopping at a couple of other places Hinkle drove to his uncle's house and parked inside of The garage. He asked L.P.O. to perform oral sex on him and she refused. L.P.O. testified that Hinkle helped her out of the front seat, gently laid her on the back seat and took off her pants. Hinkle then performed oral sex and sexual intercourse with her without her consent. L.P.O. eventually returned Hinkle back to (CCC). L.P.O. went to a friend's house to stay the night there. She did not call the police that night. On the recorded phone calls Hinkle apologized, acknowledging he "roughed her up" but claiming "he did not beat her ass." Hinkle showed up at L.P.O.'s friend's house asking to speak with L.P.O., that's when L.P.O. asked the friends mother to call 911, telling her that Hinkle has been violent the previous day. Police responded to L.P.O.'s friend's house, by that time Timothy wasn't around. L.P.O. disclosed a physical assault to Detective Parson but did not mention a sexual assault. L.P.O. eventually spoke with Sergeant Crick and finally disclosed the sexual assault to the officer. Later that day L.P.O. underwent a sexual assault nurse examination (SANE) where she was interviewed again, evidence was collected and photographs were taken. At that time L.P.O. told Detective Tony Gipson from the sex crimes unit of L.M.P.D. that she did not want to pursue charges against Hinkle related to sexual assault. Detective Gipson brought charges against Hinkle for only Wanton Endangerment, and Assault in the Fourth Degree. After the assault L.P.O. went away to Mexico for a few months. Upon her return L.P.O. was arrested for Burglary in the First Degree. Subsequent to the arrest, L.P.O. wanted to pursue the sexual assault charge of Rape in the First Degree. Hinkle was tried and convicted on all charges by a Jefferson County jury. He was sentenced to twenty-one (21) years in prison, consistent with the jury's recommendation.

Id.; Appendix A-1. pg.4-5 II. ANALYSIS (MEMORANDUM OPINION OF THE COURT)

the Supreme Court of Kentucky affirmed the Circuit Court. The Court wrote:

Hinkle alleges the trial court committed three errors that compel a reversal of his convictions. First, he argues that the trial court erred in excluding evidence of L.P.O.'s arrest for burglary in the first-degree. Second, he argues that the trial court erred in admitting multiple hearsay statements through the SANE nurse. Finally, he argues that the trial court erred in refusing to instruct the jury on sexual abuse in the third-degree as a lesser included offense of rape in the

first-degree. We address each of Hinkle's arguments in turn.

The court's reviewed Hinkle's arguments and affirmed the circuit court's decision. The three Error's that Hinkle argued are in the Appendix A pg.5-18,

A. Evidence of L.P.O.'s Arrest, B. Hearsay Testimony from SANE Nurse, C. Lesser-Included Offense Instruction

The Kentucky Supreme Court admittedly agreed to the obvious error's about double hearsay that were allowed in court but still Affirmed with the lower court's decision. See. Pg.13 (bottom page-note)

REASONS FOR GRANTING THE PETITION

Mr. Hinkle did not get a fair and impartial trial the defense was hindered when the courts erroneously allowed palpable error into the court's during trial. The truth seeking function of the trial process has been violated. Below are the error's that was allowed in the court's during trial.:

> L.P.O. initially declined to pursue her claim that Timothy Hinkle sexually assaulted her. She later gave another statement renewing that allegation the day after she was arrested for burglary. The trial court erred when it prevented defense counsel from introducing L.P.O.'s arrest as relevant evidence of her motivation to give a second statement.

This issue is preserved. Before trial, commonwealth moved to prohibit the defense from cross-examining L.P.O. about her own criminal cases. TR I, 71-75. One of those cases was a burglary and two counts of unlawful transaction with a minor case that was pending when commonwealth filed the motion, see Id. at 72, but had resolved with L.P.O. being placed on felony diversion, VR, 8/17/21, 2:33:32-2:32:01.

Defense counsel argued that L.P.O.'s arrest was relevant because it may have influenced her decision to ultimately pursue a sexual assault charge against Timothy Hinkle. Id. at 2:35:54-2:36:14, 2:37:08-2:38:19, 2:39:39-2:39:48. Counsel also said that L.P.O.'s statement after she had been arrested-in addition to confirming that she wanted to go forward with the sexual assault charge-differed in other ways from her initial statement. Id. at 2:43:36-2:44:54. So, counsel concluded, "the inference certainly be that she...changed her story...or changed her position on it and changed some of the details in order to...make this look more like a rape in order to curry a certain amount of favors what she had going on." Id. at 2:45:02-2:45:18.

The trial court granted commonwealth's motion, ruling that the defense "shall not...cross exam

[L.P.O.] about...the plea and those convictions or circumstances of the statement." Id. at 2:46:51-2:47:02. The trial court then suggested that defense counsel renew his obligation when he would have asked about L.P.O.'s arrest. Id. at 2:47:04-2:47:13. Defense did so when cross-examining Detective Tony Gipson, stating that "this is when I would...request to get into the fact that she was arrested...and that is when the first contact happened. He has testified that he didn't speak to her or attempt to speak to her before that date." Id. at 10:01:21-10:01:32. The trial court said that the obligation was preserved and overruled. Id. at 10:01:32-10:01:34 A trail court's evidentiary ruling is reviewed for an abuse of discretion. Brown v. Commonwealth, 540 S.W.3d 374, 377 (Ky. 2018) (citations omitted). A trail court abuses its discretion when its ruling was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d. 941, 945 (citation omitted). The trial court's abuses its discretion in this case.

L.P.O. said that on June 5, 2018, Timothy physically assaulted her, see VR, 8/18/21, 10:31:54-10:33:17, 10:34:34-10:36:21, and had nonconsensual sex, see Id. at 10:42:01-10:46:36, 11:48:44-11:49:02. She spoke to the police the next day, June 6. See Id. at 3:53:00-3:53:07, 3:54:16-3:54:53. She only mentioned a physical assault to the first officer she spoke to. Id. at 4:00:40-4:00:47. But she told a second officer that she had forgotten to say that she was also sexually assaulted. Id. at 4:10:57-4:11:27, 4:15:04-4:15:22. However this has taken place after the officer stated that "the protective order was just a piece of paper and people break them," in the beginning L.P.O. had motives once she added to her story. That's when she told a second officer that she had forgotten to say she was also sexually assaulted. Id. at 4:10:57-4:11:27, 4:14:04-4:15:22.

L.P.O. agreed to go to the hospital. Id. at 4:10:57-4:11:27, 4:15:04-4:15:22. When there, she again said that she had been physically been assaulted, VR, 8/19/21, 10:58:00-10:58:06, and she was interviewed by Sexual Assault Nurse Examiner Vicki Yazel and Detective Tony Gipson, Id. at 9:39:55-9:40:08. She declined, however, to pursue the sexual assault allegation. Id. at

9:41:18-9:41:44. She testified that she reached this decision because "I was sad, I just I didn't, I felt bad 'cause... I don't," and she added that she "still cared" about him. VR, 8/18/21, 11:31:28-11:31:48.

L.P.O. left the country after June 6. VR, 8/18/21, 11:31:54-11:32:05. She returned three to four months later, she testified. Id. at 11:47:48-11:47:59. She claimed that when she got back, she had decided to pursue the sexual assault claim. Id. at 11:48:01-11:48:33.

L.P.O. spoke with Detective Gipson for the second time more then five months after June 6, on November 29, 2018. VR, 8/18/21, 9:45:15-9:45:25. He did not try to contact her between those dates, he said, because "it was my understanding that she...left the country and went to Mexico." Id. at 10:00:49-10:00:57. He testified that, "situations like this, in... times of trauma...its always, the appropriate thing to do is to do two interviews." Id. at 9:45:34-9:45:41. During this second interview, L.P.O. said that her mother did not want to let this alleged sexual assault go. 8/18/21, 3:06:01-3:06:14.

L.P.O. was arrested for Burglary and two counts of unlawful transaction with a minor for her second interview with Detective Tony Gipson. TR I, 72. Defense counsel believed that the police interviewed her that day. VR, 8/17/21, 2:37:18-2:37:24.

The following day, L.P.O. and Detective Gipson spoke for a second time. See VR, 8/19/21, 9:44:40-9:46:04. When they did, defense counsel explained, Detective Gipson "mentions conversations with...I believe [the prosecutor] as well as a victim advocate...towards the beginning of that interview," and tells L.P.O. that "its his understanding that she now wishes to go forward with the sexual assault charges." VR, 8/17/21, 2:37:29-2:37:46.

The prosecutor, meanwhile, asserted, that L.P.O. had "reached out" in August when she was back in the country; that the prosecutor and the victims advocate spoke to her; and that L.P.O. "wanted to go forward with sexual assault charges." Id at 2:38:33-2:38:49. The prosecutor stated that she told the Detective this and that "its always protocol to kinda do another follow-up interview," Id. at 2:28:49-2:38:58, though as mentioned above, Detective Gipson would

testify that he did not try to contact L.P.O. between June 6 and November 29 because he understood her to be out of the country, VR, 8/19/21, 10:00:48-10:01:00. At first, the prosecutor further asserted that "it just took that there were some, I think, some scheduling issues, and it just happened that the time that we had scheduled the interview, she had gotten arrested for the... burglary." VR, 8/17/21, 2:38:59-2:39:07.

The prosecutor clarified, however, when the trial court sought to confirm that the interview was scheduled before L.P.O. was, arrested:

I'm saying that there was communication to get it scheduled, we were getting it coordinated... I don't want to mislead, saying that we had it set beforehand, but there was, we were getting it organized to get it set up, yes. Id. at 2:39:16-2:39:30. (trial court's interjections omitted).

L.P.O.'s charges resolved with her being placed on pretrial diversion. VR, 8/17/21 2:33:33-2:34:01. Timothy Hinkle's jury heard that she is a convicted felon. VR, 8/18/21, 10:29:30-10:29:33. The jury did not learn, however, that she had been arrested the day before she gave her second statement to Detective Gipson. It should have.

2. L.P.O.'s arrest for burglary was relevant evidence because it created because it Created a motive for her to give another statement to Detective Gipson renewing her claim That Timothy Hinkle had sexually assaulted her.

"Admissibility of evidence tending to prove the bias of a witness is a matter of relevancy." Miller ex rel. Monticello Banking Co. v. Marymount Med. Ctr., 125 S.W.3d 274, 281 (Ky. 2004) (citing United States v. Abel, 469 U.S. 54, 50-52 (1984). Evidence is relevant when it has "any Tendency to the existence of any fact of consequence to the determination of the action more Probable that it would be without the evidence. KRE 401/FRE 401. So "[a]ny proof that tends to Expose a motivation to slant testimony one way or another satisfies the requirement of

Relevancy. The range of possibilities is unlimited..." Miller, supra, 125 S.W.3d at 281 (quoting Robert G. Lawson, The Kentucky Evidence Law Handbook, 4.15, p. 183 (3d ed. 1993) (ellipsis In Miller). L.P.O.'s own arrest for burglary is such evidence.

It is well settled "that the defendant has a right to expose the fact that a testifying witness who Has criminal charges pending 'thereby [may posses] a motive to lie in order to curry favorable Treatment from prosecution." Star v. Commonwealth, 313 S.W.3d 30, 38 (Ky. 2010) (quoting Williams v. Commonwealth, 569 S.W.2d 139, 145 (Ky. 1978)(2013). While L.P.O.'s charges were no longer pending when she testified in this case, she had a motive to lie before Timothy Hinkle's trial.

L.P.O. was arrested on November 28, 2018, VR, 8/17/21, 2:37:09-2:37:17; charged with First-degree burglary and two lesser felonies, TR I, 72; and faced a minimum 10-year sentence, See KRS 511.020(2), KRS 532.060 (2)(b). The very next day-and more than five months after she had declined to pursue a sexual assault allegation against Timothy Hinkle, see VR, 8/17/21, 9:39:55-9:40:12,9:41:44-she gave a second statement to Detective Gipson renewing that claim, see VR, 8/19/21,9:45:14-9:46:05; VR, 8/17/21, 2:37:29-2:37:46. A reason conclusion to draw from this is that L.P.O.:

(1) Resolved that Mr. Hinkle had sexually assaulted her and declined to pursue criminal charges.

(2) was arrested for her own charges; and then

(3) chose to pursue her previous claim alleging that Mr. Hinkle had sexually assaulted her with the hope That she would receive a break in her own case.

Consequently, because L.P.O.'s arrest gave her motive to allege that she had been sexually

Assaulted, it was relevant, it was relevant evidence at Mr. Hinkle's trial because it made her Claim less probable. See KRE 401/FRE 401. And because relevant evidence is admissible unless It is prohibited by rule, L.P.O.'s arrest was admissible in this case. See KRE 402/FRE 402.

This court found reversible error in an analogous situation in Zachery v. Commonwealth, 580 S.W.3d 220 (Ky. 1979)(overruled on other ground by Commonwealth v. Hinton, 678 S.W. 388, 390 (Ky. 1984)). In this case Mr. Zachery appealed after a jury acquitted him of rape and Kidnapping, convicted him of the lesser included offense of unlawful imprisonment, and found Him to be a persistent felony offender. Zachery, supra, 580 S.W.2d at 221.

The jury in Zachery learned that the prosecuting witness had given the police a false name, And an investigating officer acknowledged "that the police late became aware she was a Runaway from juvenile authorities." Id. but the trial court excluded from trial the fact that the Prosecuting witness had an active arrest warrant at the time of the alleged incident, and it Prohibited defense from asking the officer whether he had gone to court to get her case Dismissed. Id. By avowal, the officer said he went to court, explained the prosecuting witness's Circumstances, including that she had allegedly been raped, to who seems from the opinion to Be her attorney, and that person, he believed , "made a motion to file charges away, and well, Whatever you call it." Id. at 222. This court "h[e]ld that the exclusion of it constituted reversible error." Id.

Likewise, it was relevant in Mr. Hinkle's case that L.P.O. was facing her own charges when Alleging that she had been sexually assaulted. To be sure, there was no formal agreement Between L.P.O. and the Commonwealth contingent on her cooperation and testimony against

Mr. Hinkle. See VR, 8/17/21, 2:36:44-2:36:56. But Zachery does not say anything about a deal For the prosecuting witness to testify in that case either. Therefore, consistent with Zachery, The trial court erred in this case when it prevented defense counsel from introducing L.P.O.'s Arrest as relevant evidence of her motivation to give a second statement renewing her claim That Timothy Hinkle had sexually assaulted her. Do to the **6th Amendment** and the **14th Amendment** under **The United States Constitution** Mr. Hinkle is required the **Due Process Clause**, which has been violated. Chambers v. Mississippi, 410 U.S. 284 ((1973) (citing) (Nevada v. Jackson, 133 S.ct. 1990, 186 I.ED.2d 62, 569 U.S. 505 (2013)).

The trial court's error requires that the judgment be reversed.

The trial court's error in preventing defense counsel from introducing L.P.O.'s arrest as Evidence of what motivated her to give a second statement renewing her claim that Timothy-Hinkle has sexually assaulted her requires that the judgement be reversed.

An evidentiary error "may be deemed harmless... if the reviewing court can say with fair Assurance that the judgement was substantially swayed by the error." Winstead v. Commonwealth, 283 S.W.3d 678, 689 (Ky. 2009) (citing) (Kotteakos v. United States, 238 U.S. 750 (1946)). That cannot be said here.

Timothy Hinkle and L.P.O. dated for five to six months. VR, 8/18/21, 10:30:56-10:31:04. They Had consensual sex during that time. Id. at 3:16:12-3:16:18. But L.P.O. claimed that she did not Consent to have sex with him on June 5, 2018. Id. at 3:16:19-3:16:24. The jury agreed, and convicted Mr. Timothy of rape. TR II, 193-194. So while Mr. Hinkle and L.P.O. had a consensual Sexual relationship, the jury did not know that L.P.O. had been arrested and charged with three

Felonies the day before she spoke with Detective Gipson for a second time and gave a Statement renewing her claim that Mr. Hinkle has sexually assaulted her. had the jury known This, there is a reasonable probability that it would have concluded that L.P.O. gave this Statement "to curry favor from the prosecution" for her own charges, Star, supra, 313 S.W.3d at 38 (quotation marks and citation omitted), and Mr. Hinkle did not have nonconsensual sex with her that day. Consequently, the judgement must be reversed.

II. L.P.O. told Sexual Assault Nurse Examiner Vicki Yazel that Timothy Hinkle sexually Assaulted her in her car at his uncle's house; that she had said to him that she did not want to have sex with him at that time; and that he said to her that she no longer wanted to perform oral sex on Him. These out-of-court assertions were inadmissible hearsay. The trial court erred when it allowed the Commonwealth to introduce them through Nurse Yazel.

A. preservation. This issue is preserved. Defense counsel objected to Nurse Yazel reading to the Jury the narrative that L.P.O. gave to her because it was hearsay. VR, 8/19/21, 10:59:20-10:59:49. The trial court ruled "that the Commonwealth's proposed... statements are Admissible under KRE 803(4) I'll allow it." Id. at 11:02:05-11:02:13.

Hearsay is an out-of-court statement that is offered "to prove the truth of the matter Asserted," KRE 801(c)/FRE 801 (c), unless permitted by rule, it is not admissible, KRE 802/FRE 802. A trial court's ruling on whether evidence is inadmissible hearsay is reviewed for an abuse of discretion. McNeil v. Commonwealth, 468 S.W.3d 858, 872 (Ky. 2015) (citation omitted).

Trail court abused its discretion when it's ruling "was arbitrary, unreasonable, unfair, or Unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)(citations omitted). The trial court abused its discretion when it permitted the Commonwealth to introduce inadmissible hearsay through Nurse Yazel.

1.L.P.O.'s out-of-court assertions to Nurse Yazel were hearsay.

SANE Nurse Vicki Yazel L.P.O. VR, 8/19/21, 10:57:08-10:57:20. Nurse Yazel testified that an

Exam begins with a "medical forensic statement" so that she knows were to collect evidence.

Id. at 10:58:58-10:59:03. After the trial court ruled that these statements were admissible,

Nurse Yazel read aloud a lengthy narrative that included, among other assertions, L.P.O.'s

Claim that Mr. Hinkle sexually assaulted her in her car at his uncle's house, that she told him

That she did not want to have sex with him, as the following part of the trial shows:

Nurse Yazel and the prosecutor spoke simultaneously at one point. For clarity, this transcript is Modified to the extent that it places the speaker's complete thoughts together. The substance has not been altered.

Nurse Yazel: She said "I met up with him at 8:30 and dropped him off at 12:30. He was Driving the car yesterday. He got mad at me and punched the horn at least 10 times. Im not Sure what was said after he grabbed me by the hair and then he grabbed me by my Throat. He spit on me and slapped my head up against the door."

Commonwealth: I'm sorry. You said slap.

Nurse Yazel: slammed. Im sorry. "Slammed my head up against the door. He grabbed my hair again. He went to his uncle's and acted like everything was fine. We went to the car and that is when the sexual intercourse happened and I started crying and he would not stop. He got mad because I wouldn't have sex with him because I was sore. He said I had to stay sore, the only time I could not have sex with him was on the weekends. After the assault, he acted like nothing had happened and like it was just another day. I was sitting in the passenger seat and he was standing there and he said you don't even want to suck my d--- anymore. I didn't say anything. He grabbed me up and cleaned off the back seat and that is when he pulled my pants down and I said I didn't want to. I did it anyways and guess that is when he got his frustrations out and I was crying and wiping off and got back in the front seat. These marks on my neck are hickeys from a few days before but my neck is really sore when I touch it or move."

Id. at 11:02:28-11:03:53.

The Commonwealth introduced this narrative statement to show that what L.P.O. said

To Nurse Yazel was true. Therefore, it was hearsay KRE 801(c)/FRE 801(c). And while nurse

Yazel did not name Mr. Hinkle when reading aloud this narrative, identity was not at issue in This case. See VR, 8/19/21, 10:09:17-10:09:40. So L.P.O.'s statement were allegations against Timothy Hinkle. Consequently, the jury heard that L.P.O. said to Nurse Yazel That Mr. Hinkle sexually assaulted her in a car in his uncle's garage; that she told Mr. Hinkle That she did not want to have sex with him at that time; and that he remarked to her that she No longer wanted to perform oral sex on him. Because these assertions were introduced for Their truth, they were only admissible if they fell under an exception to the general hearsay rule KRE 802/FRE 802. They did not.

2. L.P.O.'s out-of-court assertions to Nurse Yazel that Mr. Hinkle sexually Assaulted her in her car at his uncle's house, that she told him that she Did not want to have sex with him at that time, and that he said to her That she no longer wanted to perform oral sex on him were not admissible Under any exception to hearsay rule.

The trail court ruled that L.P.O.'s statements to Nurse Yazel that the Commonwealth sought to introduce were admissible under KRE 803(4), exception to the hearsay rule for out-of-court Statements that were made for the purpose of medical treatment or diagnosis. See VR, 8/19/21, 11:02:05-11:02:13. The exception states that:

> The following are not excluded by the hearsay rule, even though the declarant is Available as a witness:
>
> (4) statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

KRE 803(4)/FRE 803(4) So, to be admissible under this rule:

"(1) the declarant's motive in the making the statement must be consistent with the purposes of promoting treatment; and,

(2) the content of the statement must be such as reasonably relied on by a physician in treatment or diagnosis."

Colvard v. Commonwealth, 309 S.W.3d 239, 245 (Ky. 2010) (quotation marks and citations omitted) (line breaks added here). This rule does not apply to these out-of-court assertions. To begin, the L.P.O.'s claim that the alleged sexual assault occurred in her car in Mr. Hinkle's Uncle's garage was not "reasonable pertinent to treatment or diagnosis." KRE 803(4)/FRE(4). The location where, according to L.P.O., the alleged sexual assault took place would not affect how to diagnose or treat her. This claim was inadmissible hearsay. The same is true for L.P.O.'s assertion to Nurse Yazel that she told Mr. Hinkle that she did not want to have sex with him at that time. What L.P.O. allegedly said to Mr. Hinkle could not lead to any medical treatment or diagnosis. Thus, this statement was not admissible under KRE 803(4)/FRE 803(4) either. L.P.O.'s out-of-court claim that Mr. Hinkle told her that she no longer wanted to perform oral Sex on him is no different. Indeed, L.P.O. testified that he wanted her to perform oral sex on him that day, but that she said no and did not do it. VR, 8/18/21, 10:42:52-10:43:09. Thus, L.P.O.'s assertion to Nurse Yazel that Mr. Hinkle allegedly made a comment to her about a Sex act that she did not perform would not be "reasonably relied on by a physician in treatment diagnosis." Colvard, supra, 309 S.W.3d at 245 (quotation marks and citations

omitted). So this statement, too, was not admissible under KRE 804(4)/FRE 804(4).

Moreover, L.P.O.'s claims to Nurse Yazel were not admissible as prior consistent or prior inconsistent statements.

KRE 801(a)/FRE 801(a) explains, in part, that testifying witness's out-of-court statements maybe Admissible when it is (1) inconsistent with the declarant's testimony, or when it is

"(2) [c]onsistent with the declarant's testimony and is offered to rebut an expression or implied charge against the declarant must be "examined to concerning the statement, with a foundation laid as required by KRE 613/FRE 613," for an out-of-court assertion to be admitted under this rule. Id. because that did not happen, this rule does not apply here.

Nurse Yazel interviewed L.P.O. with Detective Tony Gipson. VR, 8/19/21, 9:39:55-9:40:08. The Commonwealth asked L.P.O. at trial is she recalled speaking to Detective Gipson, VR, 8/18/21, 11:18:13-11:18:20, and she testified that she decided to not pursue sexual assault charges after Talking to him, Id. at 2:46:28-2:49:42; about what she told Detective Gipson about her Conversation with Mr. Hinkle before they got in the back seat of the car, see Id. at 3:10:04-3:10:43; and that she told Detective Gipson that the red marks on her neck were "hickeys," Id. at 3:13:23-3:13:30.

L.P.O. was never examined at trial-by either party- about her assertions to Nurse Yazel that Mr. Hinkle sexually assaulted her in her car at Mr. Hinkle's uncle's garage, that she did not

Want to have sex at that time, and that he said to her that she no longer wanted to perform Oral sex on him. Therefore, they were not admissible under KRE 801(a)FRE 801(a), whether They were consistent or inconsistent with her testimony. In sum, these assertions that L.P.O. made to Nurse Yazel were inadmissible hearsay. Therefore, the court erred in allowing the Commonwealth to introduce them during Nurse Yazel's testimony.

Being that the investigation wasn't investigated properly, make these allegations hearsay. Detective Gipson never had spoken with Mr. Hinkle or Mr. Hinkle's Uncle, or to see if this Uncle exist with a garage as L.P.O.'s claims during these allegations.

The trial court's error requires that the judgement be reversed.

The trial court's error in allowing inadmissible hearsay evidence through Nurse Yazel that Supported L.P.O.'s claim that Timothy Hinkle had sexually assaulted her was not harmless. Therefore, the judgement must be reversed.

An evidentiary error is harmless when the appellate court can "say with fair assurance that the Judgement was not substantially swayed by the error." Winstead v. Commonwealth, 283 S.W.3d 678, 689 (Ky. 2009) (citing) (Kotteakos v. United States, 238 U.S. 750 (1946)). This is not Such an error.

L.P.O. had a consensual sexual relationship with Timothy Hinkle, but she claimed that she did Not agree to have sex with him on June 5, 2018. VR, 8/18/21, 3:16:12-3:16:24. The Commonwealth supported this claim at trial with inadmissible hearsay assertions that she Made to Nurse Yazel.

L.P.O. testified that Timothy Hinkle had nonconsensual sex with her in her car in his uncle's Garage, see Id. at 10:42:01-10:46:36, 11:48:44-11:49:02; that she was too scared to tell Mr. Hinkle, "no," when he was taking her to the back seat of the car, Id. at 10:45:52-10:46:10; and that, before he had sex with her, "I remember he asked me something about not giving him... Oral sex, so... he pulled out his d--- and told me to suck on it, and I told him no, and I didn't do it," Id. at 10:42:52-10:43:08.

Then, as the last witness in the Commonwealth's case-in-chief, Nurse Yazel read aloud L.P.O.'s assertions to her that Mr. Hinkle has sex with her in a car at his uncle's house, VR, 8/19/21, 11:02:54-11:03:03; that she told Mr. Hinkle that she "didn't want to" When he pulled her pants down, Id. at 11:03:33-11:03:37; and that Mr. Hinkle said to Her that "you don't even want to suck my d--- anymore," Id. at 11:03:26-11:03:29.

The upshot to Nurse Yazel reading aloud these out-of-court assertions is that L.P.O. must be telling the truth when she claim that Timothy Hinkle sexually assaulted Her because she previously gave a narrative statement about the alleged incident that Was largely consistent with her testimony. Such inadmissible evidence is highly Prejudicial when a sexual assault charge turned on the prosecuting witness's credibility. That the jury ultimately convicted Mr. Hinkle of raping L.P.O., TR II, 193-194, Demonstrates that it cannot be said that with "fair assurance that the judgement was not substantially swayed by the error," Winstead, supra, 283 S.W.3d at 689, of allowing This inadmissibility hearsay evidence. Therefore, the judgement must be reversed.

III. L.P.O.'s testimony created a jury question as to whether Timothy Hinkle allegedly had sexual intercourse with her by forcible compulsion or simply

without her permission. The trial court erred when it refused to instruct the jury for third-degree sexual abuse as a lesser-included offense of first-degree rape.

A. Preserved. This issue is preserved. Defense counsel tendered a third-degree Sexual abuse jury instruction as a lesser-included offense of first-degree rape. TR II, 183; App. B. Defense counsel also argued for the jury to be instructed for third-degree sexual Abuse, or sexual misconduct, as a lesser-included offense. VR, 8/19/22, 1:39:14-1:43:09. The trial court denied the request. VR, 8/20/21, 9:20:54-9:21:24.

B. Argument. The trial court erred when it did not give a third-degree sexual Abuse jury instruction as a lesser-included offense of first-degree rape because the Evidence supported a theory that Timothy Hinkle had sexual intercourse with L.P.O. Without her permission, but that he did not do so by forcible compulsion.

The trial court must instruct the jury on "lesser-included offenses that are Supported by evidence of record." Darcy v. Commonwealth, 441 S.W.3d 77, 86 (Ky. 2014)(citations omitted). The evidence must be viewed "favorably" to the party that Request such an instruction, Allen v. Commonwealth, 338 S.W.3d 252, 255 (Ky. 2011)(citations omitted), and the instruction is warranted "only if, considering the totality Of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the Greater offense, and yet believe beyond a reasonable doubt that he [or she] is guilty of the Lesser offense," Commonwealth v. Swift, 237 S.W.3d 193, 195 (Ky. 2007) (quotation Marks and citation omitted).

The trial court said that it would not give a third-degree sexual abuse or a sexual Misconduct jury instruction after reviewing case law that the Commonwealth had Provided. VR, 8/20/21, 9:20:54-9:21-24. Because this ruling was a legal one, and not Based on the evidence, it is reviewed de novo. Davis v. Commonwealth, 620 S.W.3d 16, 24 (Ky. 2021) (citations omitted).

Because third-degree sexual abuse is a lesser-included offense of first-degree Rape, and because the evidence supported a third-degree sexual abuse jury instruction, the

Trial court erred when it failed to give one in this case.

1. Third-degree sexual abuse is a lesser include-offense of first-Degree rape when there is a question as to whether a person had Sexual intercourse with another by forcible compulsion or simply Without permission.

When supported by evidence that a person had nonconsensual sexual intercourse With another, but that the intercourse did not occur by forcible compulsion, third-degree Sexual abuse is a lesser-included offense of first-degree rape.

A lesser-included offense "is established by proof of the same or less than all the Facts required to establish the commission of the greater offense charged[.]" KRS 505.020(2)(a). Third-degree sexual abuse can be proven by the same or less than all the Facts that are needed to prove first-degree rape.

Relevant here, a person commits first-degree rape when "engag[ing] in sexual Intercourse with another person by forcible compulsion[.]" KRS 510.040(1)(a). Third-Degree sexual abuse, meanwhile, is committed by "subject[ing] another person to sexual Contact without latter's consent." KRS 510.130(1). Sexual contact is defined as "any Touching of the sexual or other intimated parts of a person done for the purpose of Gratifying the sexual desire of either party[.]" KRS 510.010(7). So both offenses require (1) nonconsensual (2) sexual contact. These two requirements are proven by "the same Or less than all the facts[.]" KRS 505.020(2)(a).

To start, [s]exual intercourse always involves sexual contact as the term is Defined in the statute[.]" Salsman v. Commonwealth, 565 S.W.3d 638.642 (Ky. App. 1978). Therefore, the act that is necessary to commit third-degree sexual abuse is proven By "the same or less than all the facts," KRS 505.020(2)(a), as first-degree rape.

The same is true for lack of consent. Lack of consent occurs in one of three ways:

"(a) Forcible compulsion;

(b) incapacity to consent; or

(c) if the offense charged is sexual abuse, any circumstance in addition to Forcible compulsion or incapacity to consent in which the victim does not

Expressly or impliedly acquiesce in the actor's conduct."

KRS 510.020(2)(a)-(c). Subsection (b) does not apply to this case. Subsection (a) is Relevant because Mr. Hinkle was charged with first-degree rape under a forcible Compulsion theory or culpability, see TR I, 2, and the jury was instructed on that theory, TR II, 193. Subsection (c) matters because it covers forms of lack of consent that do not Rise to forcible compulsion. The statutory commentary to KRS 510.020 elaborates on this. It states in relevant part that:

Subsection(2)(c) is expressly limited to the offense of sexual abuse. With respect to this crime, The term, "without consent" is broadened beyond its meaning as applied to rape and sodomy. The latter crimes are committed with the victim's literal non-consent only when submission is Accomplished by "forcible compulsion" which is limited to physician force or intimidation. To restrict the prohibited conduct to forcible compulsion would not be adequate for the less Serious crime of sexual abuse which is designed to encompass not only genuinely forcible attacks but also all other sexual advances taken without the victim's acquiescence. For example, this would include the taking of indecent liberties in a crowded public place. Accordingly, in subsection (2)(c) the concept of "lack of actual consent" is extended to any circumstances in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

KRS 510.020 LRC Commentary (1974) (italics added.)

This court has used the statutory commentary before. In Cooper v. Commonwealth, 550 S.W.2d 478 (Ky. 1977), this court interpreted the sexual misconduct statute. That Statute states that "[a] person is guilty of sexual misconduct when he engages in sexual Intercourse or deviate sexual intercourse with another person without the latter's consent." KRS 510.140(1). Relying on commentary-and not just the statutory text-this court found that the statute applies to scenarios where the lack of consent is due to the victim's age and the defendant is also young. Cooper, supra, 550 S.W.2d at 480.

This court has reaffirmed Cooper several times. See Jenkins v. Commonwealth, 496 S.W. 3d 435, 449 (Ky. 2016)(string citation omitted). A majority of this court did so again in Jenkins,

496 S.W.3d at 499. Mr. Jenkins had argued on appeal that the trial court should have given a Sexual misconduct instruction as a lesser-included offense of first-degree rape. Id. when ruling That he was not entitled to that instruction-and declining to overrule Cooper- this court's Majority opinion stated that Mr. "Jenkins and the dissenters obviously see some "daylight" Between "forcible compulsion" and "without the latter's consent" but, in fact, there is none as A matter of law, at least on these facts." Id. at 453.

Indeed, nearly 30 years ago, in Johnson v. Commonwealth, 864 S.W.2d 266 (Ky. 1993), This court found error when a trail court failed to give a third-degree sexual abuse jury Instruction as a lesser- included offense of first-degree rape.

Mr. Johnson went to trial for first-degree rape, first-degree sodomy, first-degree sexual Abuse, and wanton-endangerment. Id. at 268. He argued on appeal that he was entitled to a Third-degree sexual abuse jury instruction as a lesser-included offense for each sexual charge And a sexual misconduct instruction for the rape and sodomy charges. Id. at 277. This court Said that the factual question was "whether on the total evidence the jury might reasonably Have doubted that [the prosecuting witness] was physically helpless, but might have found Her otherwise incapable of consent with Cooper. Id. this court had concluded that Mr. Johnson Was entitled to a sexual misconduct jury instruction for rape and sodomy charges as well as third-degree sexual abuse instruction "in connection with each of the sexual charges[.]" Id. at

278.

In this case, a reasonable jury could have concluded that Timothy Hinkle had sex with L.P.O. without her permission, but that he did not do so by forcible compulsion. If the jury had Made this finding, it would have convicted him of third-degree sexual abuse, not first-degree Rape.

2. The evidence that L.P.O. did not consent to have sex with Timothy Hinkle Supported giving both a first-degree rape and third-degree sexual abuse Jury instruction.

L.P.O.'s testimony that she did not consent to have sex with Timothy Hinkle supported Giving a first-degree rape and third-degree sexual abuse jury instruction, and Mr. Hinkle was Entitled to have the jury decide whether he committed the greater or lesser offense.

a. The evidence of nonconsensual sex.

L.P.O. testified that she did not want to have sex with Timothy on June 5, 2018 and that she did Not ask him to have sex with her. VR, 8/18/21, 11:48:52-11:49:02. But the evidence created a jury question as to whether he had sex with her by forcible compulsion or simply without her Permission.

Mr. Hinkle was driving L.P.O. around on June 5, 2018. VR, 8/18/21, 10:31:54-10:32:17. When Stopped at a red light, L.P.O. testified, he asked her a question, "got mad," and physically Assaulted her. Id. at 10:32:32-10:33:00. L.P.O. claimed that he threatened to break her jaw if He did not believe her answers to his questions. Id. at 10:33:10-10:33:17, and he threatened to

Transfer the title of her car to him, Id. at 10:33:25-10:33:29. She said that she was scared and That he had never done this before. Id. at 10:33:31-10:33:37. She did not recall what he asked her, but "I do know it had something to do with...sex, I think," and she testified that she told him that she was sore from a procedure that she had after her miscarriage. Id. at 10:33:42-10:34:18.

Following this, they went to L.P.O.'s friend's apartment to get her I.D., Id. at 10:37:52-10:38:12, to McDonald's, Id. at 10:41:17-10:41:32, and the L.P.O. testified to Mr. Hinkle's alleged uncle's house, where he parked in the garage and closed the garage Door, Id. at 10:42:01-10:42:19. She said that he got out, opened her car door, and talked For a few minutes. Id. at 10:42:22-10:42:29. He told her, L.P.O. claimed, that he was a Good man"; that she had embarrassed him in jail"; and that she had cheated on him. Id. at 10:42:32-10:42:51. She believed that he was trying to win her back at this time, and he was rubbing her neck and apologizing to her. Id. at 3:10:13-3:10:34.

L.P.O. testified that he "asked me something about not giving him... oral sex, So... he pulled out hid d--- and he told me to suck on it, and I told him no, and I didn't do It." Id. at 10:42:52-10:43:09. After that, he remarked that "I know what we can do," and He "helped [her] out of the car gently" and "put [her] in the back seat," L.P.O. said. Id. at 10:43:10-10:43:19.

L.P.O. testified that she "was crying at this point," not "like oh my God, like Loudly, but I had tears rolling down my face." Id. at 10:43:21-10:43:32. She said that he pulled Down her pants, put his mouth on her vagina, had vaginal sex with her, Id. at 10:43:34-10:44:14, and ejaculated, Id. at 10:44:37-10:44:48. Testing later found his DNA on swabs taken From her vagina area. VR, 8/19/21, 10:24:42-10:25:42.

L.P.O. testified that the intercourse was "painful" because she was "already sore" from The miscarriage. Id. at 10:44:50-10:45:02. She was not fighting him off or screaming and telling Him no, she said, but she claimed she was crying. Id. at 10:44:17-10:44:29. When asked by the Prosecutor why she did not tell him that she did not want to do this, she said that she was "scared" because she "thought he would try to put his hands on me or try to strangle me Again." Id. at 10:45:59-10:46:09. She also alleged that she did not feel like she could leave the Garage and that he had the keys. Id. at 10:46:11-10:46:16. "We both put our clothes or pants Back on after," they spoke for a few minutes, and then they left, L.P.O. said. Id. at 10:46:23-10:46:50.

L.P.O. talked to the police the next day, and she agreed to go to the hospital. See Id. at 4:13:57-4:14:30. She gave Sexual Assault Nurse Examiner Vicki Yazel a narrative statement Alleging that she had been physically and sexually assaulted. VR, 8/19/21, 10:58:46-10:58:51. Nurse Yazel read parts of this narrative aloud at trial, and it was largely consistent with L.P.O.'s

Testimony, though L.P.O. said at that time that she had told Mr. Hinkle that she did not want to

Have sex with him:

Nurse Yazel: She said "I met up with him at 8:30 and dropped him off at 12:30. He was Driving the car yesterday. He got mad at me and punched the horn at least 10 times. Im not Sure what was said after he grabbed me by the hair and then he grabbed me by my Throat. He spit on me and slapped my head up against the door."

Commonwealth: I'm sorry. You said slap.

Nurse Yazel: slammed. Im sorry. "Slammed my head up against the door. He grabbed my hair again. He went to his uncle's and acted like everything was fine. We went to the car and that is when the sexual intercourse happened and I started crying and he would not stop. He got mad because I wouldn't have sex with him because I was sore. He said I had to stay sore, the only time I could not have sex with him was on the weekends. After the assault, he acted like nothing had happened and like it was just another day. I was sitting in the passenger seat and he was standing there and he said you don't even want to suck my d--- anymore. I didn't say anything. He grabbed me up and cleaned off the back seat and that is when he pulled my pants down and I said I didn't want to. I did it anyways and guess that is when he got his frustrations out and I was crying and wiping off and got back in the front seat. These marks on my neck are hickeys from a few days before but my neck is really sore when I touch it or move."

Id. at 11:02:28-11:03:53.

This evidence created a question as to whether Timothy Hinkle allegedly had sex with

L.P.O. by forcible compulsion or simply without her permission. This was a jury question.

b. Timothy Hinkle was entitled to have the jury decide whether he allegedly had sex with L.P.O. by forcible compulsion or simply without her permission.

Timothy Hinkle was entitled to have a jury decide whether he allegedly had sex with

L.P.O. by forcible compulsion-meaning that he was guilty of first-degree rape-or simply did so

Without her permission-meaning that he had committed third-degree sexual abuse.

Forcible compulsion is physical force, or a threat of physical force that is either express Or implied, as KRS 510.020(2) explains:

> "forcible compulsion" means physical force or threat of physical force, express or Implied, which places a person in fear of immediate, death, physical injury to self Or another person, fear of immediate kidnap of self or another person, or fear of Any offense under this chapter. Physical resistance on the part of the victim shall Shall not be necessary to meet this definition[.]

In this case, there was not sufficient evidence that Timothy Hinkle used physical force To have sex with L.P.O. she testified that "he helped me out of the car gently, put me in the Back seat," VR, 8/18/21, 10:43:15-10:43:19, pulled down her pants, put his mouth on her Vagina, and had vaginal sex with her, Id. at 10:43:34-14:44:14. She told Nurse Yazel that "he Would not stop" when she was crying, VR, 8/19/21, 11:02:59-11:03:06, but that is proof of Non-consent, not physical force.

There was no evidence of an express threat of physical force. L.P.O. testified that after She told him that she would not perform oral sex on him, he said, "know what we can do," and then took her to the back seat of the car. VR, 8/18/21, 10:42:52-10:43:19.

L.P.O.'s testimony however, if believed, was sufficient for the jury to conclude That Mr. Hinkle used forcible compulsion through an implied threat of physical force. A subjective test "determine[s] whether the victim felt threatened to engage in sex or Feared harm from the attacker[.] "Murphy v. Commonwealth, 509 S.W.3d 34, 44 (Ky. 2017) (citations and quotation marks omitted).

Here, L.P.O. claimed that he had physically assaulted her earlier that day, Id. at 10:32:41-10:33:00; that this happened when he "got mad" after asking her a question, Id. at 10:32:37-10:32:44, that "had something to do with...sex, I think," Id. at 10:33:42-10:33:56; and that she recalled telling him that she was sore from a procedure that she Had following her miscarriage. Id. at 10:33:57-10:34:18. L.P.O. testified that she did not tell him no when he was taking her to the back seat because she was "scared" because she "thought he would try to put his hands on me or try to strangle me again." Id. at 10:45:51-10:46:09. She added that she did not believe that she could leave the garage, And that he had the keys. Id. at 10:46:11-10:46:16. This testimony, if believed, was Sufficient for the jury to conclude that there was an implied threat that he would Physically assault her again if she did not have sex with him. See, e.g. James v. Commonwealth, 360 S.W.3d 189, 194-195 (Ky. 2012) (evidence sufficient for forcible Compulsion when prosecuting witness had sex with defendant during a break from Beatings because she thought having sex with him would avoid additional beatings).

But L.P.O.'s testimony also allowed the jury to have a reasonable doubt that Timothy Hinkle had sex with her by "forcible compulsion"-what is necessary to establish First-degree rape, KRS 510.040(2)(a)-yet believe beyond a reasonable doubt that she did "not expressly or impliedly acquiesce" to having sex with him-what is needed to commit

Sex abuse, KRS 510.020(2)(c). Two specific facts support this.

One is that L.P.O. testified that, shortly before they had sex, Mr. Hinkle asked her To perform oral sex on him, "and I told him no, and I didn't do it," VR, 8/18/21, 10:42:52-10:43:09. So, despite L.P.O. saying that she was too scared to say that she would not Have sex with him, she had refused to perform oral sex on him just moments earlier. The second is that she told Nurse Yazel that when he was pulling her pants down, she "said I didn't want to," but "did it anyways and guess that is when he got his frustrations out..." VR, 8/19/21, 11:03:33-11:03:43. L.P.O.'s decision to do "it anyways" may be more evidence that she did not consent, But it is not proof of forcible compulsion.

"'Although a lesser included offense is not a defense within the technical meaning of Those terms as used in the penal code, it is, in fact and principle, a defense against the higher Charge.'" Allen, supra, 338 S.W.3d at 255 (quoting Hudson v. Commonwealth, 202 S.W.3d 17, 20 (Ky. 2006)). Timothy Hinkle was entitled to defend himself against the First-Degree Rape Charge by arguing that he was only guilty of third-degree sexual abuse. But the trial court Denied him the opportunity in this case.

In sum, the evidence supported a third-degree sexual abuse instruction as a lesser-Included offense of first-degree rape. Therefore, the trial court erred when it did not ask the Jury to determine-if it believed that L.P.O. did not consent to having sex with Timothy Hinkle on June 5, 2018-whether he had sex with her by forcible compulsion or simply without her permission.

3. Timothy Hinkle is entitled to a new trial.

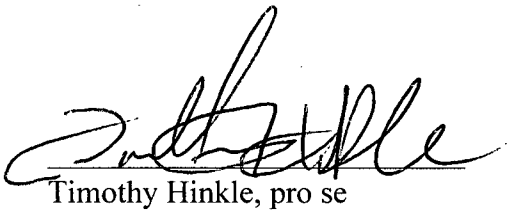
The trial court's error in not giving a third-degree sexual abuse jury instruction requires that the judgement be reversed.

"[T]he trial, court's failure to give necessary lesser-included offense instruction cannot be deemed a harmless." Swift, supra, 237 S.W.3d at 196 (citations omitted). In this case, the evidence created a jury question as to whether Mr. Hinkle had sex with L.P.O. by forcible compulsion or simply without her permission. Consequently, the jury should have been instructed for third-degree sexual abuse as a lesser-offense of first-degree rape. Because it was not, and because this error cannot be harmless, this case must be reversed and remanded for a new trial.

CONCLUSION

For the reason set above do to **due-process** under **the 14th amendment** of **the United States Constitution**, Timothy Hinkle respectfully requests that this court reverse the Judgement and remand this case for a new trial.

Respectfully Submitted,



Timothy Hinkle, pro se
1516 Dawkins Road
P.O. Box 6
Lagrange, Ky 40031