

SUPREME COURT OF KENTUCKY  
FILE NO. 2005-SC-862-MR

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SUPREME COURT

DAVID A. CLARK

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HON. JANET P. COLEMAN, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

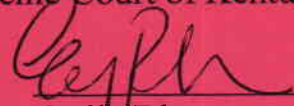
BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed, postage prepaid, to Hon. Janet P. Coleman, Judge, Hardin Circuit Court, Hardin County Justice Center, 120 E. Dixie Ave., Elizabethtown, KY 42701-1487; Hon. Chris Shaw, Commonwealth Attorney, P.O. Box 1146, Elizabethtown, KY 42702-1146; Hon. Francis L. Holbert, Asst. Public Advocate, DPA, P.O. Box 628, Elizabethtown, KY 42702; and Hon. Greg Stumbo, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on October 18, 2006. I hereby further certify that the record has been returned to the Supreme Court of Kentucky.

  
\_\_\_\_\_  
Emily Rhorer

## INTRODUCTION

This case involves allegations that David A. Clark molested M.C., his biological daughter; K.C., his biological son; and V.P., the son of his longtime paramour Susan Preston. Mr. Clark was indicted by a Hardin County Grand Jury on thirty-two counts, and was ultimately convicted in Hardin Circuit Court of twenty-five counts: first degree rape, first degree sodomy (seven counts), second degree sodomy (three counts), incest (eight counts), promoting a sexual performance by a minor, use of a minor in a sexual performance (two counts), criminal attempt to commit promoting a sexual performance by a minor, and criminal attempt to commit use of a minor in a sexual performance (two counts). He was sentenced to life imprisonment. Mr. Clark appeals as a matter of right.

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Mr. Clark welcomes oral argument if this Court believes it would be of assistance in rendering a fair and just opinion in this case.

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## STATEMENT OF THE CASE

In June, 2003, David A. Clark was indicted by a Hardin County Grand Jury for thirty-two sexual offenses involving his biological children, M.C. and K.C., as well as V.P., the son of his paramour. The sexual abuse allegedly occurred from 1999 to May 2003. Specifically, as to M.C., his biological daughter, Mr. Clark was indicted on one count of first degree rape; four counts of first degree sodomy; five counts of incest, each count corresponding a rape or sodomy count; one count of first degree sexual abuse; promoting a sexual performance by a minor; use of a minor in a sexual performance; and criminal attempt to commit use of a minor in a sexual performance. As to K.C., his biological son, Mr. Clark was indicted on five counts of first degree sodomy; five corresponding counts of incest; and two counts of first degree sexual abuse. Finally, as to V.P., the son of his paramour whom Mr. Clark had raised as his own child, he was indicted on three counts of first degree sodomy; use of a minor in a sexual performance; criminal attempt to commit promoting a sexual performance by a minor; and criminal attempt to commit use of a minor in a sexual performance. TR 1 1-5

The trial which is the subject of this appeal commenced on August 22, 2005.<sup>1</sup> The trial court overruled the defense motion to disqualify the entire jury panel after several members of a jury drawn from the panel were confronted by a newspaper reporter three days before Mr. Clark's trial commenced. The jurors were berated by the reporter because they acquitted a defendant in another sex case. TR 2 106; Tape 3 8/22/05 9:26:07; See Argument I, infra.

The Commonwealth's first witness was Susan Preston, Mr. Clark's paramour and the mother of all three children. Ms. Preston testified she and Mr. Clark had lived

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<sup>1</sup> Mr. Clark originally proceeded to trial on May 5, 2004, but it ended in a mistrial during voir dire. TR 1 65

together as husband and wife (although not legally married) for 13 years. Supplemental Tape 8/24/05 9:35:21-36:00 V.P. was 10 months old when they met. Id., 9:36:36 K.C. was born a year and a half later, in 1991, and M.C. followed a year after that, in 1992. Id., 9:36:45 The relationship was good at the beginning, but eventually soured. Id., 9:36:30 Indeed, to use Ms. Preston's own words, Mr. Clark was a "perfect father but a shitty husband." Supplemental Tape 8/25/05 11:01:32 She told the jury Mr. Clark rarely worked, Supplemental Tape 8/24/05 9:38:06, and that his family members were as just good for nothing as he was. According to Ms. Preston, various relations of his were always staying in their trailer with them for extended periods of time. Id., 9:46:38-57:20 Their relationship was so bad Ms. Preston started seeing another man. Supplemental Tape 8/25/05 11:06:20

Ms. Preston testified her relationship with Mr. Clark ended the day she found out "he messed with my children." Supplemental Tape 8/24/05 9:39:33 According to Ms. Preston, she was trying to light a cigarette when her lighter fell to the bottom of the kitchen trashcan. When she pulled it out, there was a piece of paper dated 4-27-03 stuck to it. Id., 9:39:43 On one side of the paper were drawings of mermaids by M.C., and on the other side were some crude notations which included, "Hump Dawn I Watch. . . I Suck You and You Jack Me, etc." Id., 9:40:13-44:30; Commonwealth's Exhibit 1 There was a second piece of paper dated 4-27-03 in the trash which included these words: "You Jack Your Self I Jack You I Suck You I Hump You," and "I Jack My Self You Suck Me You Jack Me You Hump Me." Id., 9:44:37-46:38; Commonwealth's Exhibit 2 According to Ms. Preston, the handwriting was David Clark's. Id., 9:41:03, 9:45:10



Ms. Preston waited until that evening, and asked her children about the notes she had found. All of them denied any knowledge. Id., 9:58:02 A little later, K.C. approached her, and told her he had a secret. Id., 9:58:20 After he told her his secret, she grabbed and hugged him. Id., 9:59:35 She then talked to V.P. about what K.C. had told her; after that conversation, she grabbed and hugged V.P. and told him she believed him. Id., 10:00:18 Ms. Preston testified she did not approach M.C. because she was afraid she would tell Mr. Clark. Ms. Preston said she was in fear of Mr. Clark because he beat her on different occasions. Id., 10:00:20-01:12; See Argument IV, infra. Ms. Preston went to the police station where she reported that her children were being molested by Mr. Clark. Id., 10:08:45

After Mr. Clark was arrested, Ms. Preston and her children continued to have contact with Mr. Clark via the telephone. Id., 10:11:29 Ms. Preston said Mr. Clark told her to accuse other people of molesting the children. Supplemental Tape 8/25/05 9:59:57-10:02:08 Mr. Clark and Ms. Preston also exchanged written correspondence in which he basically denied all the allegations. Id., 11:09:44

Ms. Preston testified about an occurrence before she found the note in late April. This occurrence was in February, 2003. It was snowy. When she got to work, she found out there was a two-hour school delay. She had a customer (Ms. Preston worked at Waffle House) drive her home to tell Mr. Clark. Supplemental Tape 8/24/05 10:14:15 Her bedroom door was shut. Id., 10:15:05 V.P. was on the floor with his pants and underwear down, while Mr. Clark was allegedly standing by the bed fastening his belt. Id., 10:13:44 Ms. Preston said she asked what was going on, and Mr. Clark countered by asking how she got home. Id., 10:15:400 Ms. Preston rushed back to work, but later that

day asked V.P. what had happened. He did not disclose any sexual abuse. Id., 10:16:48 Ms. Preston testified after Mr. Clark's arrest, he told her he and V.P. had been masturbating together. Id., 10:13:04

Detective Jodi Ennis of the Radcliff Police Department was the second witness for the Commonwealth. On April 29, 2003, she went to Radcliff Middle School and interviewed V.P., who was thirteen years old, and K.C., who was eleven. Supplemental Tape 8/25/05 11:44:02, 11:55:22 After speaking with them, she got an arrest warrant for Mr. Clark, and he was arrested that same day. Id., 11:50:34, 11:52:06 She eventually arrested Ms. Preston as well. Id., 11:56:45 Ms. Preston pled guilty to "complicity to sodomize," Id., 10:18:36, and received a sentence of eight years probated in exchange for her testimony for the Commonwealth. Supplemental Tape 8/25/05 10:48:39

The Commonwealth's third witness was K.C., Mr. Clark's biological son. K.C. was born on July 2, 1991. Supplemental Tape 8/25/05 1:31:33 He testified Mr. Clark sexually abused himself, V.P., and M.C. Id., 1:33:17 Specifically he testified beginning in the 4<sup>th</sup> or 5<sup>th</sup> grade, or when he was 9 to 10 years old, his dad made him "suck his penis," Id., 1:33:37-57, 1:40:48; tried to get him to engage in sexual contact with M.C., Id., 1:42:47; and made him "suck his balls" while Mr. Clark "jacked off." Id., 1:43:51 K.C. also testified about a time his dad made him suck his penis while V.P. sucked his penis and M.C. sucked V.P.'s penis. Id., 1:46:45-47:09 The jury was not instructed on this alleged occurrence as V.P. testified it never happened. Id., 2:46:50-48:28

K.C. said one day Mr. Clark stopped telling him to go to his bedroom, although his sister and brother were still going in there. Id., 1:48:37 He said he never told anyone

what happened because he was scared of what his dad would do to him. Id., 1:49:35 He said after Mr. Clark was arrested, he called and asked K.C. to lie for him. Id., 1:55:22

The fourth witness for the Commonwealth was V.P., who was born on October 25, 1989. Supplemental Tape 8/25/05 2:11:39 He is not Mr. Clark's biological son, but was raised to believe that he was. Id., 2:16:46-17:26 He testified Mr. Clark sexually abused himself, K.C., and M.C. Id., 2:18:23 He said he started being sexually abused in 1999, Id., 2:19:05, but only testified to occurrences beginning in 2002 when he was 12. Id., 2:20:13 Specifically he said Mr. Clark made him suck his penis, Id., 2:23:00, 2:28:20; tried to get him to "hump" his sister as a pornographic movie played in the background, Id., 2:31:54-33:14; made him "hump" his sister as a pornographic movie played in the background and Mr. Clark "jacked himself off," Id., 2:33:32-37:00;<sup>2</sup> and, a couple of weeks before Mr. Clark was arrested, made him suck his penis and "rub his balls." Id., 2:38:36 V.P. said one of the times Mr. Clark made V.P. suck his penis, his mom walked in on them as they were finishing up. She later confronted him about it, and he denied it. Id., 2:28:39, 2:30:01 V.P. testified he never told anyone about this to protect his mom. Id., 2:30:37 V.P. testified Mr. Clark called the house after he was arrested, and asked V.P. to lie for him. Id., 2:43:15

The Commonwealth's fifth witness was M.C., Mr. Clark's biological daughter who was born on November 5, 1992. Id., 3:31:45 She testified her father began sexually abusing her the first time she was in third grade, when she was around 8 years old. Id., 3:34:17-34:23, 3:36:14 Specifically, Mr. Clark "stuck his dick" in M.C.'s mouth, Id., 3:36:39, 3:45:52, 3:58:26; put his penis in her vagina, Id., 3:48:45, 3:51:47; licked her

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<sup>2</sup> Mr. Clark was convicted of both promotion and use of a minor in a sexual performance based on this one incident. See Argument II, infra.

vagina, Id., 4:00:02; and had V.P. hump her. Id., 3:55:16-56:41 M.C. testified she once observed K.C. “sucking my dad’s dick.” Id., 3:47:39 M.C. testified she never told anyone because if she did her dad would give her a “whooping.” Id., 4:04:05 M.C. said after her dad was arrested he called and asked her to lie. Id., 4:05:58

The Commonwealth’s sixth and final witness was Dr. Betty Spevak, forensic pediatrician. Tape 7 8/29/05 10:18:37 She examined K.C., V.P., and M.C. K.C.’s and V.P.’s anal-genital examinations were completely normal. Id., 10:25:37, 10:26:33 M.C., who was 10-1/2 years old when Dr. Spevak examined her in May, 2003, had no acute injuries. Id., 10:27:47 However Dr. Spevak said there were some abnormal findings in her genital region. Id. Specifically the opening of the hymen was “much larger” than usually seen in her age group, of a size Dr. Spevak said “many experts consider indicative of sexual abuse but not always.” Id., 10:28:22 There was “marked thinning” between 7-10 o’clock. Id., 10:38:36 Also, there was a shallow notch at 5 o’clock. Id., 10:28:47 This, Dr. Spevak said, can be a remnant of healed trauma, Id., 10:33:55, or it could just be a side effect of puberty. Id., 10:34:11

At the close of the Commonwealth’s case, the Commonwealth dismissed counts 9 and 10 (first degree sodomy counts- K.C.); 22 and 23 (incest counts- K.C.); 24 (first degree sexual abuse- M.C.); and 25 and 26 (first degree sexual abuse counts- K.C.). Tape 7 8/29/05 10:09:45, 10:48:10 The defense made a general directed verdict motion on all other counts, which was overruled by the trial court. Id., 10:48:34-50:00

Mr. Clark was the sole defense witness. He denied writing the notes Ms. Preston said she found in the kitchen trash. Tape 7 8/29/05 10:54:35 He said he did call his home after his arrest to talk to the children, and what he told them was that they had lied. Id.,

10:55:15 He testified he was not proud of the way he treated Ms. Preston during his marriage—he hit her, drank a lot, ran the streets and partied while she and the kids stayed home, smoked pot, etc. Id., 11:03:35-04:15, 11:06:24 He agreed he was a lousy husband. Id., 11:06:53 However Mr. Clark denied sexually abusing K.C., M.C., and V.P. Id., 11:09:17 The defense theory of the case was that these charges were manufactured so the family would no longer have to live with Mr. Clark who was physically abusive. Tape 10 8/29/05 2:33:31-35:25 The defense pointed out the children now lived with their grandmother, and were much happier. Thus, they had an incentive to testify in such a way to keep Mr. Clark in prison. Supplemental Tape 8/25/05 3:06:27-06:47; Tape 7 8/25/05 4:16:24

The defense renewed its general directed verdict motion at the close of its case, which the trial court overruled. Tape 7 8/29/05 11:25:51

The trial court instructed the jury on all indicted counts except for the seven the Commonwealth had dismissed. TR 2 107-156 The only counts in which lesser included offense instructions were given were counts 11-13, which were the sodomy counts involving V.P. As to these three counts, the jury was instructed on second degree sodomy in addition to first degree sodomy. Id., 115-118 Inexplicably as to two counts—counts 27 and 30, both sexual performance crimes, the trial court instructed the jury on different victims then identified in the indictment without even attempting to amend the indictment. See Argument III, infra.

The jury convicted Mr. Clark of all counts, although it did convict him as to the lesser offense of second degree sodomy as to three counts involving V.P. In sum, Mr. Clark was convicted of first degree rape, first degree sodomy (seven counts), second

degree sodomy (three counts), incest (eight counts), promoting a sexual performance by a minor, use of a minor in a sexual performance (two counts), criminal attempt to commit promoting a sexual performance by a minor, and criminal attempt to commit use of a minor in a sexual performance (two counts). TR 2 132-156

During the penalty phase, the Commonwealth called four witnesses, Trenton VanMeter of Probation and Parole, V.P., K.C., and M.C. Tape 10 8/30/05 10:17:00-52:00 The defense called no witnesses. Id., 10:53:13 The jury recommended the maximum penalty on all counts. Thus, the jury recommended life sentences on the first degree rape and first degree sodomy counts; 10 years each on the second degree sodomy counts; 10 years each on the incest counts; 20 years on the promoting a sexual performance by a minor count; 20 years on the use of a minor in a sexual performance counts; and 10 years on the criminal attempt counts. The jury recommended all sentences run consecutively. TR 2 157-172

At final sentencing the trial court sentenced Mr. Clark to life imprisonment. Tape 1 10/11/05 2:06:32 Final judgment was entered on October 17, 2006, TR 2 193-195; Appendix, hereinafter A-1-3, and timely notice of appeal was filed on October 28, 2005. TR 2 198

Other facts will be developed as necessary in the Argument.

## ARGUMENT

### I. THE TRIAL COURT ERRED TO MR. CLARK'S SUBSTANTIAL PREJUDICE AND DENIED HIM DUE PROCESS OF LAW WHEN IT OVERRULED HIS MOTION TO DISQUALIFY THE ENTIRE JURY PANEL ON THE GROUND JURORS HAD BEEN BERATED AFTER ACQUITTING A DEFENDANT OF SEX CRIMES TWO DAYS BEFORE MR. CLARK'S TRIAL COMMENCED.

**Preservation.** This issue is preserved. TR 2 106; Tape 3 8/22/05 9:26:07

**Relevant Facts.** On the morning of trial, Mr. Clark filed a “motion to dismiss the entire August jury pool” because the pool was “tainted by the berating of the jury that took place on the Commonwealth v. Heck case on August 19, 2005.” TR 2 106

Heck was a rape/sodomy case tried in Hardin Circuit Court, Division 1, the week before the instant case. The jury returned a “not guilty” verdict against Mr. Heck. Tape 3 8/22/05 9:17:42 After the verdict was returned, four female jurors taking a smoke break were approached by a reporter from the local newspaper. The reporter told the jurors they were wrong in rendering an acquittal of Mr. Heck. She also told them the jury did not have all the facts—“if you read my articles you would know.” She informed the jurors of various other bad acts Mr. Heck had committed that the jury had not been told of in court. TR 1 105; Tape 3 8/22/05 11:25:28-26:15

After hearing arguments of counsel, the trial court overruled the motion to dismiss the entire jury pool. Tape 3 8/22/05 9:26:07

It was revealed during voir dire that even those Heck jurors who were not among the four women approached had heard about the confrontation. Tape 3 8/22/05 11:13:18, 11:17:30, 11:20:20, 11:22:39, 14:04:08, 14:07:09 Seven people who had served on the Heck jury were on the venire panel in this case, Id., 11:13:18, 11:17:30, 11:20:20,

11:22:39, 14:04:08, 14:07:09, including one of the woman who was actually confronted by the reporter. Id., 11:25:28

The defense exhausted all nine of its peremptory challenges. TR 1 102 Three of these were used on jurors who had sat on the Heck jury. Id.; Tape 3 8/22/05 11:11:31, 11:16:00, 11:22:29 Ultimately four Heck jurors, including the woman who had been confronted, sat on the jury that convicted Mr. Clark and sentenced him to the maximum penalty. Id., 11:20:00, 11:25:22, 14:03:16, 14:06:40; TR 1 104

**Argument.** The Sixth Amendment to the U.S. Constitution guarantees that “[i]n 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...” (Emphasis added). The right to a jury trial is applicable to the States through the due process clause of the Fourteenth Amendment. See Duncan v. Louisiana, 88 S.Ct. 1444 (1968). “A fair tribunal is a basic requirement of due process.” In Re Murchison, 75 S.Ct. 623, 625 (1955).

§ 11 of the Kentucky Constitution also guarantees to a defendant in a criminal prosecution the right to a trial by an impartial jury. To implement this right, RCr 9.36 provides “...[w]here there is reasonable ground to believe that a juror cannot render a fair and impartial verdict on the evidence, he shall be excused as not qualified to serve.”

In the instant case, the entire August jury panel was rendered impartial after a newspaper reporter approached four women who had served on a jury in a sex case a few days before the start of Mr. Clark’s trial. According to the women, they were berated by the reporter for acquitting the defendant in the other case. Not only were the women subject to harsh criticism and judgment (from someone who is supposed to be impartial),



they were also informed by the reporter that the trial judge and the parties hid evidence from the jury during trial. TR 1 105 The reporter's actions impacted Mr. Clark's trial two ways: (1) individuals may have been more reluctant to acquit a defendant after being yelled at for so doing the prior week and (2) jurors were informed they do not hear all the evidence against a defendant at trial, specifically evidence concerning other bad acts.

The four women confronted by the reporter were not the only jurors affected. These women told the other people on the Heck jury about the incident. Tape 3 8/22/05 11:13:18, 11:17:30, 11:20:20, 11:22:39, 14:04:08, 14:07:09 It is unknown whether venire persons not involved in the Heck case were made aware of the reporter's actions; there is nothing in the record it indicate they were not.

In Morgan v. Commonwealth, 189 S.W.3d 99 (Ky.2006), this Court held the right to exercise peremptory challenges is not a "substantial right," and, as a result, overruled Thomas v. Commonwealth, 864 S.W.2d 252 (Ky.1993). Specifically, this Court stated:

A defendant's right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision. As long as the jury that actually hears and decides the case is impartial, there is no constitutional violation. Even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury. Morgan, 107 (citations omitted).

As a result, the Morgan Court found it was harmless error for the trial court to have not struck a partial juror for cause "since he did not play a part in Morgan's conviction." Id.

However, in the instant case, four jurors—rendered biased as a result of the newspaper reporter's actions—**did** play a part in Mr. Clark's convictions. Indeed, there very well may have been more than four biased jurors sitting in judgment of Mr. Clark—the record does not reflect whether members of the jury panel that did not sit on the Heck

case heard about the confrontation. The trial judge abused its discretion when it did not disqualify the entire August jury panel from sitting on Mr. Clark's case. This is the only way it could be insured that a fair and impartial jury heard the instant case. Reversal is required. 6<sup>th</sup> and 14<sup>th</sup> Amends., U.S. Const., §§2, 7, 11, Ky. Const., RCr 9.36(1).

**II. CONVICTIONS FOR BOTH PROMOTION OF A SEXUAL PERFORMANCE OF V.P., A MINOR, AND USE OF V.P., A MINOR, IN A SEXUAL PERFORMANCE VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY UNDER BOTH STATE AND FEDERAL CONSTITUTIONS AND KRS 505.020(2)(a).**

**Preservation.** This issue is not preserved for appeal, but is palpable error under RCr 10.26 based on the Double Jeopardy violation. See Baker v. Commonwealth, 922 S.W.2d 371 (Ky.1996); Jones v. Commonwealth, 756 S.W.2d 462 (Ky.1988); Phillips v. Commonwealth, 679 S.W.2d 235 (Ky.1984); Sherley v. Commonwealth, 558 S.W.2d 615 (Ky.1977).

**Relevant Facts.** Mr. Clark was indicted on six KRS Chapter 531 counts. At issue in this Argument are two of those counts—Counts 27 and 29. The indictment on these counts read as follows:

COUNT 27- That during the month of April, 2003, in Hardin County, Kentucky, the above named Defendant committed the offense of Promoting a Sexual Performance by a Minor when, knowing the character and conduct thereof, he produced, directed or promoted a sexual performance which includes sexual conduct of "M.C.," a minor under 16 years of age, by directing a said sexual performance by said minor. TR 1 4

COUNT 29- That during the month of April, 2003, in Hardin County, Kentucky, the above named Defendant committed the offense of Use of a Minor in a Sexual Performance when he employed, consented to, authorized or induced V.P., a minor under 16 years of age, to engage in a sexual performance which includes sexual conduct by said minor. TR 1 4- 5

Despite the fact the trial court never amended count 27—nor could it have done so, See Argument III, infra.—the jury was instructed Mr. Clark promoted a sexual performance including conduct by V.P., not M.C. Thus, the jury was instructed on 2 counts, counts 27 and 29, involving V.P. that arose from the same alleged sexual performance. The jury instructions were as follows:

Count 27—

You will find the Defendant guilty of Promoting a Sexual Performance by a Minor under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county over a period of time from January, 2003, through April, 2003, and before the finding of the Indictment herein, he knowingly produced, directed, or promoted a performance which included sexual conduct by V.P.;

AND

- B. That V.P. was then less than 16 years of age. TR 2 125

Count 29—

You will find the Defendant guilty of Use of a Minor in a Sexual Performance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county over a period of time from January, 2003, through April, 2003, and before the finding of the Indictment herein, he knowingly authorized or induced V.P. to engage in or consented to V.P.'s engagement in a sexual performance;

AND

- B. That V.P. was then less than 16 years of age. TR 2 126-127

V.P. was the fourth witness for the Commonwealth. He told the jury about several alleged incidents of sexual abuse at the hands of Mr. Clark, including the following occurrence. Once, around January to April, 2003, V.P. went into Mr. Clark's

bedroom and saw M.C., who was not wearing any clothes, lying on the floor. Supplemental Tape 8/25/05 2:33:52-34:37 Mr. Clark stood behind V.P., undid his pants and his belt, made him get on his knees, and nudged him towards M.C. According to V.P., Mr. Clark laid on the bed, "jacking himself off," as he pushed V.P. up and down on M.C. Id., 2:35:09-35:20 A pornographic movie played in the background. Id., 2:35:34 V.P. said his penis did not go inside M.C., and the entire episode lasted approximately 5 minutes, until Mr. Clark ejaculated. Id., 2:36:22-36:41 Afterwards, Mr. Clark told V.P. to go finish cleaning his room. Id., 2:36:46

M.C. also testified to this incident. She said her dad told her to go lie down on the floor of his room, and pull down her pants. Id., 3:55:27 He went and got V.P. Id., 3:55:27 He told V.P. to pull down his pants, and get on top of her. Mr. Clark pushed V.P. up and down on her as he lay on the bed. Id., 3:55:50 V.P.'s penis did not go inside of her. Id., 3:56:41

The parties discussed jury instructions after Ms. Preston, Detective Ennis, K.C., V.P., and M.C. testified but before the Commonwealth closed its case. In discussing count 27, the Commonwealth stated this was the incident where M.C. said her brother humped her. Tape 7 8/26/05 10:21:06 Defense counsel—Mr. Clark was not present at the instruction conference, Id., 9:41:45—stated he had concerns about both a promotion charge and a usage charge. Id., 10:21:51 The Commonwealth stated promotion was directing M.C. and V.P. to do it, while use was actually making them engage in it. Id., 10:23:03 The Commonwealth stated promote was to direct and use was what happened. Id., 10:25:10 The trial court stated the counts sounded duplicative, and asked the Commonwealth to provide a factual basis for all the counts. Id., 10:26:28 The

Commonwealth said the factual basis of count 27 was when M.C. was on the floor, Mr. Clark directed V.P. to do her like on the video.<sup>3</sup> Id., 10:27:32 The prosecutor said the direction of that act was the promoting. Id., 10:28:14 The Commonwealth said the use in count 28 was after the promotion, Id., 10:28:32, that it was the use of M.C. in the sex act. Id., 10:29:14 Finally the Commonwealth stated count 29 involved V.P.'s participation. Id., 10:29:51

During closing argument, the prosecutor argued the following about counts 27-29:

... we're going to move on to count 27, promoting a sexual performance by a minor. "Do your sister like they're doing on television."<sup>4</sup> He had on the pornographic movie. Told V.P. to do this, V.P. said he slightly nudged me toward the floor, V.P. was still was afraid. The definition says there is to be a visual representation for an audience. That audience was David Clark. M.C. said I couldn't see what he was doing, but I know that he was on the bed, and he was pushing V.P. on top of me. But V.P. told you that he was masturbating. The audience was David Clark and he enjoyed himself as he made his children engage in this act. The "use" in count 28. He used M.C. in that act. He had M.C. prepped and ready to go, on the floor. Towel over her face, towel under her body, no shorts, no panties. The defendant knowingly authorized this act because he created this act for himself, the audience. Count 29, "use." Not only did he use M.P., he used V.P. by pushing him up and down on M.C. causing them to perform this sexual act for his viewing pleasure. Tape 10 8/29/05 3:53:40-55:20

**Argument.** In Commonwealth v. Burge, 947 S.W.2d 805 (Ky.1997), this Court adopted the double jeopardy analysis articulated by the U.S. Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932) and United States v. Dixon, 509 U.S. 688 (1993). The test for determining whether double jeopardy has occurred is "whether the act or transaction complained of constitutes a violation of two distinct statutes, and if it does, if

<sup>3</sup> Actually, V.P. stated that comment was made another time Mr. Clark solicited him to "hump" M.C. Supplemental Tape 8/25/05 2:32:57, 2:35:40

<sup>4</sup> Again, V.P. stated that comment was made the first time Mr. Clark solicited him to "hump" M.C. Supplemental Tape 8/25/05 2:32:57 When testifying about the second time, he was specifically asked whether Mr. Clark made any comment in reference to the pornographic videotape, and he said no. Id., 2:35:40

*each statute requires proof of a fact the other does not.”* Burge, 947 S.W.2d at 811 (emphasis added).

KRS 531.310, in relevant part, sets out the elements of use of a minor in a sexual performance:

- (1) A person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance.

KRS 531.320, in relevant part, sets out the elements of promoting a sexual performance by a minor:

- (1) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a minor.

The term “promote” is defined in KRS 531.300(7) as “to prepare, publish, print, procure or manufacture, or to offer or agree to do the same.” The definition of “promote” was not included in these jury instructions as recommended by this Court in Purcell v. Commonwealth, 149 S.W.3d 382, 394(Ky.2004).

The elements of the two offenses bear great similarity, and each statute does not appear to require proof of a fact that the other does not. The instructions utilized by the trial court also do not seem to require proof of a fact that the other does not. For example, the use of a minor in a sexual performance count involving V.P. required the jury to find Mr. Clark “knowingly authorized or induced V.P. to engage in or consented to V.P.’s engagement in a sexual performance.” TR 2 127 The promotion count involving V.P. required the jury to find Mr. Clark “knowingly produced, directed, or promoted a performance which included sexual conduct by V.P.” Id., 125 The terms

“authorizes,” “induces,” and “consents” seem to have the same meaning as “produced,” “directed,” and “promoted.”

The Commonwealth argued the difference in the statutes was that promotion involved Mr. Clark telling or directing V.P. to “hump” M.C. while use was V.P. actually doing it. Tape 7 8/26/05 10:23:03 With all due respect, this cannot be what the Legislature contemplated as “promotion” when it enacted this law. Appellant would also note the Commonwealth emphasized “promotion” occurred because Mr. Clark allegedly told V.P. to “do” his sister like they were the pornographic movie playing on the TV. *Id.*, 10:27:32 However V.P. specifically stated that remark was made the time Mr. Clark solicited him to engage in this conduct, not the time it actually happened. Supplemental Tape 8/25/05 2:32:57, 2:35:40

KRS 505.020(1) provides in part, “When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when: (a) One offense is included in the other, as defined in subsection (2).” KRS 505.020(2) provides in pertinent part, “An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” In this case, the same facts established the commission of both promotion of a sexual performance of a minor and use of a minor in a sexual performance—V.P. allegedly “humped” M.C.

This Court should vacate one of these convictions. §§2 11, and 13, Ky. Const.; 5th and 14th Amends., U.S. Const.

**III. JURY INSTRUCTIONS ON COUNTS 27 AND 30 OF THE INDICTMENT ALLOWED THE JURY TO CONSIDER AND CONVICT MR. CLARK OF OFFENSES NOT CHARGED IN THE INDICTMENT IN VIOLATION OF RCR 6.16.**

**Preservation.** This issue is not preserved, but Mr. Clark asks that this error be reviewed as a palpable error resulting in a manifest injustice. RCr 10.26 He was convicted of two offenses for which he had not been indicted. Illegal convictions and sentences resulted. Cf. Cobb v. Commonwealth, 105 S.W.3d 455, 457-458 (Ky. 2003)(palpable error when illegally enhanced term of years resulted because the jury was incorrectly instructed to recommend a sentence within the enhanced penalty range without expressly finding him guilty of being a subsequent trafficking offender).

**Relevant Facts.** Mr. Clark was indicted on six KRS Chapter 531 counts. At issue in this Argument are two of those counts, 27 and 30. As to count 27, the indictment read:

That during the month of April, 2003, in Hardin County, Kentucky, the above named Defendant committed the offense of Promoting a Sexual Performance by a Minor when, knowing the character and conduct thereof, he produced, directed or promoted a sexual performance which includes sexual conduct of "M.C.," a minor under 16 years of age, by directing a said sexual performance by said minor. TR 1 4

The jury instruction for Count 27, however, was as follows:

You will find the Defendant guilty of Promoting a Sexual Performance by a Minor under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county over a period of time from January, 2003, through April, 2003, and before the finding of the Indictment herein, he knowingly produced, directed, or promoted a performance which included sexual conduct by V.P.;

AND



B. That V.P. was then less than 16 years of age. TR 2 125

Count 30 of the indictment provided,

That during the month of March, 2003, in Hardin County, Kentucky, the above named Defendant committed the offense of Criminal Attempt to Commit Promoting a Sexual Performance by a Minor when, knowing the character and conduct thereof, he attempted to produce, direct or promote a sexual performance which includes sexual conduct of "V.P.," a minor under 16 years of age, by attempting to directing a sexual performance by said minor. TR 1 5

The jury instruction for Count 30, however, was as follows:

You will find the Defendant guilty of Criminal Attempt to Commit Promoting a Sexual Performance by a Minor under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county over a period of time from January, 2003, through April, 2003, and before the finding of the Indictment herein, he knowingly produced, directed, or promoted a performance which included sexual conduct by K.C.;
- B. That K.C. was then less than 16 years of age.
- C. That under the circumstances as he believed them to be, the Defendant's actions constituted a substantial step in a course of conduct planned to culminate in a performance which included sexual conduct by K.C. TR 2 127-128

The Commonwealth stated the factual basis for this count was the time K.C. was directed to engage in a sexual act with M.C., and he said no. Tape 7 8/26/05 10:31:04 K.C. testified his dad told him to go into his bedroom. Supplemental Tape 8/25/05 1:42:27 M.C., who was only wearing a shirt, was lying on the bed. Id., 1:43:17 K.C. testified he refused to go into the bedroom, even though his father kept trying to get him to. K.C. said "no," and walked away. Id., 1:42:27

There was no mention at all by the Commonwealth of any need to amend the indictment as to Count 27 to reflect a change in victim from M.C. to V.P. As to Count

30, during a conference on jury instructions, the Commonwealth mentioned the count "should not be V.P. but K.C.," and stated it should be amended to K.C. Tape 7 8/26/05 10:30:52 However the trial court never ordered the indictment amended as to either count.

**Argument.** RCr 6.02 provides that "[a]ll offenses required to be prosecuted by indictment pursuant to § 12 of the Kentucky Constitution shall be prosecuted by indictment unless the defendant waives indictment by notice in writing to the circuit court, in which event the offense may be prosecuted forthwith by information." There was no such waiver by Mr. Clark. In addition, the Grand Jury Clause of the Fifth Amendment guarantees the right to be tried for an infamous crime only upon charges returned in grand jury indictment, thus protecting against oppressive actions of the prosecutor or court, which may alter the charge to fit the proof. Wright v. United States, 564 A.2d 734 (D.C. Cir. 1989)

As to counts 27 and 30 of the indictment, Mr. Clark could only have been convicted by the jury, in count 27, of promotion of a sexual performance by M.C., a minor, and, in count 30, criminal attempt to commit promotion of a sexual performance by V.P., a minor. Yet the trial court allowed the jury to convict Mr. Clark in count 27 of promotion of a sexual performance by V.P., a minor, and in count 30, criminal attempt to commit promotion of a sexual performance by K.C., a minor. This was despite the fact the court never actually amended the indictment.

Even if the trial court had formally amended the indictment, that would have been impermissible. Amendment of counts 27 and 30 to change the victim would have violated RCr 6.16, which states:

The court may permit an indictment...to be amended any time before verdict or finding **if no additional or different offense is charged** and if the substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted. (emphasis added)

Pursuant to this rule, it is clear that even though the prosecution can seek to amend the indictment to conform to the proof, it cannot add an offense for which the defendant has not been indicted. Wolbrecht v. Commonwealth, 955 S.W.2d 533 (Ky. 1997); Schambon v. Commonwealth, 821 S.W.2d 804, 810 (Ky. 1991). In Frizell v. Commonwealth, 511 S.W.2d 200 (Ky. 1974), the Court held that that an indictment on a charge of forgery could not be amended to uttering a forged instrument because the second charge was a different offense. The prosecutor in the instant case did not even seek to have the indictment amended, other than an offhand reference that one of the counts should be amended.

“An indictment . . . serves three vital constitutional functions. First, it insures that the accused is apprised of the charges so as to be able to adequately prepare a defense. Second, it describes the crime with sufficient specificity to protect the accused against future jeopardy for the same offense. Third, it protects against oppressive actions of the prosecutor or a court, who may alter the charge to fit the proof.” Byrd v. United States, 579 A.2d 725 (D.C. Cir.1990) Mr. Clark was afforded none of these protections. Ultimately, “[t]he conviction of a person for a crime with which he was never charged constitutes a clear violation of the right to due process.” Hagen v. State, 864 S.W.2d 856 (Ark. 1993)

A Kentucky “trial court has no authority to amend an indictment to charge an additional or different offense.” Coleman v. Commonwealth, 501 S.W.2d 583, 584 (Ky.

App. 1973) In the instant case the trial court did not amend the indictment, but it did charge a different offense. It instructed on promotion of a sexual performance of V.P., a minor, and attempt to commit promotion of a sexual performance of K.C., a minor, when neither of these counts were included in the indictment.

Here the trial court failed to amend the indictment, and even if it had amended it, that would have been error. Reversal is required. Mr. Clark's convictions for promotion of a sexual performance of V.P., a minor, and criminal attempt to commit promotion of a sexual performance by K.C., a minor, and the corresponding 20 and 10 year sentences must be vacated. RCr 6.02, 6.16; § § 2, 11, and 12, Kentucky Const.; 5<sup>th</sup>, 6<sup>th</sup> & 14<sup>th</sup> Amendments, United States Const. The convictions and sentences were unlawful because Mr. Clark had not been indicted for those offenses.

**IV. MR. CLARK WAS SUBSTANTIALLY PREJUDICED AND DENIED DUE PROCESS OF LAW BY IMPROPER TESTIMONY BY HIS FORMER PARAMOUR, AND MOTHER OF THE ALLEGED VICTIMS, SUSAN PRESTON.**

**Preservation.** Preservation will be noted in each subsection.

**Relevant Facts and Argument.**

Susan Preston, Mr. Clark's paramour of over 13 years and the mother of all three children, was the Commonwealth's first witness. Supplemental Tape 8/24/05 9:35:21-36:00 Ms. Preston was allowed to testify improperly a number of times.

(1) Mr. Clark was charged in a multi-count indictment with sexual abuse of V.P., M.C., and K.C. He was not, however, charged with any acts involving physical abuse like beatings, hitting, etc. TR 1 1-4 Furthermore the Commonwealth failed to provide any

KRE 404(c) notice that any such incidents would be introduced at trial. Supplemental Tape 8/24/05 10:01:28

The Commonwealth asked Ms. Preston why she did not want Mr. Clark to know she suspected him of sexual abuse of her children. Ms. Preston responded "out of fear." She said she had lived Mr. Clark for thirteen years and knew how Mr. Clark acted and reacted. Supplemental Tape 8/24/05 10:00:57 Ms. Preston said Mr. Clark had beaten her before, on different occasions. Id., 10:01:12

Mr. Clark immediately objected on KRE 404 grounds. Id., 10:00:18 The trial court overruled the objection, stating Ms. Preston could explain why she behaved as she did. Id., 10:02:07 The Commonwealth stated it was going to stop this line of questioning anyway, and, in the presence of the jury told Ms. Preston "we're going to leave it right there," Id., 10:02:29, yet then asked, "so the two of you had physical altercations before?" Id., 10:02:43 Ms. Preston responded in the affirmative, and said that was why she was afraid. Id., 10:02:51

A juror soon became sick, and the trial had to be continued until the next day. Id., 10:40:00 Ms. Preston's testimony on direct resumed the next day. The Commonwealth reminded Ms. Preston that she had testified to physical altercations between herself and Mr. Clark the day before. Supplemental Tape 8/25/05 10:13:11 Mr. Clark immediately objected, and the trial court sustained the objection to any more information. Id., 10:13:15 Ignoring this ruling, the Commonwealth asked Ms. Preston if V.P. ever witnessed any of these altercations, and she responded in the affirmative that was the case, and as a result V.P. was probably afraid Mr. Clark would hurt her. Id., 10:13:34-14:50

On redirect Ms. Preston testified V.P., M.C., and K.C. were all afraid Mr. Clark would beat them. Id., 11:23:10 Mr. Clark objected. While the trial court sustained the objection, it refused to admonish the jury per Mr. Clark's request. Id., 11:23:20-54

The essence of KRE 404(b) is "evidence of criminal conduct [or acts] other than that being tried, is admissible only if probative of an issue independent of character or criminal disposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky.1992). Because the potential for prejudice from evidence of this type is extremely high, the exceptions to the rule excluding evidence of bad character "must be strictly construed." Pendleton v. Commonwealth, 685 S.W.2d 549, 552 (Ky.1985). As a result, KRE 404(b) has always been interpreted as exclusionary in nature. Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky.1994).

The burden is on the Commonwealth to establish a proper basis for admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its inflammatory effect. Daniel v. Commonwealth, 905 S.W.2d 76, 78 (Ky.1995). As to the evidence elicited at trial, the Commonwealth did not even attempt to carry its burden to show admissibility of these prior bad acts. There was no justification even offered for this evidence. The evidence was extraneous. Evidence that Mr. Clark allegedly beat Ms. Preston was truly evidence of bad character.

Furthermore when the prosecution intends to introduce evidence under KRE 404(b) as a part of its case in chief, the Commonwealth must give *reasonable* pretrial notice to the defendant of its intention to offer such evidence. KRE 404(c). The KRE 404(c) notice requirement is in place "to assure that the defense is given an adequate

opportunity to investigate the factual basis for evidence of [prior bad acts] and to deal with the dangers of unreliability and prejudice." Commentary to KRE 404 Kentucky Evidence Rules Study Commission, Final Draft (1989). Even though evidence could otherwise be admitted under 404(b), the notice requirement operates as a separate hurdle that protects the defendant's right to a fair trial. Id.

Kentucky law requires specific notice of what evidence the Commonwealth intends to introduce as KRE 404(b) evidence. It does not matter that the evidence was disclosed in discovery—separate notice is required. “A police report alone does not provide reasonable pretrial notice.” Daniel, supra at 77. No KRE 404(c) notice was given to Mr. Clark. Supplemental Tape 8/24/05 10:01:28

The admission of evidence Mr. Clark beat Ms. Preston and the children were afraid he would beat them denied Mr. Clark due process and a reliable determination of his sentence under the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments, U.S. Const., and §§2, 7, 11 and 17, Ky. Const.; KRE 404(b) and (c). Reversal is required.

(2) Ms. Preston testified she was testifying for the Commonwealth “because I believe he needs to get punished for what he did.” Supplemental Tape 8/25/05 11:32:38 Of course, she was also testifying as part of her plea deal with the Commonwealth. Id., 10:48:39

Mr. Clark immediately objected, Id., 11:33:01, and the trial court overruled the objection. Id., 11:35:19

Ms. Preston stated again she was testifying “because he deserves to get punished for what he did.” Id., 11:36:04

Appellant would note that this comment occurred after Ms. Preston had already testified “my kids say it happened. I trust my kids.” Id., 11:21:18 That, however was not objected to.


The problem with Ms. Preston stating Mr. Clark “needs to be punished for what he did” is that it presupposes his guilt. As defense argued to the trial court, it is impermissible for a witness to express her opinion as to the defendant’s guilt. Stringer v. Commonwealth, 956 S.W.2d 883, 889-890 (Ky.1997) The fact Ms. Preston believes Mr. Clark needs to be punished should not enter into the jury’s analysis when considering the guilt or innocence of Mr. Clark.

Mr. Clark’s rights to due process, to present a defense, and a fundamentally fair trial were violated by the admission of this opinion testimony. 6<sup>th</sup> and 14<sup>th</sup> Amends. of the U.S. Const. and §§ 2, 3, 7, and 11 of the Ky. Const. Reversal is required.

### CONCLUSION

For the foregoing reasons, David A. Clark respectfully requests that this Court vacate his convictions, as well as his life sentence. Alternatively Mr. Clark requests this Court to reverse and remand the case for a new trial, or to grant him any other appropriate relief to which he may appear to be entitled.

RESPECTFULLY SUBMITTED,

  
for Emily Holt Rhorer

COUNSEL FOR DAVID A. CLARK