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Kentucky Supreme Court

2011-SC-000630-D
(2009-CA-2109-MR)

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COMMONWEALTH OF KENTUCKY — **APPELLANT/MOVANT**

v.

Appeal from Jefferson Circuit Court
Hon. Barry Willett, Judge
Indictment No. 2008-CR-2323

ERIC RAE BELL — **APPELLEE/RESPONDENT**

Brief for the Commonwealth/Appellant

Submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2012, the foregoing Brief for the Commonwealth was served, first class, pre-paid mail to Hon. Barry Willett, Judge, Chief Regional Circuit Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Room 601, Louisville, Ky. 40202-4733; sent via state delivered messenger mail to: Hon. Thomas Ransdell, Assistant Public Defender, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601; and electronically mailed to: Hon. Samuel Floyd, Assistant Commonwealth's Attorney, 514 West Liberty St., Louisville, KY 40202. I certify that the record was not checked out in this case.

W. Bryan Jones

W. BRYAN JONES
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INTRODUCTION

The Appellee, Eric Rae Bell was convicted in Jefferson Circuit Court of sodomy in the first degree, assault in the fourth degree and tampering with physical evidence. His conviction for sodomy in the first degree was reversed by the Kentucky Court of Appeals and his convictions for assault in the fourth degree and tampering with physical evidence were affirmed. The Commonwealth, as the Appellant, now appeals only the reversal of that sodomy in the first degree conviction.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant requests oral argument in order to fully develop the reasons why the decision of the Kentucky Court of Appeals should be reversed.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Appellee was indicted on August 6, 2008, for rape in the first degree, sodomy in the first degree, assault in the first degree and tampering with physical evidence. (TR I, "Indictment", pp. 1-3). He was subsequently indicted as a persistent felony offender. (VR Hearings: 2/3/09; 9:13:13).

Months before the trial, the trial court conducted a hearing on December 16, 2008 regarding a defense motion to admit evidence that the Appellee and the complainant used drugs during the incident in question and on one occasion about a year earlier. (VR Hearings: 12/16/08; 3:19:30-3:48:16). The trial judge issued a written order that the Appellee could introduce evidence that the complainant engaged in prostitution for drugs with the Appellee, once in 2007 and on the night of the incident in question at trial. (TR Vol. I, 98-103, "Order", May 19, 2009).

On the morning of the first day of the trial, the Commonwealth moved *in limine* to exclude evidence that the complaining witness had a prior history of drug use or was a "drug user," as inadmissible character evidence which was more prejudicial than probative. (VR No. 1: 6/23/09; 10:07:41-10:09:10). The defense argued that the complainant's statement to medical personnel when she was taken to the hospital on the day of the incident was admissible. (VR No. 1: 6/23/09; 10:09:14-10:11:50). The statement sought to be introduced by the Appellee was contained in Defendant's Exhibit 1/Avowal. This medical record reflects that the complainant said that she used cocaine monthly, for twenty years, was unsure of the last time and unsure of the amount, and that the longest she had gone without using was two months. (Defendant's Exhibit 1/Avowal, Appendix, Exhibit 1). The trial judge ordered that the Appellee could testify as to what

happened between the Appellee and the complainant on the day in question and that he and the complainant had traded drugs for sex once in 2007, but other past drug use and prostitution could not be mentioned. This ruling excluded the complainant's statement to hospital personnel that she had used cocaine for twenty years. (VR No. 1: 6/23/09; 10:11:52-10:12:45; 10:15:00-10:15:24; 10:16:40-10:16:56). The Appellee objected to this ruling. (VR No. 1: 6/23/09; 10:14:34; 10:17:20). Regarding an additional evidentiary matter, the Commonwealth conceded at trial that it would be permissible to show that the complainant had cocaine in her system on the day in question. (VR No. 1: 6/23/09; 10:13:15)

On the following day, the defense revisited the ruling regarding the medical record evidence. (VR No. 2: 6/24/09; 9:06:30). The trial judge stated that such proof was character evidence. He reasoned by analogy to a defendant standing trial that the problem with such evidence was that the jury might decide a case not on the evidence at trial, but based on feeling that if the person who was the target of bad acts evidence from the past had done something bad before, that he must have done it this time. (VR No. 2: 6/24/09; 9:11:40-9:12:11). The judge stated that the evidence in question would smear the complainant. (VR No. 2: 6/24/09; 9:14:40). The trial judge stated that the trial would focus on the incident, not history. (VR No. 2: 6/24/09; 9:23:00).

The Appellant was convicted of sodomy in the first degree, assault in the fourth degree and tampering with physical evidence. He was acquitted of rape in the first degree and being a PFO in the second degree. He was sentenced to thirteen (13) years for sodomy, two (2) years for tampering with physical evidence and twelve (12) months and

a one thousand ($1000.00) fine for assault. His total sentence was fifteen years imprisonment and a $1,000 fine. (TR Vol. II, 194-198, "Judgment of Conviction", October 8, 2009; See Appendix, Exhibit 1).

Upon direct appeal, the Kentucky Court of Appeals issued an Opinion on May 27, 2011, which reversed in part and affirmed in part, and remanded the case to Jefferson Circuit Court. The Opinion reversed the sodomy in the first degree conviction and affirmed the other convictions. (Court of Appeals Opinion, May 27, 2011, Appendix, Exhibit 2). The Appellant sought rehearing/modification, which was granted, and the May 27, 2011 Opinion was withdrawn and an Opinion dated September 16, 2011 was substituted for the previous Opinion. (Court of Appeals Order, September 16, 2011, Appendix, Exhibit three (3)). The second Opinion also reversed the sodomy in the first degree conviction while affirming the other convictions, and remanded the matter to Jefferson Circuit Court. (Court of Appeals Opinion, September 16, 2011, Appendix, Exhibit 4). [1]The Appellant sought discretionary review from this Court of the September 16, 2011 Opinion of the Court of Appeals, which was granted by this Court. (Supreme Court of Kentucky, "Order Granting Motion for Discretionary Review", December 14, 2011, Appendix, Exhibit 6).

The Court of Appeals Opinion held that the trial court's ruling excluding the complainant's past drug use for twenty years was erroneous and therefore overturned the Appellee's conviction for sodomy in the first degree. The Court of Appeals held that

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[1] Both Opinions by the Court of Appeals vacated the $1000.00 fine for assault in the 4th degree. That fine is not an issue in this appeal.

the trial judge abused his discretion in excluding the statement. The Court of Appeals relied heavily on an out-of-state case, Vermont v. Memoli, 18 A.3d 567 (Vt. 2011). The Court of Appeals held that the statement was admissible to show the complainant's motive to consent to sex with the Appellee in order to obtain cocaine. The Appellant will argue that the statement was properly excluded, but it is necessary to review the evidence at trial to complete this Statement of the Case.

P.W. (The adult victim in this case, who will be identified by her initials due to the sexual nature of some of the offenses) testified that at approximately 7:30-8:00 p.m. on June 27, 2008, she left her daughter's house where she was babysitting, to go to the Dairy Mart to buy a beer. The complainant also wanted to go to the house of "Daddy Travis" in order to borrow some money from him. She testified that he would loan her money and she would pay him back when she got paid, and that she got paid the first of the month. The complainant saw the Appellee at the Dairy Mart, whom she recognized from having met him in 2008. The Appellee offered to give her a ride, and she said she wanted to go back to her daughter's house. P.W. testified that she suffers from multiple sclerosis, which sometimes causes her problems with walking. After she got in the Appellee's car, he punched her in the face. He drove to a driveway of a house, got her out of the car, and pushed her into the house. She testified that she was dazed by the punch. (VR No. 2: 6/24/09; 9:30:33-9:44:15). P.W. testified that at that time, she was forty-eight years old, weighed only 110 pounds, and was five feet tall. (VR No. 2: 6/24/09; 9:29:43; 10:16:50-10:17:00).

P.W. testified that once inside, the Appellee pulled on her clothes and told

her to take them off. The Appellee demanded oral sex from her and made her perform oral sex on him. She tried to make excuses, and he let her go upstairs to the bathroom. When she came downstairs, the Appellee again made her perform oral sex on him. The Appellee tried to have sexual intercourse with her, and was able to penetrate her, but he did not stay inside her. He then began to beat her. (VR No. 2: 6/24/09; 9:45:50-9:51:10). He hit her in the face with his fists. She wanted to go to the bathroom again, but he would not let her go, and she defecated on the floor, as she has muscle disease. The Appellee beat her some more, saying he was mad because P.W. had messed up his girl's place. She was able to strike him in the head with an ash tray, and the Appellee stopped and went upstairs. Although nude, she crawled out to the street, and hid behind a vehicle. (VR No. 2: 6/24/09; 10:06:36-10:10:17). P.W. testified that she had been made to perform oral sex three or four times and that the Appellee penetrated her once when trying to rape her. (VR No. 2: 6/24/09; 10:10:27-10:11:00). She testified that she did not smoke crack with the Appellee that night, but had used cocaine the day before. She stated that this incident was not a prostitution situation. She testified that she had not exchanged sex for drugs with the Appellee in the year 2007. (VR No. 2: 6/24/09; 10:13:26-10:14:40).

Detective Docky Ousley testified that on June 27, 2008, he responded to a call to go to the 43rd Street/Duncan Avenue area, where he found P.W. nude, except for a blue jean coat, behind a van on a street curb. He called for an ambulance. (VR No. 2: 6/24/09; 11:35:25-11:38:00). He described her as bleeding from the mouth, with a swollen face and her eyes almost closed. She was in and out of consciousness. He feared

for her life. (VR No. 2: 6/24/09; 11:40:40-11:41:09). He testified that officers followed a blood trail to a house at 138 North 43rd Street. The police secured the house pending obtaining a search warrant. (VR No. 2: 6/24/09; 11:44:30-11:46:10).

Detective Brian Tucker testified that blood was found on the driveway at the 138 North 43rd Street house, as well as on the stairs to the house, the railing and the porch. (VR No. 2: 6/24/09; 1:20:06-1:28:34). Police knocked on the door, but nobody answered. (VR No. 2: 6/24/09; 1:28:45-1:29:15). The Appellee's wife arrived at the house, and provided a key so the officers with the search warrant could go inside, and entry was made at approximately 2:00 a.m. (VR No. 2: 6/24/09; 1:31:51-1:34:20). Upon entry, the police noted blood and feces on the floor and walls. They found the Appellee in the house, dressed in shorts and no shirt, with a cut on his head. He declined medical attention. (VR No. 2: 6/24/09; 1:34:41-1:36:23; 1:44:00).

Dr. Brandi Huecker, a University of Louisville Hospital obstetrician/gynecologist, testified that P.W. arrived at the hospital at approximately 9:20/9:30 p.m. Dr. Huecker gathered evidence from her for a sexual assault evidence kit. The doctor stated that P.W. was horribly beaten, with a bloody face and her eyes swollen shut. (VR No. 2: 6/24/09; 2:15:49-2:24:30). Dr. Huecker noted bruising and blood on the complainant. (VR No. 2: 6/24/09; 2:32:25-2:33:51). Dr. Huecker noted that P.W. tested positive for cocaine, which can remain in the system for up to ten days. (VR No. 2: 6/24/09; 2:41:30-2:44:50). P.W. remained in the hospital from June 27, 2008 until July 1, 2008. (VR No. 2: 6/24/09; 3:05:31; 3:14:28-3:15:10).

Kentucky State Police forensic biologist Alison Tunstill testified that DNA

found on the living room wall, bath tub, panties from the residence's kitchen garbage and underwear from the kitchen garbage matched P.W. with an estimated frequency of one person in 250 quintillion. A quintillion is a "one" followed by eighteen zeros. (VR No. 2: 6/24/09; 3:45:22-3:55:55). Ms. Tunstill further testified that male DNA from a vaginal swab taken from P.W. matched the Appellee with an estimated frequency of one person in 3.9 quintillion. (VR No. 2: 6/24/09; 3:56:30-3:56:49).

Detective Bryan Sherrard testified that when he met P.W. at the hospital her face was bloody and swollen and it was hard for her to open her mouth. (VR No. 3: 6/25/09; 9:19:50-922:50). The Appellee said that there had not been a girl in his house and that the blood was his, as he had fought some dude outside his house. When then told by Detective Sherrard that the blood could be analyzed, the Appellee then changed his story and said that a woman had been present, he had picked her up, smoked crack and weed with her, asked for sex, which occurred, and then she "tripped" and hit him with an ash tray. He then defended himself. (VR No. 3: 6/25/09; 9:52:30-9:54:50). Detective Sherrard testified that he observed a bloody mop, streaks in the bathtub, clothes in the garbage, and paper with blood and feces in the trash, which he considered proof of tampering with the crime scene evidence. (VR No. 3: 6/26/09; 10:29:00-10:30:40).

The Appellee testified that he was a convicted felon, and the trial judge admonished the jury that such evidence could only be used for credibility purposes. (VR No. 3: 6/26/09; 11:13:14; 11:41:12-11:42:23). The Appellee testified that he had traded drugs for sex with P.W. in the summer of 2007. (VR No. 3: 6/26/09; 11:14:40-11:15:50). He testified that on the date in question, P.W. voluntarily got into his car, went into his

house, and that he smoked crack on his marijuana, and she smoked crack in her crack pipe. He asked her to "get busy", meaning to have sex, and she performed oral sex on him. He attempted sexual intercourse, but could not become erect. He stated that she asked for more crack, but he did not have any more, and he told her "Now bitch you got to go." (VR No. 3: 6/26/09; 11:20:29-11:28:00). The Appellee said that she hit him in the head with an ash tray and he bled. He defended himself by hitting her with his fists with "all my might." She fell, and he went to the kitchen to wash his face. He then noticed the door was open, P.W. was gone, and there was feces on the floor. He stated that he cleaned up the feces. He cleaned up in the shower and mopped the kitchen floor. When the police arrived, they woke him up. (VR No. 3: 6/26/09; 11:28:00-11:36:10). The Appellee stated that he told the police at first that he had fought another man because he did not want his wife to find out that he had another woman in the house. (VR No. 3: 6/26/09; 11:37:10-11:37:50).

ARGUMENT

The Appellant respectfully requests reversal of the decision of the Kentucky Court of Appeals overturning the sodomy in the first degree conviction. The statement by the complaining witness to medical personnel that she had used drugs for twenty years was properly excluded by the trial court, and that the Court of Appeals erred in reversing the trial court by holding that the statement should have been admitted at trial. The issue regarding the trial court's ruling was preserved for consideration by this Court by virtue of the trial judge's oral rulings from the bench and subsequent appeal to the Court of Appeals. The trial court sustained the Commonwealth's pretrial motion to

exclude the disputed evidence. (VR No. 1: 6/23/09; 10:11:52-10:12:45; 10:15:00-10:15:24; 10:16:40-10:16:56; VR No. 2: 6/24/09; 9:11:40-9:12:11; 9:14:40; 9:23:00). The Appellee appealed his conviction to the Court of Appeals on multiple grounds, including the exclusion of the medical record evidence issue, and the Court of Appeals reversed the sodomy in the first degree conviction on the ground that the statement should not have been excluded. (Court of Appeals Opinion, May 27, 2001, Appendix, Exhibit 2). The Appellant sought rehearing from the Kentucky Court of Appeals, which was granted. The Court of Appeals withdrew the first Opinion, and issued a second Opinion, which still reversed the sodomy in the first degree conviction on the ground that the statement should not have been excluded. (Court of Appeals Opinion, September 16, 2011, Appendix, Exhibit 4). The Appellant sought discretionary review from this Court on October 17, 2011 on the issue of the exclusion of the medical record evidence by the trial court. This Court granted discretionary review. (Supreme Court of Kentucky, "Order Granting Motion for Discretionary Review," December 14, 2011, Appendix, Exhibit 5). Therefore the issue of the statement's admissibility is preserved for review by this Court. The Appellant argues for reversal of the Court of Appeals decision overturning the sodomy in the first degree conviction. This leaves intact the convictions as to assault in the fourth degree and tampering with physical evidence which are not appealed. The Appellant now makes its argument in five parts.

I

THE MEDICAL RECORD EVIDENCE OF THE STATEMENT BY THE COMPLAINANT REGARDING HER DRUG HISTORY WAS IRRELEVANT.

The Court of Appeals held that evidence of P.W.'s statement to medical personnel about her history of drug use and addiction was admissible under KRE 401, because it was relevant in determining whether she consented to sex with the Appellee in exchange for drugs. (Court of Appeals Opinion, September 16, 2011, p. 8, Appendix, Exhibit 4, p. 42). This threshold issue for admissibility was incorrectly decided on appeal. KRE 401 defines relevant evidence as, "... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." KRE 402 provides that relevant evidence is admissible unless excluded by the federal or Kentucky constitutions or Kentucky laws or rules, and that irrelevant evidence is not admissible. To hold that drug use for the past twenty years is relevant calls for a conclusion that all or most long term drug users would perform sexual acts to get drugs, which is so general a conclusion as to be a stereotype rather than a valid rationale for an evidentiary ruling. The fact that the complainant used drugs for many years does not make it more or less probable that she would have decided to sell herself for cocaine on the day in question. The evidence is not relevant.

The record shows that the trial judge indicated skepticism about whether the disputed evidence tended to prove the motive to consent to sex that it was offered for. The trial judge stated during a hearing on the matter that he thought the medical record only referred to the complainant's history of drug use. Defense counsel acknowledged that the complainant did not say that she had a history of prostitution for drug use. The trial judge then asked defense counsel if he had not just made a "quantum leap." (VR

No. 2: 6/24/09; 9:20:15-9:20:40). The trial judge was questioning if it was a stretch to go from evidence of past drug use to a conclusion that the drug user would prostitute herself for drugs. It was a stretch, and the past use of drugs was not relevant to show that the complainant would trade sex for drugs, and was not relevant to the trial.

The trial judge's ruling to admit evidence that P.W. had used cocaine the day before and to admit testimony from the Appellee that the two of them had engaged in trading sex for drugs one year earlier recognized that more recent evidence of drug use and more recent evidence of a relationship between the defendant and the complainant had relevancy. However, evidence that was distant in time from the incident was not relevant to the trial. The Court of Appeals mistakenly concluded that the disputed evidence had relevance to the case.

II

EVEN IF RELEVANT, THE MEDICAL RECORD STATEMENT OF THE COMPLAINANT REGARDING HER DRUG USE WAS PROPERLY EXCLUDED AS HAVING A PREJUDICIAL EFFECT THAT OUTWEIGHED ITS PROBATIVE VALUE

The Court of Appeals held that the trial court erred when it excluded P.W.'s statement to medical personnel about her history of drug use and addiction, because any prejudicial effect of that evidence was outweighed by the probative value of that evidence to show P.W.'s motive to consent to trade sex for drugs. (Court of Appeals Opinion, September 16, 2011, p. 8, Appendix, Exhibit 3). An examination of relevant law, focusing on KRE 404(b) and KRE 403, shows that the evidence was appropriately excluded by the trial judge because its prejudicial effect outweighed its probative value.

KRE 404(a)(2) provides that "in a prosecution for criminal sexual conduct," evidence offered by an accused about "a pertinent trait of character of the victim" is not admissible. Also, evidence of other offenses or bad acts is generally inadmissible. KRE 404(b) states, in pertinent part, that,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;...

The Court of Appeals Opinion cited to a passage in Vermont v.Memoli, 18 A.3d 567 (Vt. 2011) that stated that the defendant Memoli "*...did not seek to introduce complainant's drug use to prove that she had a specific character trait of being an addict or a reputation as a drug user to undercut her credibility...* Defendant's proffer was narrower: that evidence of complainant's drug use was relevant to demonstrate that she had motive to consent to sexual acts with defendant. This purpose is consistent with the rule." (Emphasis added). (Court of Appeals Opinion, September 16, 2011, p. 7-8, Appendix, Exhibit 4 p. 41-42, citing Memoli at ¶27, p. 576, citing Vermont Rule of Evidence 404(b)). The Court of Appeals stated that in the Appellee's case, the evidence of prior drug use was not being offered to establish a character trait of P.W., but to show motive to trade sex for drugs, which rendered the evidence admissible. The record shows that this was far more than just an attempt by the Appellee to show a motive.

Defense counsel stated during pretrial arguments on this issue that P.W.'s

statements to medical personnel about prior drug use "goes to her credibility." (VR No. 1: 6/23/09; 10:11:34). Defense counsel continued, stating that he wanted to show that "drug addicts are not reliable," and that this evidence went to the complainant's credibility. (VR No. 1: 6/23/09; 10:20:00-10:20:15). The very argument made by the Appellee's attorney on this issue shows that the real reason he wanted to get this evidence before the jury was to use the medical records statement as character evidence to smear her as a person who was unreliable and with bad credibility by virtue of being a drug user. This is exactly what the Vermont high court and the Kentucky Court of Appeals condemned as a rationale for introducing this evidence, while those Courts allowed the evidence under another theory of motive.

"The fundamental purpose of KRE 404(b) is to prohibit unfair inferences against a defendant." Anderson v. Commonwealth, 231 S.W.3d 117, 120-21 (Ky. 2007). While KRE 404(b) "...is overwhelmingly applied to crime or bad acts committed by a criminal defendant, it is also applicable to persons other than the criminal defendant." Parker v. Commonwealth, 241 S.W.3d 805, 812 (Ky. 2007). P.W. is therefore entitled to the protections of KRE 404(b) in the Appellee's case to prevent her from being prejudiced by "unfair inferences" that defense counsel apparently was prepared to argue at trial regarding her past drug use.

This Court has cautioned against the use of evidence that is claimed to be proof of motive, when that evidence actually more strongly tends to prove a "propensity" toward certain behavior. This Court has noted that even if relevant and probative, it should be excluded when "the probative value is substantially outweighed by the danger

of undue prejudice and confusion of the issues. KRE 403." Elaborating on this rule, this Court has said,

> If protection against propensity evidence is to be meaningful, courts must limit the use of the "motive" exception to situations where motive is pertinent to the issues of the case and where the other crimes evidence shows a motive to commit the charged offense and not just some offense.
>
> ...[B]ecause proving motive by other acts may inject serious risk of prejudice...considerable caution is needed. In the end, other acts that bring such risk should not be admitted to prove motive where the connection with such elements in the case...is too attenuated, where such elements are abundantly established by other evidence..., or where they are not seriously contested.

Purcell v. Commonwealth, 149 S.W.3d 382, 400 (Ky. 2004) (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25[5], at 146 (4th ed. 2003), quoting 1 Christopher Mueller and Laird C. Kirkpatrick, *Federal Evidence*, § 110, (2d ed. 1994)). (Purcell, supra, overruled on other grounds by Commonwealth v. Prater, 324 S.W.3d 393 (Ky. 2010)).

Even if evidence is deemed relevant and probative, it may be excluded under KRE 403, "if the probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." "In determining whether to exclude evidence a trial court should consider three factors: the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth." Page v. Commonwealth, 149 S.W.3d 416, 420 (Ky. 2004). (Citations omitted). Even if relevant and probative to

show motive, the inflammatory nature of evidence may outweigh its probative value. Funk v. Commonwealth, 842 S.W.2d 476, 481 (Ky. 1993). "[W]here the value of the evidence for a legitimate purpose is slight and the jury's probable misuse of the evidence for an incompetent purpose is great, the evidence may be excluded altogether." Chumbler v. Commonwealth, 905 S.W.2d 488, 496 (Ky. 1995).

The complainant in the Appellee's case is entitled to protection from propensity evidence, cumulative evidence and prejudicial evidence, just as a criminal defendant would be. There was a great risk of prejudice to her. This is apparent when considering that defense counsel advocated for the introduction of the prior drug use evidence on a theory of branding her as a drug addict with a character trait of bad credibility and unreliability, which was a theory disapproved of by the Vermont court in Memoli and the Kentucky Court of Appeals in this very case. The risk of prejudice is also apparent when considering that motive was abundantly established by other evidence. The Appellee was free to argue that the complainant traded sex for drugs based on the evidence at trial that she had cocaine in her system at the time of the incident, which could have been up to ten days old. The Appellee could also have argued motive based on the evidence at trial that P.W. said she had used cocaine the day before. The Appellee also testified that she had traded sex for drugs with him about one year earlier. All of this evidence allowed the Appellee to adequately defend himself by raising his argument that the complainant consented to the sex acts to obtain cocaine. There was no need to bring in her statement to medical personnel, as it would have actually served to cast her in a bad light with the jury while piling on more "motive" evidence that had little,

if any, additional value. KRE 404(b) and KRE 403 operate to exclude the kind of evidence that the Appellee sought to introduce through the complainant's statement to medical personnel.

The trial judge carefully considered this issue, as evidenced by the hearings and arguments devoted to this issue during the first two days of trial. While he allowed the evidence of more recent cocaine use and testimony that the complainant exchanged sex for drugs with the Appellee a year earlier, the trial judge correctly concluded that the statement to medical workers was impermissible character evidence. The judge performed the required balancing of competing interests of probative value versus prejudicial effect as required by law in reaching his decision. (VR No. 1: 6/23/09; 10:11:52-10:12:45; 10:15:00-10:15:24; 10:16:40-10:16:56; VR No. 2: 6/24/09; 9:11:40-9:12:11; 9:14:40; 9:23:00). The trial court did not abuse its discretion in making this evidentiary ruling, as the trial court decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003); Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The Court of Appeals should not have reversed the trial court, as there was no abuse of discretion in the trial court evidentiary ruling. Barnett v. Commonwealth, 979 S.W.2d 98, 103 (Ky. 1998).

III

VERMONT V. MEMOLI, THE CASE CITED AS AUTHORITY BY THE COURT OF APPEALS, DOES NOT SUPPORT THAT COURT'S HOLDING THAT THE MEDICAL RECORDS STATEMENTS OF THE COMPLAINANT REGARDING HER PAST TWENTY-YEAR DRUG USE ARE ADMISSIBLE

When the Kentucky Court of Appeals based its decision on Vermont v.Memoli, it noted that the "...Vermont Court ruled that evidence of the complainant's drug use thirty days before and after the incident was relevant to whether she had consented to the sexual relations with Memoli in exchange for crack cocaine." (Court of Appeals Opinion, September 16, 2011, p. 7, Appendix, Exhibit 4, p. 41). Memoli permitted evidence of drug use one month before and one month after the incident as evidence of motive to consent to sex in exchange for drugs. The excluded evidence that the Appellee sought to introduce was that twenty years of drug use was evidence of motive to consent to sex in exchange for drugs. The Appellee wanted to introduce this evidence, even though the trial evidence showed that the complainant had cocaine in her system on the day of the offense, had admitted that she used cocaine the day before, and the Appellee was permitted to testify that he had traded drugs for sex with the complainant one year earlier. As recent drug use was relevant to the ability to recall and relate the incident, as well as evidence of motive to consent, recent drug use was admissible. As testimony that the Appellee and the complainant had engaged in the trading of sex for drugs with each other and within the relatively recent time frame of one year earlier, that evidence was admissible, and could be used to argue consent by the

complainant. Expanding the boundaries of the evidence to include drug use for the past twenty years on the theory that it proves motive to consent goes too far, and even exceeds the scope of the evidence of drug use thirty days before and thirty days after in Memoli. In the present case, the trial judge fairly and ably considered the evidence, and recent and relevant evidence was available to and utilized by the Appellee which allowed him to present his defense that the complainant consented. The trial judge appropriately used his discretion to exclude remote and prejudicial evidence of distant behavior. As the time frame of the evidence of drug use in Memoli was thirty days before and after the incident, the use of that case to permit the introduction of evidence of drug use that was twenty years old was a misapplication of that case.

IV

KENTUCKY CASE LAW DOES NOT SUPPORT THE ADMISSION OF THE COMPLAINANT'S MEDICAL RECORDS STATEMENTS REGARDING HER PAST DRUG USE

The Kentucky Court of Appeals ruled that the Appellee should have been allowed to introduce evidence of P.W.'s past twenty years of drug use to show that she was a drug addict, and would therefore be more likely to consent to trade sex for drugs. Kentucky authority is that evidence of a drug habit is relevant to show a motive to commit a crime in order to get money to buy drugs, when evidence of the drug habit is coupled with evidence of insufficient funds to support that habit. Adkins v. Commonwealth, 96 S.W.3d 779, 793 (Ky. 2003). In Adkins, there was proof that the defendant lived in "abject poverty" but had bought cocaine after a robbery/murder. Id. at

793. Therefore, one may contend under appropriate circumstances that evidence of a drug habit, along with sufficient financial hardship, is admissible to show that a person would have a motive to commit a crime obtain drugs.

The Court of Appeals adopted the reasoning and result of Memoli as to evidence of drug use, but neither the Vermont Court nor the Kentucky Court addressed the issue of financial need on the part of the complainant. As the decision of the Kentucky Court of Appeals stands, all that would be required in order to introduce evidence of the past drug use or evidence of addiction to show motive, would be evidence of the drug use or addiction itself, which is a departure from present Kentucky case law. Proof of use or addiction alone is insufficient to establish motive, as it does not follow that just because an individual is a user or addict that the individual would be more likely to trade his/her body for something of value, like drugs. Memoli and the Kentucky Court of Appeals Opinion in this matter fail to provide a legally sound basis for the admission of the type of evidence that was sought to be introduced by the Appellee.

The financial status of the complainant in this case was not extensively developed in the record. P.W. testified that before running into the Appellee, she had just bought a beer at the Dairy Mart, which would show that she had some money at the time. P.W. indicated that she wanted to borrow some money from "Daddy Travis." She said he would loan her money and she would pay him back, and she got paid at the first of the month. Many folks borrow money, whether it be to buy a car or a house, or to finance a particular expense, so just borrowing does not always provide proof of financial need that would drive somebody to the extreme measure of trading sexual favors for

something of value. There was no proof of how much money the complainant sought to borrow either, whether the amount was large or a nominal sum.

There was no proof at trial regarding the cost of crack cocaine. That would be relevant to the issue of whether a person seeking access to the drug would be able to buy it or might find it necessary to resort to barter or trading sex to get the drug. Kentucky law requires a showing of financial need in order to introduce evidence of drug addiction to prove motive to commit a bad act, and the record here is insufficient as to P.W.'s lack of financial resources.

Should this Court conclude that there was a sufficient showing of financial need on the part of P.W., there was still plenty of evidence introduced to allow the Appellee to present his defense of consent to the jury. The jury heard evidence that the complainant had cocaine in her system, had used it the day before, and that she had traded sex for drugs with the Appellee a year earlier. The jury also heard about the complainant wanting to borrow money and was free to conclude based on the evidence that she might want to trade sex for cocaine. The jury may make reasonable inferences from the evidence. Dillingham v. Commonwealth, 995 S.W.2d 377, 380 (Ky. 1999); Blades v. Commonwealth, 957 S.W.2d 246, 250 (Ky. 1998). Credibility and weight of the evidence are matters within the exclusive province of the jury. Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999). The jury had some evidence of financial concern by the complainant, and evidence about her drug use that stretched back an entire year. The Appellee was free to argue consent and the jury was free to accept or reject that argument. Just because the Appellee was unable to introduce evidence of P.W.'s twenty-year drug

use and because he did not win acquittal on all charges does not mean that he was deprived of a fair trial.

It should be kept in mind that evidence bearing on the issue of force or consent in this case was not limited to the issue of drugs. The jury was presented with evidence that the Appellee struck the complainant and forced her inside his residence, where the incident occurred. There was evidence of blood in the residence, and evidence that the complainant was found outside that residence, nude and beaten, behind a vehicle on the street. There was evidence that she spent five days in the hospital. Evidence regarding consent or force was greater than just proof about the involvement of drugs in this case. The Appellee was able to adequately defend himself with a consent claim based on the drug evidence introduced against P.W. The jury also had plenty of evidence of violence on the part of the Appellee which could account for the rejection of that consent defense. The Appellee was not convicted because he was not allowed to label P.W. as a twenty-year drug addict, but was convicted due to the strength of the other evidence against him.

V

THE MEDICAL RECORDS STATEMENTS OF THE COMPLAINANT REGARDING HER PAST DRUG USE WERE INADMISSIBLE "PREDISPOSITION" EVIDENCE UNDER KRE 412

The Court of Appeals found that KRE 412, the "rape shield law", was inapplicable to this case. (Court of Appeals Opinion, September 16, 2011, p. 7, Appendix, Exhibit 4, p. 41). Judge Combs of the Court of Appeals in dissent did not invoke KRE 412. However, she did express concern over the effect of the Opinion on

victims, stating, "I would refrain from adopting a rule from a foreign jurisdiction that essentially would render evidence of drug use into a rebuttable presumption of sexual promiscuity or an automatic inference that sexual favors must be a *quid pro quo* for drugs. And the Vermont case relied upon by the majority creates that very evidentiary outcome - an outcome which, in effect, may further victimize and stigmatize the victim of an alleged sexual assault." (Court of Appeals Opinion, September 16, 2011, p. 19, Appendix, Exhibit 3). The contested evidence would have had the effect of suggesting that the complainant had a predisposition to engage in sexual activity, which is troublesome.

KRE 412 provides that,

> (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):...
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

The Appellee sought to admit evidence of the complainant's past drug use under the rubric of "motive", but the effect of this evidence is that it attempts to establish the predisposition of the complainant to engage in sex in order to obtain drugs. This is contrary to the command of KRE 412(a)(2) that such predisposition evidence is not admissible. Howard v. Commonwealth , 318 S.W.3d 607, 614-15 (Ky. App. 2010). The trial judge allowed more recent evidence of sexual behavior between the Appellee and the complainant for purposes of showing motive to consent, which was consistent with KRE 412(b)(1)(B). However, the excluded evidence proposed by the Appellee was not

admissible evidence of motive to consent, but evidence of a general predisposition to have sex with anybody so long as drugs were available to be traded. The exclusion of this predisposition evidence by the trial court was consistent with KRE 412, and the trial judge correctly denied its admission.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Kentucky Court of Appeals which overturned the conviction of the Appellee for sodomy in the first degree, affirm the sodomy in the first degree conviction of the Appellee in the Jefferson Circuit Court, and leave intact the decision of the Kentucky Court of Appeals affirming the convictions for assault in the fourth degree and tampering with physical evidence.

Respectfully submitted,

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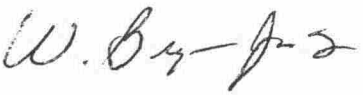
Attorney General of Kentucky



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