COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2008-SC-731

DISCRETIONARY REVIEW FROM 2007-CA-194

LUTHER WILBERT SEXTON **APPELLANT**

v. **APPEAL FROM PULASKI CIRCUIT COURT**
HON. JEFFERY THOMAS BURDETTE, JUDGE
INDICTMENT NO. 05-CR-267

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLANT, LUTHER WILBERT SEXTON

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Jeffrey Thomas Burdette, Chief Judge, 100 N. Main Street, P.O. Box 1324, Somerset, Kentucky 42502; the Hon. Jeremy A. Bartley, Assistant Commonwealth Attorney, 236 E. Mount Vernon Street, Somerset, Kentucky 42501; the Hon. Robert E. Norfleet, 207 West Mt. Vernon ST. STE 111, Somerset, Kentucky 42501; and to Hon. Todd D. Ferguson, Asst. Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on September 4, 2009. The record on appeal has been returned to the Kentucky Supreme Court.

SAMUEL N. POTTER

Introduction

This Court granted discretionary review of Luther Wilbert Sexton's case because of the novel application of Tampering with Physical Evidence to Mr. Sexton and the excessive amount of prior bad acts introduced against him. The Court of Appeals affirmed the Pulaski Circuit Court judgment that convicted him of Tampering with Physical Evidence, Disorderly Conduct, and First Degree Persistent Felony Offender and that imposed a 12 year prison sentence upon him.

Statement Regarding Oral Argument

Luther requests oral argument because it would assist the Court in rendering fair and just opinion in a case that deals with a novel application of Tampering with Physical Evidence and would aid the Court in understanding the nature and amount of prior bad acts used against Luther.

Statement of Points and Authorities

Statement of the Case

Testimony regarding what happened in Pulaski County on July 21, 2005.

Brenda McDowell ran the child care program for the Pulaski County school system. VR No. 2: 11/20/06; 11:46:10. On July 21, 2005, she took the children to the pool at General Burnside State Resort Park. VR No. 2: 11/20/06; 11:47:30. As the children were swimming, she noticed a man squatting and holding a camera across the road by a shelter. VR No. 2: 11/20/06; 11:48:45; 11:51:00. The shelter was a pavilion next to a picnic area that was outside of the fenced in pool, across the road, and up the hill. VR No. 2: 11/20/06; 11:57:00. The man left in his truck once he realized that the people at the pool noticed him. VR No. 2: 11/20/06; 11:50:30. Someone at the pool got the license number and make of the truck and called the police. VR No. 2: 11/20/06; 11:53:10.

Troy McClin, a deputy with the Pulaski County Sheriff's Department, went to the home of Luther Sexton because the truck was registered in his name. VR No. 2: 11/20/06; 2:02:30. Mr. McClin testified at trial that he knew Luther was a registered sex offender. VR No. 2: 11/20/06; 2:04:00. However, Mr. McClin testified at the preliminary hearing that he found out that Luther was a registered sex offender after he left Luther's house. Transcript of Record (TR) 1, 65. Luther initially said he was not at the pool, but then said he was after Mr. McClin mentioned his license plate number. VR No. 2: 11/20/06; 2:08:40. At first, Luther told Mr. McClin he was just sitting there, but then told him that

he did have a camera. VR No. 2: 11/20/06; 2:09:30. Luther told him he got the camera out to look at a houseboat he saw, but could not get it out in time to tape it. VR No. 2: 11/20/06; 2:10:00.

Mr. McClin asked to see the tape. When Luther brought the camera and tape to him, Mr. McClin asked to watch the tape and Luther allowed him to do so. VR No. 2: 11/20/06; 2:10:30; 2:12:30. Mr. McClin watched part of the tape and did not see any footage of the children at the Burnside pool. VR No. 2: 11/20/06; 2:13:00. Mr. McClin would have taken the tape if it had evidence on it. However, he gave it back to Luther. If Mr. McClin thought the tape was evidence, he would not have left it with Luther. He did not tell Luther he was going to get a search warrant. He did not tell Luther he was going to come back to his house. Luther had no way of knowing he would come back. Mr. McClin assumed Luther thought the tape was his to keep forever. He said Luther had no reason to think the tape would be evidence. Luther never told him to stop watching the tape or to not rewind it. Luther cooperated fully with his request to watch the tape. VR No. 2: 11/20/06; 2:30:00-2:32:00.

Mr. McClin told Luther not to go to the pool again. Luther allowed him to walk through his house and then Mr. McClin left. VR No. 2: 11/20/06; 2:14:00. When Mr. McClin left Luther's house, he had no idea he would be coming back. VR No. 2: 11/20/06; 2:32:00. Mr. McClin contacted his

supervisor about what to do next. His supervisor told him to come into the office so they could get a warrant. VR No. 2: 11/20/06; 2:15:00.

Lieutenant Brett Whitaker ran the criminal investigation unit of the Pulaski County Sheriff's Office. VR No. 2: 11/20/06; 3:24:00. Lt. Whitaker got an arrest warrant for disorderly conduct for Luther based on his conduct at the Burnside pool and a search warrant for Luther's home. He served the warrants with Mr. McClin and several other officers. VR No. 2: 11/20/06; 3:28:00. They did not find the tape that Mr. McClin had watched. VR No. 2: 11/20/06; 3:29:00. Their search revealed no child pornography nor any other criminal material. VR No. 2: 11/20/06; 4:24:00.

Lt. Whitaker seized 53 videotapes during the search. VR No. 2: 11/20/06; 3:31:30. One of the tapes was played for the jury. VR No. 2: 11/20/06; 3:39:45-4:12:30. It contained footage of little girls from movies and TV shows. Lt. Whitaker said there was nothing criminal on that tape or any of the other tapes. VR No. 3: 11/20/06; 4:27:00-4:28:20. He found no images from the Burnside pool on any of those tapes. VR No. 3: 11/20/06; 4:31:00.

Testimony regarding what happened outside of Pulaski County before July 21, 2005.

Angela Capps was an Assistant Commonwealth's Attorney in Wayne County. VR No. 2: 11/20/06; 12:04:40. She told the jury that on July 21,

2005, Luther had three counts of sexual abuse against two minor children pending in Wayne Circuit Court. VR No. 2: 11/20/06; 12:05:00. She said that Luther had been released on bond and that one of his bond conditions was not to be around any children. VR No. 2: 11/20/06; 12:08:30-12:09:30. She admitted that a bond sheet from March 5, 2005 did not contain the condition that Luther have no contact with children. VR No. 2: 11/20/06; 1:35:00; 1:36:00. She claimed that he was orally told at some point to stay away from children. VR No. 2: 11/20/06; 1:48:50.

Ms. Capps had prosecuted Luther in Wayne County after his arrest in Pulaski County. The jury found him not guilty on two of counts and could not reach a verdict on the third. On the morning of the trial in Wayne County, the Wayne Circuit Court ordered that the Commonwealth could not introduce Luther's prior convictions for sexual offenses in Florida and Ohio because they were too prejudicial.

A tape of the Wayne County trial was included in the record in this case. On that tape, Ms. Capps asked for a continuance "because we have built our case around the prior convictions and the Pulaski County charges." VR No. 4: 4/5/06; 9:54:25. Despite what she said on tape, during the trial in Pulaski County, she denied making that statement but did testify that "it was the basis of the theory of their case to substantiate what he had done." VR No. 2: 11/20/06; 12:15:10.

Tim Marhar retired from the Lorain County Sheriff's Office in Ohio. VR No. 3: 11/20/06; 5:12:20. He last saw Luther in 1985 when he was a detective. He investigated him twice regarding sexual abuse allegations. There were two alleged victims in each investigation, and their ages ranged from eight to eleven. VR No. 3: 11/20/06; 5:13:10.

Mr. Marhar detailed his first investigation for the jury. He said Luther touched one of the girls multiple times by putting his hand down her pants and up her shirt. VR No. 3: 11/20/06; 5:17:00. Two of the girls went to his house to swim. One wore a loose top that exposed her breasts. The other wore a loose bottom that exposed her vagina. VR No. 3: 11/20/06; 5:18:00. Mr. Marhar said one of the girls took a trip with Luther where they looked at pornography. He said that Luther told him that the girls said they wanted to suck his dick. VR No. 3: 11/20/06; 5:19:00. This investigation resulted in Luther pleading guilty to Gross Sexual Imposition, which involved fondling a minor under 13. VR No. 3: 11/20/06; 5:21:25. During the second investigation, Mr. Marhar said Luther told him that he had a sickness and needed help. VR No. 3: 11/20/06; 5:22:45.

Ed Boone was a retired law enforcement official from Lee and Glades Counties in Florida and had been a military police officer before that. VR No. 3: 11/20/06; 5:32:15. He investigated Luther in 1999. VR No. 3: 11/20/06; 5:33:30. Luther pled no contest to one count of Lewd and Lascivious Acts with

a Minor, which involved the improper touching of the private parts of an eight year old girl. He was designated a sexual predator. VR No. 3: 11/20/06; 5:34:10; 5:41:00; 6:06:45. Mr. Boone identified a tape with him that he seized when he searched Luther's home in Florida in 1999. It had footage of young girls at a swimming pool that focused on their breasts, vaginas, and buttocks. VR No. 3: 11/20/06; 5:43:30-5:44:40. The tape was played for the jury. VR No. 3: 11/20/06; 5:46:00-6:02:35.

Procedural history.

A Pulaski County Grand Jury indicted Luther Sexton for Tampering with Physical Evidence, Disorderly Conduct, and First Degree Persistent Felony Offender on September 21, 2005. TR 1, 1-2. A jury trial was held on November 20 and 21, 2006. The jury found him guilty of both underlying offenses, and he pled guilty to first degree persistent felony offender. VR No. 3: 11/21/06; 12:10:25; 12:41:40. The jury recommended a 12 year prison sentence and a $200.00 fine. VR No. 3: 11/21/06; 2:14:40. A final judgment was entered on February 7, 2007 that sentenced him accordingly. TR 2, 299-301.

Luther appealed as a matter of right to the Court of Appeals. The Court affirmed his conviction in an opinion rendered on September 5, 2008. Thereafter, this Court granted discretionary review to address the sufficiency of the evidence of the tampering conviction and the admission of the prior bad acts evidence against Luther. Further facts will be developed throughout this brief as necessary.

Arguments

I. When an officer views a videotape, sees no evidence of a crime on that tape, returns the tape to its owner and leaves without indicating in any way that his investigation is continuing, the evidence does not support a conviction for Tampering with Physical Evidence.

Preservation

This issue was preserved when defense counsel moved for a directed verdict of not guilty based upon insufficiency of the evidence at that close of the Commonwealth's case-in-chief and at the close of all evidence. The court overruled both motions. VR No. 3: 11/20/06; 6:15:10-6:18:50; 6:57:00-6:58:30.

Argument

Due process requires that the prosecution must prove beyond a reasonable doubt every element in its case. *In re Winship*, 397 U.S. 358, 364 (1970); *see also*, KRS 500.070. When the prosecution fails to present sufficient evidence to prove every element, due process is violated. *Fiori v. White*, 531 U.S. 225 (2001). A directed verdict of acquittal is not warranted at the trial level if after drawing "all fair and reasonable inferences from the evidence in favor of the Commonwealth . . . the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)(*citing*, *Sawhill v. Commonwealth*, 660 S.W.2d 3 (Ky. 1983)).

The standard is different on the appellate level. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Benham*, 816 S.W.2d at 187 (*citing, Sawhill, supra*). The prosecution must prove every element included in the definition of the offense beyond a reasonable doubt, and it may not shift the burden of proof to the defendant on those essential elements. *Patterson v. New York*, 432 U.S. 197 (1977.)

It was clearly unreasonable for the jury to find Luther guilty of Tampering with Physical Evidence. Therefore, he was entitled to an acquittal as to that charge.

To find Luther guilty of Tampering with Physical Evidence, the jury had to find beyond a reasonable doubt that he (1) altered, concealed or removed evidence, which he believed was about to be produced or used as evidence in an official proceeding; and (2) that he did so with intent to impair the accuracy of the official proceeding. TR 2, 191; KRS 524.100.

The only objective and reasonable interpretation of the evidence introduced at trial was that Luther had no reason to believe the tape he showed to Mr. McClin would ever be used as evidence in any official proceeding. Mr. McClin watched the tape. He saw no footage from the Burnside pool on it. VR No. 2:

11/20/06; 2:29:20. After he watched what he wanted of it, he gave it back to Luther. VR No. 2: 11/20/06; 2:30:05. He believed Luther would have thought that the tape was Luther's – forever – to do with what he wanted. VR No. 2: 11/20/06; 2:30:45. Mr. McClin did not tell Luther that he was coming back. Luther had no reason to expect his return. VR No. 2: 11/20/06; 2:30:35.

At this point, Luther had no reason to believe that the tape would ever be the subject to any criminal proceeding or further criminal investigations. These are not "self-serving statements from the defendant." *Commonwealth v. Nourse*, 177 S.W.3d 691, 698-699 (Ky. 2005)(*citing, Edmonds v. Commonwealth*, 906 S.W.2d 343, 347 (Ky. 1995). Rather, Mr. McClin, the investigating officer, made these statements under oath during Luther's trial. Thus, the only conclusion Luther or any other reasonable person could reach was that the investigation had been concluded and that no official proceeding would follow because there was nothing criminal on the tape.

In *Commonwealth v. Henderson*, 85 S.W.3d 616, 619-620, Ky. (2002), this Court commented that "the investigatory process" includes a police chase. Luther had every reason to believe "the investigatory process" had concluded when Mr. McClin left his home. After watching the tape and finding no footage of the Burnside pool, Mr. McClin gave the camera and tape back to Luther. He then told Luther to stay away from the pool. VR No. 2: 11/20/06; 2:13:50.

What is important for this appeal is what Mr. McClin did not tell Luther. He did not tell Luther to not destroy the tape. He did not tell Luther to not erase the tape. He did not tell Luther he would be back for the tape. He did not ask Luther to take the tape with him. What obligation applied to Luther (or any other person for that matter) when a police officer returned his property after finding no evidence of any kind of a crime? The tape that was in Luther's possession was his personal property. He was free to do whatever he wanted to do with it.

Luther's conduct with Mr. McClin contrasts with what happened in *Burdell v. Commonwealth*, 990 S.W.2d 628 (Ky. 1999). In *Burdell*, an officer noticed a vehicle parked on a street and blocking traffic. The officer went to a nearby home in an attempt to find the driver. The main door to the house was open, though a transparent storm remained closed. The officer noticed a bag containing a white powder sitting on the kitchen counter. Burdell noticed the officer and closed the main front door. The officer called for backup, and they were eventually allowed to enter the house through the back door. By then, the bag containing the white powder had disappeared. *Id.* at 630. This Court concluded that the "sequence of events described by the officers sufficed to support a conclusion that Appellant participated in the concealment or removal of this evidence" and upheld Burdell's conviction for Tampering with Physical Evidence. *Id.* at 632.

Luther's actions differed from those of Burdell. Luther did not close the front door. Rather, he let in Mr. McClin immediately. Luther did not hide the tape. Instead, he got the tape for Mr. McClin and let him watch it without restriction. Additionally, Luther let Mr. McClin search his whole house. Burdell tampered with physical evidence. Luther did not.

Luther's conviction for Tampering with Physical Evidence violated due process. 5th and 14th Amds., U.S. Const.; §§ 11 and 14, Ky. Const.; *In re Winship*, 397 U.S. 358; *Fiori*, 531 U.S. 225; KRS 509.020. Reversal is required.

II. The prior bad acts introduced against Luther were not relevant or probative, and the undue prejudice substantially outweighed any probative value the acts had.

Preservation

This issue was preserved. Luther filed a motion to exclude KRE 404(b) evidence. TR 1, 104-114. The court denied his motion, noting his continuing objection. VR No. 1: 10/18/06; 11:03:00. After this ruling, he filed a motion for reconsideration. TR 1, 131-139. The court also denied that motion. TR 2, 148-150. Luther filed a supplemental filing of persuasive authority on the exclusion of KRE 404(b) evidence. TR 2, 163-164.

Argument

Ultimate fairness mandates that an accused be tried only for the particular crime for which he is charged. *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982); *Tamme v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988). Evidence

of the commission of crimes other than the one that is the subject of a charge is not admissible to prove that an accused is a person of criminal disposition. *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (Ky. 1991); *Funk v. Commonwealth*, 842 S.W.2d 476, 480(Ky. 1992); Lawson, *The Kentucky Evidence Law Handbook*, 3d ed., Sec 2.25(I) (1993).

KRE 404(b) states that an exception may exist to the prohibition against other bad acts evidence where it is relevant to and probative of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. KRE 404(b) essentially holds that "evidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, 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). The standard of review for a 404(b) issue is abuse of discretion. *Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky. 1994)(*overruled on other grounds in Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003)).

Because the potential for prejudice associated with this type of evidence is extremely high, "exceptions allowing evidence of collateral criminal acts must be strictly construed." *Billings*, 843 S.W.2d at 893. Consequently, "KRE 404(b) has always been interpreted as exclusionary in nature." *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). *Bell* further explained, "trial courts must

apply the rule cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." *Id.* "The burden is on the Commonwealth to establish a proper basis before 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).

Ultimately, a court must make three inquiries: relevance, probativeness, and prejudice. *Bell* 875 S.W.2d at 889(citing Lawson, The Kentucky Evidence Law Handbook, 3d ed., Sec. 2.25(II) (1993)). Other instances of misconduct can be admitted only if the evidence is "relevant, probative and the potential for prejudice does not outweigh the probative value of such evidence." *Muncy v. Commonwealth*, 132 S.W.3d 845, 847 (Ky. 2004)(*citing, Parker v. Commonwealth*, 952 S.W.2d 209, 213 (Ky. 1997)). The standard of review is abuse of discretion. *Id.*

Relevance and probativeness. Evidence is relevant when it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. The Commonwealth introduced prior bad acts (the prior convictions from Ohio and Florida, the tape from Florida, and the Wayne County charges) which were not relevant or probative as to whether Luther tampered with physical evidence.

In its "Notice Of Potential KRE 404(B) Evidence" the Commonwealth stated that Luther was charged with "Tampering with Physical Evidence and PFO, First Degree," and that it "intended to show at trial that Defendant videotaped children at the Burnside Island Pool." The Commonwealth stated that it intended to prove that Luther was "committing Voyeurism and/or Video Voyeurism." The notice continued, "In order to show notice for such . . . [t]he Commonwealth intends to prove that Defendant was a registered sex offender. The Commonwealth intends to introduce ***similar act evidence*** from the prosecution of Defendant in Florida, Ohio, and Wayne County, Kentucky." TR 1, 102.

This line of reasoning is puzzling for two reasons. First, Luther was not charged with Voyeurism or any sex related crime. The sex crimes for which he was convicted were in no way a "similar act" to the conduct for which he was charged under the indictment, i.e., tampering with the videotape Mr. McClin watched. Indeed, the convictions in Ohio from 1985 and from Florida in 1999 and the charges from Wayne County dealt with sexual contact between Luther and the victims. Luther was not accused of any kind of criminal sexual contact with anyone in Pulaski County.[1] Luther was never accused of destroying, mutilating, concealing, removing, or altering physical evidence in Ohio, Florida,

[1]At trial, the Commonwealth accused, or at least not so subtly implied, that one of Luther's witnesses was having an affair with him. VR No. 3: 11/20/06; 6:35:45-6:37:30. Jeane Hardwick was 20 years old and a neighbor of Luther's. VR No. 3: 11/20/06; 6:29:00. On redirect, defense counsel asked her, "How do you feel being accused of having an affair with Luther Sexton?" She answered, "I honestly feel violated." VR No. 3: 11/20/06; 6:37:00.

or Wayne County. There is simply no other way to state it: the prior bad acts were not, are not, and never will be similar.

Second, the crimes in Wayne County had no merit because he was found not guilty on two instances and the jury hung on the third charge. In addition, the Wayne County trial court did not allow the Ohio and Florida convictions into evidence because it found that they were too remote and were more prejudicial than probative.

Luther was never charged in the instant case with any sex crime. He was not charged with video voyeurism or even attempted video voyeurism. The Commonwealth presented no evidence that any of the children at the park were ever in any stage of undress or that from his vantage point from across the road, Luther could possibly film the dressing room or any other private area where one might have some expectation of privacy. Luther was standing on a public road with a video camera. He consistently maintained that he was taping a houseboat. The Commonwealth said he was videotaping people at a public pool.

The differences between the tampering charges in Pulaski County and the sex convictions 20 years ago in Ohio, six years ago in Florida, and the sex charges from Wayne County make the prior bad acts not relevant or probative

of whether Luther tampered with physical evidence. Reversible error occurred when they were admitted.

Prejudice. As argued above, Luther asserts that the prior bad acts were not relevant or probative because they were not similar in any respect. If this Court disagrees and determines they were relevant and had some probative value, Luther asserts that whatever probative value the acts had were substantially outweighed by their undue prejudice. KRE 403.

Prejudice is that which is unnecessary and unreasonable. *Partin v. Commonwealth*, 918 S.W.2d 219, 223 (Ky. 1996). The *Bell* Court acknowledged that it "is very difficult for jurors to sift and separate such damaging information to avoid the natural inclination to view [the admission(s)] as evidence of a defendant's criminal disposition." *Bell*, 875 S.W.2d at 890.

That is precisely what happened to Luther. He was convicted of Tampering with Physical Evidence because he was a pervert. That is how the Commonwealth described him during opening statements. The Commonwealth called him a pervert, and the court sustained an objection to that term. VR No. 2: 11/20/06; 11:38:00.

The Commonwealth also called him a sexual predator. VR No. 2: 11/20/06; 11:36:55. To prove this, the Commonwealth introduced the prior bad acts. The Commonwealth flew in the retired officers from Ohio and Florida to testify in

detail about what happened 20 years ago and five years ago. The Florida officer, Mr. Boone, brought a tape he seized from Luther in 1999 that had little girls in swimming suits on it. The jury got to watch it for 15 minutes. VR No. 3: 11/20/06; 5:46:00-6:02:35. However, that tape was not the basis for his conviction in Florida. VR No. 3: 11/20/06; 6:09:00. Mr. Boone did seize it to "bolster" his case, though. VR No. 3: 11/20/06; 5:43:10.

Why did the Commonwealth play this tape from Florida? Because the tape Luther freely showed Mr. McClin had nothing criminal or objectionable on it, just a TV show. VR No. 2: 11/20/06; 2:13:00. Based on his review of the tape, Mr. McClin gave it back to Luther and left not intending to come back. VR No. 2: 11/20/06; 2:13:50; 2:32:00. Because there was no evidence of anything bad on the tape Mr. McClin watched, the Commonwealth introduced the Florida tape. The Commonwealth then had to argue that because Luther taped girls in swimsuits in Florida six years before, he must have been doing the same thing at Burnside pool even though Mr. McClin saw no evidence of it.

This is exactly what the Commonwealth did during closing arguments when the Commonwealth mentioned the Florida tape and reminded the jury that the tape zoomed down a girl's top. VR No. 3: 11/21/06; 11:06:40. The Commonwealth then argued that Luther got rid of the tape so he would not get caught like he did in Florida and Ohio. VR No. 3: 11/21/06; 11:18:45.

Thus, the Commonwealth asked the jury to convict Luther because of what he did in Florida six years ago in spite of what Mr. McClin saw on the actual tape at issue in this case. This is nothing other than a conviction based on Luther's propensity to be a sexual pervert, according to the Commonwealth. The prior bad acts were far more prejudicial than probative. Reversible error occurred when they were admitted.

The Commonwealth's introduction of the convictions from Ohio and Florida, the tape from Florida, and the Wayne County charges violated the "fundamental demands of justice and fair play." *Robey v. Commonwealth*, 943 S.W.2d 616, 619 (Ky. 1997). Luther's rights under the Fifth, Sixth and Fourteenth Amendments and Sections 2, 7, and 11 of the Kentucky Constitution were violated. Moreover, introduction of this evidence resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established law, as defined by the Supreme Court of the United States. *Old Chief v. U.S.*, 519 U.S. 172 (1997). This Court should remand his case for a new trial.

Conclusion

For these reasons, Luther Wilbert Sexton respectfully requests that this Court reverse his conviction for tampering with physical evidence. Alternatively, he requests that this Court reverse and remand his case to the Pulaski Circuit Court with instructions to grant a new trial in which the KRE 404(b) evidence is excluded. Finally, he requests any and all other relief this Court determines is appropriate.

Respectfully submitted,

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