Commonwealth of Kentucky
Supreme Court
No. 2007-SC-248

JOHN TIM JENKINS **APPELLANT**

On Discretionary Review from the
Kentucky Court of Appeals No. 2006-CA-158
Appeal from Woodford Circuit Court
v. Hon. Paul F. Isaacs, Judge
Indictment No. 04-CR-5 % 04-CR-34

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 8th day of October, 2007 to Hon. Paul F. Isaacs, Woodford Circuit Court, Justice Building, 119 North Hamilton Street, Georgetown, Kentucky 40324; Hon. Gordon Shaw, Commonwealth Attorney, 187 South Main Street, Versailles, Kentucky 40383-0468; and Hon. J. Guthrie True, Johnson, True & Guarnieri, LLP, 326 West Main Street, Frankfort, Kentucky 40601, counsel for appellant.

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INTRODUCTION

Appellant, John Tim Jenkins, was charged with violating KRS 510.070, sodomy in the first degree, a Class A felony, two counts; KRS 510.110, sexual abuse in the first degree, a Class D felony, two counts; and KRS 510.148, indecent exposure, a Class B misdemeanor, two counts. After a jury trial, Appellant was found guilty of one count of sexual abuse in the first degree and one count of indecent exposure. He was sentenced to a term of five (5) years imprisonment for committing sexual abuse in the first degree, and he was fined $250.00 for committing indecent exposure. Appellant is free on appellate bond.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not desire oral argument in this case, nor does it believe it would aide the Court in deciding this appeal. The case was orally argued before the Court of Appeals. The Commonwealth does not know if the oral argument was recorded and included with the record before this Court. The Commonwealth does stand ready to present oral argument if so ordered.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On January 7, 2004, Appellant, John Tim Jenkins, was indicted by the Woodford County Grand Jury. He was charged with two counts of sodomy in the first degree, two counts of sexual abuse in the first degree, and two counts of indecent exposure. (TR 1 - 2, 90). The male victim, "J.S.," was less than twelve (12) years old. A jury trial was held on August 15 - 18, 2005. Appellant was found guilty of one count of sexual abuse in the first degree and one count of indecent exposure. (TR 322 - 334). Appellant was sentenced to a term of five years imprisonment for committing sexual abuse in the first degree. He was also ordered to pay a fine of $250.00 for committing the offense of indecent exposure. (TR 389 - 391).

Additional facts will be discussed as necessary in the Argument section.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISALLOWING THE CHARACTER TESTIMONY OF APPELLANT'S EXPERT WITNESS.

A. The Standard of Review. At trial, Appellant sought to introduce expert testimony from Dr. Terence Campbell, a forensic psychologist. KRE 702. The disputed testimony was taken by avowal. Dr. Campbell "was prepared to testify concerning improper questioning techniques which can result in unreliable reporting by child witnesses, and specifically, the improper questioning methods utilized by [the Commonwealth's witnesses]." Appellant's Brief, at p. 10. The trial court's decision to allow, or disallow, expert testimony is reviewed under the abuse of discretion standard of review. Stringer v. Commonwealth, 956 S.W. 2d 883, 895 (Ky. 1997); Mitchell v. Commonwealth, 908 S.W.2d 100, 102 (Ky. 1995).

B. The Trial Court's Ruling. Dr. Campbell's testimony was taken by avowal. (Transcript of Evidence, hereinafter "TE," Vol. III, p. 55 - 89). After listening to Dr. Campbell's testimony, the trial court held its admission was precluded by KRE 702. The trial court held:

> Well, I have looked at the cases that you [Appellant] gave me from the other states. One of the interesting things I noted in those cases and also in the 6th Circuit case, that a lot of their reasoning was based on the ruling of the New Jersey Supreme Court in Michael [State v. Michaels, 642 A.2d 1372 (N.J. 1994)], which Kentucky has not adopted. So, I'm a little bit concerned that we're going into an area that Kentucky has not gone with. Maybe, we may be wrong

> in Kentucky, but at this point I don't think we're following the rules that maybe even a majority of the states have, but we're not there yet. I don't see anything in Kentucky's courts that would allow this type of testimony. Now, if I'm missing something I would like to know because in fact, in reading this dissent in the Florida case [State v. Malarney, 617 So.2d 739 (Fla. App. 1993)], I think pretty much–pretty well set up what I understand the law in Kentucky is. It says the Court, and its citing another Florida case, saying that an expert in the field of investigation and interviewing allegedly sexually abused children should not have been allowed to testify because he was, in effect, performing a test of credibility not unlike that of a polygraph examination, and since cross examination can perform the same function, it was held that it was error to allow him to testify for the state, it showed it on the other foot in this case. So, that seems to me although it was not the law in Florida, it is the law in Kentucky. TE, Vol. III, p. 90 - 91.

The trial court continued;

> I understand your [Appellant] argument, unfortunately I think your position, the Kentucky courts have drawn the line that there is a difference between the handling of evidence at the crime scene and the testimony of a witness. They have still, after Daubert, there's nothing to indicate that they have changed their view that it is improper to go into questioning about interview techniques which are designed to show that the witness was not being truthful. You can ask questions about it, it's proper for cross examination. In fact, quite frankly, the issues that he raised certainly are proper issues for you to raise in cross examination. You can raise the issue of suggestibility, you can raise the issue of whether or not this child was coerced, and that is a jury question, but I don't think that Kentucky has gone along with the other courts [cited by Appellant] in saying that you can bolster that with expert testimony. I don't think they've gone there, and so until they do, I don't think I have any choice but not to let it in. I don't make these rules, I only follow them. TE, Vol. III, p. 93 - 94.

C. **The Trial Court Did Not Abuse its Discretion**. As noted earlier, Appellant's alleged expert, Dr. Terence Campbell, was prepared to testify that certain studies have shown that improper questioning techniques, i.e., leading questions, can result in unreliable reporting of sexual abuse by child witnesses. So long as a proper foundation is established, the Commonwealth agrees such testimony would generally be admissible. But, Appellant and Dr. Campbell would not stop there. Dr. Campbell also wanted to go over the transcripts of the interviews of the Victim, J.S., and note ever time an allegedly "improper" question was asked.[1] Of course, Appellant wanted the jury to conclude, based upon Dr. Campbell's testimony, that the questioning of J.S. was improper and, therefore, his responses were unreliable.

Kentucky law is clear. Experts may not offer testimony concerning the credibility of other witnesses. Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1992); Hester v. Commonwealth, 734 S.W.2d 457, 459 (Ky. 1987); and, Hall v. Commonwealth, 862 S.W.2d 321 (Ky. 1993). The Court of Appeals herein misconstrued Stringer, supra. In Stringer, this Court held that: "We once again depart from the 'ultimate issue' rule and rejoin the majority view on this issue." Id at p. 891. Thus, an expert opinion is not otherwise excluded simply because it touches upon, or concerns the ultimate issue. Id. "In a criminal case, the ultimate fact in issue is whether the defendant is guilty or not guilty." Id. The character of a witness is not the ultimate issue, and

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[1] Appellant cross-examined the interviewer, and Appellant asked him many questions about his questioning technique. In several instances, the interviewer admitted his questions may have been leading. Thus, the need for Dr. Campbell's character attack was mooted. Further, Dr. Campbell's testimony would have been improperly cumulative.

Stringer does not open the door for expert witnesses to attack the character of other witnesses. After Stringer, an expert still may not comment upon the character of another witness. "Evidence of the character of the victim of criminal sexual conduct is generally inadmissible." Id at p. 892. Of course, the character of a witness includes the truthfulness, candor and honesty of a witness. When Dr. Campbell sought to comment upon the individual questions asked of J.S., and his responses, Dr. Campbell was trying to attack J.S.'s truthfulness, candor and honesty. He was attacking the character of J.S. Appellant, through Dr. Campbell, was attempting to introduce inadmissible "evidence of the character of the victim of criminal sexual conduct." Even after Stringer, this testimony is improper. The trial court properly excluded the same.

Per Stringer, supra, at p. 891, non-character, expert testimony is admissible so long as it meets the following four-prong test. First, the witness must be qualified to render an opinion on the subject matter. Second, the subject matter must be proper for one as expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2768, 125 L.Ed.2d 469 (1993). Third, the subject matter must satisfy the test of relevancy, subject to balancing of probativeness against prejudice. Lastly, the opinion must assist the trier of fact. Dr. Campbell's testimony was properly excluded per Stringer, supra, because his opinions upon the character of J.S., and his interviewers, were not relevant. And, his opinion would not have assisted the trier of fact. Rather, it would have invaded the province the trier of fact, i.e., assessing the reliability of the witnesses and assigning the weight to be afforded their testimony.

In Newkirk v. Commonwealth, 937 S.W.2d 690 (Ky. 1997), a child sexual accommodation syndrome case, the Court was presented with the issue of whether expert testimony could be introduced "to show that it is common for children to report sexual abuse, and then retract their allegations." Id at p. 693. The Court answered in the negative. "Regardless of whether the expert testimony of Dr. Sullivan was admissible under *Daubert* . . . we remain convinced that the testimony lacked relevancy and invaded the province of the jury by expressing an opinion on the ultimate issue of guilt or innocence." Id at p. 695. The Court continued:

> "In final analysis, the more that courts permit experts to advise the jury based on probability, classifications, syndromes and traits, the more we remove the jury from its historic function of assessing credibility. While a criminal may be facile with his denials and explanations and a child may be timid and halting, we entrust to the wisdom of the twelve men and women who comprise the jury the responsibility to sort between the conflicting versions of events and arrive at a proper verdict." Id at p. 696.

While the case *sub judice* does not concern child sexual abuse accommodation syndrome case, the overwhelming logic of Newkirk is controlling. Dr. Campbell's avowal testimony was nothing more than an attempt to attack the credibility of the victim and the witnesses who interviewed him. Dr. Campbell did not have to expressly say that these witnesses lacked credibility. Yet, this belief came through loud and clear in his avowal testimony–a syllogism with an implied conclusion. His avowal testimony was: the witnesses failed to use proper interviewing techniques; and, proper interviewing techniques produce false results. All that was missing was Dr. Campbell's implied conclusion, and any reasonable juror could have supplied the conclusion–the

testimony of the victim and his interviewers was unreliable. Dr. Campbell's testimony would have improperly invaded the exclusive province of the jury.

In Stringer, supra, "Dr. Terence Campbell [the same Dr. Campbell who testified by avowal in this case] testified by avowal that children are generally suggestible and may be improperly influenced by adult interrogators if proper procedures are not followed." Id at p. 892. The trial court held that his testimony was "properly excluded as irrelevant." Id. But, the legally strong reasoning for excluding Dr. Campbell's testimony came from now-Chief Justice Lambert, who was joined by then-Chief Justice Stephens, in his opinion concurring in result only. Justice Lambert stated:

> On appeal, the standard of review of a ruling denying admissibility of evidence under KRE 702, which governs expert opinion evidence, was whether "the trial judge abused his or her discretion." [Citation omitted]. The proffered testimony of Dr. Campbell consists precisely of the profile generalities we have prohibited the Commonwealth from introducing in the long line of cases culminating in *Newkirk v. Commonwealth, supra*. Without interviewing the children himself, Dr. Campbell **implied** that, due to the extreme suggestibility of children and certain non-standard practices in the investigation of abuse, the child witnesses' testimony was not reliable. (Emphasis added.)
>
> There is no meaningful distinction between this testimony and that which was excluded in *Newkirk* and other cases as evidence of "child sexual abuse accommodation syndrome" or some facet thereof. This case well illustrates the mischief of such testimony and shows that allowing opinion testimony of this nature invites a war between "experts" which will serve only to confuse the jury and diminish its historic role of assessing witness credibility. The trial court properly excluded this testimony. Id at p. 895 - 896.

The Kentucky Supreme Court is not the only court that has specifically rejected Dr. Campbell's syllogism, character testimony. In U.S. v. Huberty, 53 M.J. 399 (Armed Forces 2000), the Court held that Dr. Campbell could not testify that: exhibitionists consistently produce certain test results on the MMPI-2; that appellant did not produce those results; and, therefore, appellant was not an exhibitionist.

Appellant has cited a number of foreign cases which suggest allowing Dr. Campbell's testimony. But, it appears most, if not all, of those states have adopted FRE 704. Kentucky has not. Dr. Campbell's testimony would be rejected by a host of other states, too. In Timmons v. State, 584 N.E.2d 1108, 1112 - 1113 (In. 1992), the defendant sought to introduce testimony similar to that of Dr. Campbell. The Indiana Supreme Court held it was properly excluded. The Court held:

> We do not feel the trial court erred in excluding the testimony . . . Its purpose was to impeach the credibility of the State's witnesses Dr. Shea, Kelly, and Turnbloom by showing that their interviewing techniques were inadequate and thus tainted T.T.'s responses. Appellant, however, had the opportunity to fully cross-examine the State's witnesses with respect to these issues and did indeed fully exercise this opportunity . . . In this instance, the trial judge was correct in determining that any additional testimony concerning interview bias would be of no aid to the jury. Id.

Appellant herein had ample opportunity to cross-examine those who interviewed the victim. He also had ample opportunity to cross-examine the victim. He took advantage of both opportunities.

In State v. Russell, 571 A.2d 229 (Ma. 1990), the trial court excluded [illegible]rt testimony, holding that its admission "would entirely change the focus of the trial from what happened in this case to the way in which the investigation was carried out." Id at p. 230. The Supreme Judicial Court of Maine affirmed the trial court's decision on this issue, holding:

> Robinson's testimony amounted at most to a generalized critique of the techniques he understood were used to interview the victim. His testimony, if admitted, would have created a trial within the trial. After weighing all factors, the justice concluded that the probative value of Robinson's testimony was substantially outweighed by the danger that the jury would be confused or misled. We cannot say that the court's decision to exclude this testimony constituted an abuse of discretion accorded it by Rule 403. Id at p. 231.

It is interesting to note that Maine follows FRE 704, yet even it held the trial court may exclude such testimony. It explained its reasoning in Footnote 1: "The trial court did not otherwise limit defendant's ability to explore this issue. Defendant had ample opportunity to cross-examine the people who did interview the victim and argue to the jury any flaws in the interview techniques." Id. This is the same reasoning used by non-FRE 403 states. Appellant herein also had ample opportunity to cross-examine the victim, as well as those who interviewed him.

In State v. Walters, 260 Wis.2d 210, 659 N.W.2d 151 (2003), the Court of Appeals of Wisconsin held that the trial court properly excluded testimony similar to that which Dr. Campbell would have offered herein. The Court found the trial court did not abuse its discretion in finding the evidence would be "at best, minimally relevant"

because the state was planning on using live witnesses and would not rely on the children's statements to police. Id at p. 158. In other words, the victim and the interviewer were subject to cross examination. In the case *sub judice,* the victim and the interviewer testified at the trial and were subjected to cross examination. There was no need for Dr. Campbell's testimony.

In State v. Biezer, 947 S.W.2d 540 (Mo.App.E.D. 1997), the Missouri Court of Appeals held similar expert testimony was properly excluded. The Court held the trial judge did not abuse his discretion given the ages of the victims and "other corroborating witnesses." Id at p. 543. In the case *sub judice*, there were many corroborating witnesses, i.e., the lifeguards and other employees of Falling Springs Arts and Recreation Center, as well as B.F., the boy who saw Appellant improperly touch victim, J.S.

The trial court properly excluded Dr. Campbell's testimony. Now-Chief Justice Lambert was correct. Testimony of this nature only serves "to confuse the jury and diminish its historic role of assessing witness credibility." Stringer, supra, at p. 896. The Supreme Court of Maine was correct when it stated such evidence creates a "trial within the trial." Russell, supra, at p. 231. The Court of Appeals of Wisconsin was correct when it stated that such testimony is "at best, minimally relevant" when the victim testifies at trial. Walters, supra, at p. 158. The Missouri Court of Appeals also correctly held that such testimony is unnecessary, especially when the victim's allegations are corroborated by other, non-expert witnesses. Lastly, like now-Chief Justice Lambert in Stringer, supra, the Indiana Supreme Court was correct when it held that such expert

is unnecessary because the defendant can cross-examine those people who ed the victim. Timmons, supra, at p. 1112-1113. The trial court herein did not abuse its discretion in disallowing Dr. Campbell's testimony. The trial court must be affirmed.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT HELD APPELLANT COULD NOT PLAY THE INTERVIEW TAPE TO THE JURY.

A. The Facts Concerning this Issue. During the course of investigating this case, Officer Rick Qualls of the Versailles Police Department interviewed the victim, J.S. This interview was recorded. TE, Vol. IV, p. 20 - 21. During cross-examination, Appellant sought to cross examine Officer Qualls concerning his interviewing technique. But, Appellant did not want to ask Officer Qualls individual questions about the questions that were put to J.S. Rather, Appellant simply wanted to play the tape to the jury, including both Officer Qualls' questions and victim J.S.'s answers. The Commonwealth objected, claiming the tape constituted hearsay per KRE 802 and 801(c) A KRE 103 hearing was held.

B. The Trial Court's Ruling. The trial court held the audiotape constituted hearsay and could not be played for the jury. The trial court specifically held:

> This is my problem, Mr. True, I'd like for you to address is that I understand your argument as to what Mr. Qualls, what Officer Qualls said. The problem I'm having is with the tape is it not only contains his questions, but the response of a party, of a witness who has not testified, so there's no foundation for that. You could lay a foundation

for Mr. Qualls' part of it and what he said, but there's no foundation for what the responses are, and they are out of court statements of a witness, which is hearsay. Now, you can lay a foundation under 613 [prior inconsistent statements] for that, but that's the problem I'm having. Not the part that is his questions which you want to get into and which is legitimate, but child's responses to those questions have no relevance to the issue you're wanting to talk about. TE, Vol. IV, p. 91.

[illegible] continued:

> You can ask the officer about his questioning and then you ask the child about his answers, and you can play it, and you can ask the child if he did that, and then you've got them both out there. I would feel a lot more comfortable doing it that way than through this officer because I think really what you're trying to get at is that you're trying to use these statements of the child, these out of court statements of the child for the purpose of showing they're not true, and I really don't see any difference between that and offering them to show that they are true. I think it's the flip side of the same coin . . . No, but you are offering it to destroy the credibility of a witness who is not testifying [at that moment] . . . But, you have already impeached this child with this statement [tape] before he ever gets on the stand–because the whole purpose of this is to show that his testimony is not reliable because it has been tainted by the methods. I think you can cross examine him until the cows come home about the way he did it. You can ask him if its leading and everything, and you can ask him about the questions. I just have a problem with the child's statements coming in before the child testifies or before there's anything about what he has said or not. I think you're trying to do the flip side of what I wouldn't let them do on the other side. Now, I understand your argument that it's not being for the purpose of showing its truthfulness, but it is for the purpose of showing that his testimony was unreliable. TE, Vol. IV, p. 100 - 102.

C. <u>The Standard of Review</u>. It is well-settled that the evidentiary decisions of the trial court will not be disturbed absent an abuse of discretion. <u>Partin v.</u>

[illegible]wealth, 918 S.W.2d 219 (Ky. 1996). An abuse of discretion only occurs when [illegible] court's decision to allow, or exclude, evidence is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Woodard v. Commonwealth, 147 S.W.3d 63 (Ky. 2004). A trial court's decision whether to strike all or part of a witness' testimony is also reviewed under the abuse of discretion standard. Moody v. Commonwealth, 170 [illegible] (Ky. 2005).

D. The Trial Court Did Not Abuse its Discretion and Appellant's Due Process Rights Were Not Violated. The trial court did not abuse its discretion. But, Appellant does not argue that the trial judge abused his discretion, and he does not frame this issue as one concerning the admissibility of the interview tape. Appellant has abandoned his argument that the tape was not hearsay. Instead, Appellant argues that his inability to play the tape to the jury restricted his right to cross examine, thereby violating his due process rights and right to confront and cross examine witnesses.

The trial court did not limit Appellant's right to confront or cross examine Officer Qualls in the slightest. As the trial court noted, Appellant was free to cross examine Officer Qualls' about his interview questions and technique "until the cows come home." The trial court also noted Appellant was free to question victim J.S. about his answers. Appellant extensively cross examined Officer Qualls and victim J.S. Appellant's right to confront and cross examine Officer Qualls and Victim J.S. was not impaired in any way.

The essence of Appellant's argument can be stated thus: due process [illegible]dates that his right to cross examine be unrestricted. This is not the law.

> A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. [Citations omitted]. A defendant's interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.' [Citations omitted]. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." [Citations omitted]. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. U.S. v. Scheffer, 503 U.S. 303, 308, 118 SCt 1261 (1998).

KRE 801 and 802 serve several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the trial court's role in determining the admissibility of evidence, particularly hearsay, and avoiding litigation that is collateral to the primary purpose of the trial. KRE 801 and 802 are neither arbitrary nor disproportionate in promoting these ends. Nor do they implicate a weighty interest of the defendant to raise a constitutional concern under established precedent.

Further, Appellant's weighty interest in confronting and cross examining Officer Qualls and victim J.S. was not impaired in any way by the trial court's decision. As noted earlier, Appellant was free to, and did, cross examine Officer Qualls as to his interview technique and the questions he put to victim J.S. TE, Vol. IV, p. 72 - 76, 116 - 127, and 130 - 135. Appellant was also free to, and did, cross examine victim J.S. as to the answers he gave to those questions. TE, Vol. V, p. 36 - 39, 41 - 42, 49, 51, 53 - 54.

process rights were not violated. The trial court did not abuse its discretion in ng the tape to be played to the jury. The trial court must be affirmed.

III.

THE INDICTMENT WAS NOT CONSTRUCTIVELY AMENDED AND APPELLANT FAILED TO PRESERVE THE ISSUE FOR APPEAL.

A. <u>The Facts Concerning this Issue</u>. Appellant was charged with committing sexual abuse upon victim J.S. on October 8, 2003. This abuse occurred at the Falling Springs Arts and Recreation Center in Woodford County, Kentucky. Victim, J.S., testified that, after swimming, he took a shower with Appellant and another minor, B.F. J.S. testified that, while in the shower, Appellant "put his mouth on my front toward privates." No contemporaneous objection was made. TE, Vol. V, p. 23. During a brief recess, after J.S.'s testimony, Appellant moved for a mistrial. Appellant did not argue constructive amendment of the indictment. Rather, Appellant argued a violation of KRE (b). The trial court overruled the motion for mistrial. TE, Vol. V, p. 44 - 46.

The minor, B.F., also testified. B.F. testified that he was briefly in the shower with Appellant and victim J.S. at the Falling Springs Arts and Recreation Center and that he saw Appellant touch J.S. on "his private." TE, Vol. III, p. 21 - 24. Again, no contemporaneous objection was made. The following morning, in chambers, Appellant moved for a mistrial. Appellant did not argue constructive amendment of the indictment. Rather, Appellant again argued a violation of KRE 404(b). TE, Vol. III, p. 100 - 103. The trial court denied the motion. TE, Vol. III, p. 107 - 108. The trial court held:

"Secondly, I don't think this is quite 404B testimony because he's charged with sexual abuse, which is improper touching. This is evidence of that. It is part of the same event, and I don't think that it is an independent act, prior act, I think it comes with it." TE, Vol. III, p. 108.

B. The Issue Was Not Properly Preserved for Appeal. Appellant argues this issue was properly preserved for appeal. The Commonwealth disagrees. To preserve an issue for appeal, a contemporaneous objection must be made at the time of the relevant testimony. RCr 9.22. Lickliter v. Commonwealth, 142 S.W.3d 65 (Ky. 2004); Commonwealth v. Pace, 82 S.W.3d 894 (Ky. 2002); Bell v. Commonwealth, 473 S.W.2d 820 (Ky. 1971). Appellant did not object or move for a mistrial at the time the relevant testimony was offered. Rather, regarding J.S., the motion for mistrial was made during a brief recess. Regarding B.F., the motion for mistrial was made the morning after his testimony. The objections and motions were not timely, and this issue has not been properly preserved for appellate review.

Further, before the trial court, Appellant did not argue that the indictment had been constructively amended. Instead, Appellant argued that the relevant statements of J.S. and B.F. violated KRE 404(b). Appellant does not raise a violation of KRE 404(b) on appeal. Appellant cannot raise an issue on appeal that was not presented first to the trial court. The trial court must be given an opportunity to rule on an appellant's complaint. The courts of this Commonwealth have long held that an appellant cannot feed one can of worms to the trial court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976); Hopewell v. Commonwealth, 641

744, 745 (Ky. 1982). Appellant's waiver of this issue and failure to raise it [illegible] trial court in any manner completely removes this issue as a subject of appellate review. West v. Commonwealth, 780 S.W.2d 600, 602 - 603 (Ky. 1989) (upheld on federal habeas corpus review in West v. Seabold, 73 F.3d 81 (6th Cir. 1996)); Kennedy, supra; Hopewell, supra.

Nonetheless, no error occurred and Appellant suffered no prejudice. Appellant was charged with sexual abuse in the first degree. It was alleged that, "[o]n or about the 8th day of October, 2003, in Woodford County, Kentucky, the above named Defendant unlawfully committed the offense of Sexual Abuse, First Degree, when he subjected J.S. to sexual contact, who was incapable of consent because he was less than twelve years old." TR 1. Sexual contact is defined as "**any** touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." (Emphasis added.) KRS 510.010(8).

The indictment was legally sufficient. "The indictment need not detail the essential elements of the charged crime, so long as it fairly informs the accused of the nature of the charged crime . . . and if it informs the accused of the specific offense with which he is charged and does not mislead him." Ernst v. Commonwealth, 160 S.W.3d 744, 752 (Ky. 2005). See also: Parrish v. Commonwealth, 121 S.W.3d 198, 202 (Ky. 2003) and Schrimsher v. Commonwealth, 190 S.W.3d 318 (Ky. 2006).

The fact that Appellant touched J.S.'s "privates" in the shower instead of, or in addition to, the pool is irrelevant. Appellant was on notice that he was charged with [illegible]" touching of J.S.'s intimate parts, and that said touching occurred in Woodford

October 8, 2003. Where the touching occurred, inside Woodford County, is

Appellant argues J.S.'s and B.F.'s testimony constructively amended the indictment. Particularly, he alleges that J.S.'s testimony raised an unindicted act of sodomy. The facts do not support this allegation. J.S. never said that, on October 8, Falling Springs Arts and Recreation Center, Appellant performed oral sodomy upon him. J.S. testified Appellant "put his mouth on my front toward privates." "Toward" and "on" are two completely different things. There was no allegation of sodomy on October 8, 2003. There was no proof of oral sodomy committed on October 8, 2003.

In U.S. v. Zidell, 323 F.3d 412, 432 (6th Cir. 2003), the Sixth Circuit Court of Appeals, quoting its earlier decision in U.S. v. Chilingirian, 280 F.3d 704, 711-12 (6th Cir. 2002), held:

> The Fifth Amendment guarantees that an accused be tried only on those offenses presented in an indictment and returned by a grand jury. The constitutional rights of an accused are violated when a modification at trial acts to broaden the charge contained in an indictment. A *variance* [to the indictment] occurs when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. In contrast, an *amendment* involves a change, whether literal or in effect, in the terms of the indictment. This Circuit has held that a variance rises to the level of a constructive amendment when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.

The proof that Appellant touched victim J.S.'s penis, or other intimate [illegible] his hand (or even his mouth) did not "modify essential elements of the offense [illegible]ged." He was charged with sexual abuse in the first degree, which requires "sexual contact." "Sexual contact" includes "any" touching of the sexual or intimate parts of a [illegible] for the purpose of gratifying the sexual desire of either party. "Any" means any. It doesn't matter if Appellant touched J.S.'s penis, or intimate parts with his hand, his mouth or his great toe, so long as he did it for his sexual gratification. It constitutes "sexual contact." Of course, the reason Appellant did not raise this argument before the trial court is the simple fact that the Commonwealth could have moved to amend the indictment during the trial. RCr 6.16. Thus, Appellant was not prejudiced by his failure to raise this issue before the trial court. Had he raised the issue, the Commonwealth simply would have moved to amend the indictment per RCr 6.16. Therefore, any error was also harmless. Harmless error is applicable to constructive amendment of indictments. Washington v. Commonwealth, 6 S.W.3d 384 (Ky. App. 1999).

In summary, this issue was not properly preserved for appellate review. Nonetheless, Appellant was not prejudiced by this failure. No new offense was alleged, or proven, and the Commonwealth could have moved to amend the indictment per RCr 6.16. Any error was harmless. The trial court must be affirmed.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S MOTIONS FOR MISTRIAL CONCERNING THE

COMMONWEALTH'S CLOSING ARGUMENT.

A. The Standard of Review. In Kentucky, a prosecutor is allowed ble latitude in closing argument. White v. Commonwealth, 695 S.W.2d 438, 439 (Ky. App. 1985); Lymen v. Commonwealth, 565 S.W.2d 141, 145 (Ky. 1978); Harness v. Commonwealth, 475 S.W.2d 485, 490 (Ky. 1971). A mistrial or reversal for prosecutorial misconduct in a closing argument is not to be granted absent an urgent and real necessity for it. Matthews v. Commonwealth, 163 S.W.3d 11 (Ky. 2005). A mistrial or reversal is necessary only if the misconduct is "flagrant" or if each of the following three conditions is satisfied: (1) Proof of the defendant's guilt is not overwhelming; (2) Defense counsel objected; and, (3) The trial court failed to cure the error with a sufficient admonition to the jury. Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002) (citations omitted). Misconduct is "flagrant" not merely if it is openly or defiantly improper, but only if it is "so prejudicial, under the circumstances of ne case, that an admonition could not cure it." Price v. Commonwealth, 59 S.W.3d 878, 881 (Ky. 2001).

Furthermore, in considering allegations of prosecutorial misconduct during closing argument, the court must determine whether the conduct was of such an "egregious" nature as to deny the accused his constitutional right to due process of law. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The required analysis, by an appellate court, must focus on the overall fairness of the trial, not the culpability of the prosecutor. Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed. 78 (1982).

B. The Trial Court Properly Overruled Appellant's Motions for Mistrial. To prevail on appeal, Appellant must meet all three prongs of the test contained in Barnes, supra. Appellant did object to all three statements which concern this issue. But, proof of defendant's guilt was overwhelming. That should be the end of the Barnes analysis. Even if the Barnes analysis is continued, there is no error. Regarding the first motion for mistrial, the Court held: "I didn't hear it that way, so I'm going to overrule. I think all she [prosecutor] was saying is that there were certain things that couldn't come in because of the rules of evidence, and that she didn't have to answer all of their [jury] questions, which is the law. So, I don't think it was an improper argument, so I'm overruling your objection." Nothing the Commonwealth said was so "egregious" as to deny Appellant his right to due process.

Regarding the second motion for mistrial, the Court stated: "Yeah, but you're limited to those 4040B (sic) cases. You can't just throw open the door and say, well, there may be a lot more going on out there and we didn't introduce any proof on it." TE, Vol. VI, p. 103. The trial court then admonished the jury, telling them they were not to consider any extraneous information, but "that you are limited in your deliberations to only matters in evidence." TE, Vol. VI, p. 103. When the Commonwealth refers to another crime, the error, if any, is to be cured by an admonition, not a mistrial. Richards v. Commonwealth, 517 S.W.2d 237, 242 (Ky. 1974).

During its closing argument, the Commonwealth said: "But he is one of the most offensive people you'll ever meet. Someone who sexually abuses young,

vulnerable children." Appellant immediately objected. TE, Vol. VI, p. 115. At the bench conference, the Commonwealth stated: "I said children and I should have said child, I'm sorry." TE, Vol. VI, p. 115. The trial court held: "I'm not going to grant a mistrial, but I will direct you to say that it was only one child." TE, Vol. VI, p. 116. Addressing the jury, the Commonwealth then immediately said: "Actually, I misspoke (sic) there, and he caught me. I said children and I did mean child, so I apologize for that." TE, Vol. VI, p. 116. While the trial court did not itself offer a correction to the jury, the Commonwealth was made to offer a *mea culpa*. This had the same curative effect as a correction or admonition coming from the trial court. Any error was harmless.

The trial court properly overruled all three motions for mistrial. The trial court must be affirmed.

V.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE MOTION FOR DIRECTED VERDICT ON THE CHARGE OF INDECENT EXPOSURE.

Appellant argues the trial court erred in denying his motion for a directed verdict of acquittal relative to his charge of indecent exposure. "A person is guilty of indecent exposure in the first degree when he intentionally exposes his genitals under circumstances in which he knows or should know that his conduct is likely to cause affront or alarm to a person under the age of eighteen (18) years." KRS 510.148.

The seminal Kentucky case for directed verdicts is Commonwealth v.

816 S.W. 2d. 186 (Ky. 1991). The Court in Benham held, at p. 187:

> On motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

See also: Shegog v Commonwealth, 142 S.W.3d 101 (Ky. 2004); Farler v. Commonwealth, 880 S.W.2d 882 (Ky.App., 1994); and, Yarnell v. Commonwealth, 833 S.W.2d 834 (Ky. 1992). A directed verdict is only proper if the Commonwealth fails to produce more than a mere scintilla of evidence. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Benham, supra, at p. 187. The United States Supreme Court has also given firm direction in this matter:

> [T]his inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt [citation omitted]. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319-320, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis original.)

The Commonwealth offered far more than a mere scintilla of evidence to

the conviction for indecent exposure. After Appellant, victim J.S., and B.F. finished swimming, they went into the locker room. Before they entered the showers, Appellant told the boys to take off their swimming trunks. Appellant said they should all do that so they could wash off the chlorine. TE, Vol. V, p. 22 - 23. The young boys took off their trunks, and Appellant took off his trunks, too. TE, Vol. V, p. 22. The showers were individual stalls. B.F. was in the middle stall, and Appellant and victim J.S. were in the left stall. TE, Vol. III, p. 28. While naked, and in an individual shower stall with J.S., Appellant placed "his mouth" on J.S.'s "front toward privates." TE, Vol. V, p. 22. B.F. exited his shower, looked inside Appellant's shower stall, and saw Appellant touch J.S. on his privates. TE, Vol. III, p. 21 - 22.

Drawing all reasonable inferences, a reasonable jury could find Appellant exposed his genitals under circumstances in which he knew, or reasonably should have known, would likely cause affront or alarm to a prepubescent boy. Appellant and victim J.S. were not related. They were in a small shower stall. Appellant was naked, and he was molesting the boy while both were naked. Given the circumstances, his exposed genitalia and conduct certainly would cause affront or alarm to a prepubescent boy. The trial court did not err in denying the motion for a directed verdict.

VI.

APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE LENGTH AND HOURS OF THE JURY'S DELIBERATIONS.

It is well settled, in Kentucky, that the length and hours of jury deliberations is left to the sound discretion of the trial judge. Gilbert v. Commonwealth,

Law Rep. 416, 51 S.W. 590 (1899). "The record shows that the jury were kept [illegible] less than 30 hours, and this is a matter which must necessarily be left to the discretion of the trial court. There is nothing in the record which indicates that the jury were coerced into rendering a verdict not in accordance with their convictions as to defendant's guilt or innocence; and, while it is the duty of the trial judge to see that a [illegible] charged with a crime is given a fair and impartial trial, it is also his duty, after such trial, to give the jury every reasonable opportunity to arrive at a verdict." Id at p. 591.

Thus, the Gilbert Court held that permitting 30 hours of deliberations was not an abuse of discretion. Other states have addressed the issue of late night deliberations. In State v. Bell, 798 S.W.2d 481 (Mo.App.S.D. 1990), the jury retired at 4:40 p.m. to begin its deliberations. It returned its verdict at 3:20 a.m. The Missouri Court of Appeals found no error. Id at p. 485. In Martin v. State, 196 So. 753 (Ala.App. 1946) the jury deliberated through the night and returned its verdict the following morning. The Court of Appeals of Alabama found no error. Id at p. 753 - 754.

Appellant cites three foreign cases for the proposition that the jury's late night deliberations violated his right to due process. In State v. Parisien, 703 N.W.306, 313 (N.D. 2005), the jury deliberated from 7:40 p.m. until 2:19 a.m. The Court found this deliberation, in and of itself, was not erroneous. But, the Court did find reversible error based upon a combination of six factors, only one of which was the hours of deliberation. Other factors giving rise to error included giving the jury two *Allen* charges, failure of the court to follow proper procedure in addressing the jury's questions, and the

of an official record for the in-chambers conferences. Id.

In State v. Parton, 817 S.W.2d 28 (Tenn.Cr.App. 1991), the jury deliberated from 11:45 p.m. until 2:15 a.m. The Court held there was no per se rule prohibiting late night deliberations. But, the Court did say such sessions should be avoided absent unusual circumstances. If the parties and the jury consent to the late deliberations, no error occurs. Appellant herein stated he had no objection to continuing the sentencing phase of the trial that night. TE, Vol. VI, p.132

In State v. McMulllin, 801 S.W.826 (Tenn.Cr.App. 1990), the Court found error in allowing the jury to hear evidence after 1:00 a.m. The jury in this case did not hear evidence after 1:00 a.m. Thus, McMullin is not applicable, even as persuasive authority.

The trial court did not abuse its discretion in allowing late night deliberations. Appellant's right to due process was not violated. The trial court must be affirmed.

VII.

THERE IS NO CUMULATIVE ERROR IN THIS CASE.

Appellant argues "[t]he cumulative effect of the errors deprived Appellant of due process under the . . . " law. Appellant's Brief, at p. 25. This is not a case of cumulative error. Appellant has not shown any error which would require reversal. "[A} combination of non-errors does not suddenly require reversal." Bowling v. Commonwealth, 981 S.W.2d 545 (Ky. 1998). See also: Funk v. Commonwealth, 842

483 (Ky. 1993) and McQueen v. Commonwealth, 721 S.W.2d 694 (Ky.

CONCLUSION

WHEREFORE, the Final Judgment of Woodford Circuit Court must be AFFIRMED.

Respectfully submitted,

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