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**

REPLY BRIEF FOR APPELLANT, LUTHER WILBERT SEXTON

Submitted by:

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The undersigned does certify that copies of this Reply 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 December 4th, 2009. The record on appeal was not checked out for the purpose of this Reply Brief.

S. N. P.

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Purpose of the Reply Brief

The purpose of this Reply Brief is to address only those matters presented in the Brief for Appellee that deserve further comment, argument, and/or citation of additional authority.

Statement Concerning Oral Argument

Luther Wilbert Sexton requests oral argument.

Statement of Points and Authorities

Arguments

I. A directed verdict should have been granted for the Tampering with Physical Evidence Charge.

Both parties agree on the essential facts of this case. Both agree that Luther Sexton was at Burnside Park. Both agree he had a video camera and was looking at something. Both agree he went home. Both agree he voluntarily showed a tape to Deputy Troy McClin. Both agree Mr. McClin saw no footage of the Burnside pool on it. Both agree he gave the tape back to Luther and told him not to go back to the pool. Both agree that when the police returned with a warrant, Luther did not give them the tape.

The Commonwealth argues that because Luther did not give the police the tape a second time, that he was guilty of Tampering with Physical Evidence. This argument must fail for one simple reason: ***citizens ought to be able to rely upon the representations of the police.*** In Luther's case, Mr. McClin watched the tape, saw nothing criminal on it and returned it to him for him to keep forever and do whatever he wanted to do with it.

What was he or any other person, for that matter, supposed to do? Should he have kept the tape in perpetuity just in case the police changed their mind? Citizens ought not to be required to divine that future police action will be exactly opposite to what the police just expressed. Luther's tampering conviction must be reversed because it is unfair to him and it prevents citizens from trusting the assertions of police officers.

II. The KRE 404(b) evidence should have been excluded.

The disagreement between the parties focused on the emphasis of particular facts. Luther chose to emphasize that Mr. McClin reviewed the tape Luther voluntarily gave him, that Mr. McClin found nothing incriminating on it, returned it to Luther, but did not tell Luther the investigation was ongoing, and believed that Luther was free to do with it what he wanted. The Commonwealth chose to emphasize the bad things Luther did in Ohio and Florida and the bad things he had been accused of doing in Wayne County. The facts the Commonwealth emphasized violated KRE 404(b).

KRE 404(b) evidence is so prejudicial and dangerous, that, as a rule of thumb, it has always been that KRE 404(b) is viewed first as a rule of exclusion. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). The first two inquiries a court must undertake in a KRE 404(b) analysis are whether the purported KRE 404(b) evidence is admissible for something other than propensity evidence and whether proof of the other acts is sufficiently probative to warrant the introduction of the purported KRE 404(b)evidence. *Daniel v. Commonwealth*, 905 S.W.2d 76, 78 (Ky. 1995) *citing Drumm v. Commonwealth*, 783 S.W.2d 380, 381 (Ky. 1990). As such, the presumption is that KRE 404(b) evidence must be excluded in the absence of a compelling issue during the trial that warrants its introduction.

1. Motive was never a valid issue during Luther's trial so that exception does not apply.

The defense did not raise the issue of motive during Luther's trial. In fact, the defense claimed that when Mr. McClin handed Luther the videotape back—**after** the conclusion of Mr. McClin's investigation, the videotape was **not** evidence of anything. Mr. McClin

even testified that the tape was Luther's to do with as he desired. The Commonwealth argued weakly that the other crimes evidence was relevant to motive since Luther might want to destroy evidence to avoid being convicted again. But that reasoning could apply whenever a person charged with tampering has a criminal past. Therefore, no KRE 404(b) evidence should have been permitted to address motive because that was not a valid issue. Because motive was never a valid issue during Luther's trial, no KRE 404(b) evidence should have been permitted under the guise of motive evidence.

2. Luther never raised the issue of opportunity or lack thereof so that exception does not apply.

There was no claim during the trial that Luther did not have the opportunity to videotape children at Burnside Island or that he did not have opportunity to destroy the videotape. Simply put, opportunity was never an issue in Luther's trial. As such, no ancillary evidence regarding opportunity should have ever been permitted to be introduced at trial. Further, the KRE 404(b) evidence introduced at Luther's trial bore no relationship to any issue of opportunity or lack thereof. The incidents in Florida, Ohio, or Wayne County never created the opportunity for Luther to engage in the later remote alleged criminal acts at Burnside Island. Therefore, no KRE 404(b) evidence should have been permissible under the guise of "opportunity".

3. Luther never raised the issue of intent or lack thereof so that exception does not apply.

The defense never made any claim which implicated or raised any issue with respect to Luther's intent. Simply put, the defense claimed that the videotape was a non-issue because Luther voluntarily provided the videotape, law enforcement looked at the

videotape, and because the content of the tape was not inculpatory, gave it back to Luther, but told him not to return to Burnside Island State Park. Further, Mr. McClin stated that when he gave the videotape back to Luther, that it was not evidence and was Luther Sexton's forever to do with as he wished. VR No. 2: 11/20/06; 2:30:45. As such, Luther's intent was never an issue in the trial.

The defense did not claim that Luther had no intent to impair evidence in an inevitable legal proceeding. The defense only claimed that once Mr. McClin watched the tape—which had no evidence of anything related to Burnside Island on it—and handed it back to Luther, it was **not** evidence. Mr. McClin testified that he never told Luther he would be back with a search warrant. VR No. 2: 11/20/06; 2:30:35. In fact, Mr. McClin testified that when he left Luther's house, he had no idea he would be back. VR No. 2: 11/20/06; 2:30:35. Therefore, intent could never have been an issue in the trial.

4. Preparation or plan were never at issue during Luther's trial so that exception does not apply.

The Commonwealth never claimed that the Florida, Ohio, or Wayne County events were done in preparation for the alleged criminal acts committed by Luther Sexton at Burnside Island Resort Park. Likewise, the Commonwealth never claimed that the Florida, Ohio, or Wayne County events were done in furtherance of a plan related to the alleged criminal acts committed by Luther Sexton at Burnside Island Resort Park. Simply put, the Commonwealth never attempted to relate the past events as some sort of preparatory scheme or plan to the event for which Luther was on trial. Therefore, the KRE 404(b) evidence should have never been admitted in Luther Sexton's case in

furtherance of some argument by the Commonwealth that the prior acts demonstrated "preparation" or "plan" for the events that occurred at Burnside Island.

5. The issue of knowledge to commit the act of tampering with physical evidence was never an issue during Luther's trial so that exception does not apply.

The defense never claimed that Luther acted unknowingly in connection with the charge of Tampering with Physical Evidence. The defense asserted that committing the crime was impossible because Luther voluntarily provided the videotape, the police looked at it, gave it back to Luther and told him not to return to Burnside Park.

Further, the Commonwealth never claimed that the Ohio, Florida, and Wayne County experiences provided Luther with a base of knowledge with which to commit the crime of Tampering with Physical Evidence. That crime requires the intentional destruction, concealment, impairment, and/or hiding of evidence one knows is about to be produced against him or her in an official legal proceeding. KRS 524.100. Nothing regarding the Ohio, Florida, or Wayne County charges had anything to do with the destruction, concealment, impairment, or hiding of evidence Luther knew was about to be produced against him in those proceedings. In fact, based upon Mr. McClin's statements, Luther knew the tape was **not** evidence. As such, the KRE 404(b) evidence had nothing to do with proving a knowing state of mind.

6. The issue of identify was never an issue during Luther's trial so that exception does not apply.

Neither party raised any argument that Luther Sexton was not the man at Burnside Island with a video camera. Neither did the defense or the Commonwealth raise any

argument that Luther Sexton was not the individual that allowed Mr. McClin in his home. Neither the defense nor the Commonwealth raised any argument that Luther was not the individual who admitted to Mr. McClin that he was, in fact, at Burnside Island with a video camera. Neither the defense nor the Commonwealth raised any argument that Luther was not the person who handed Mr. McClin the video camera. Neither the defense nor the Commonwealth raised any argument that Luther was not the person that Mr. McClin handed the videotape back to. Hence, identity was never an issue in Luther's trial.

Furthermore, even if identity were at issue, the Florida, Ohio, and Wayne County criminal allegations would certainly not be relevant to the issue of identity. Identity is usually linked to a "signature" crime. The crime is committed in such a way that the identity of the perpetrator is easily identified. In the Florida and Ohio cases, Luther was arrested for and convicted of the unlawful touching of underage females. In the Wayne County, Kentucky case, Luther was charged with the unlawful touching of underage females. In the Wayne County, Kentucky case, Luther was acquitted of two counts and the jury was unable to reach a verdict on the third count. Nevertheless, the Florida, Ohio, and Wayne County cases all involved allegations of the unlawful touching of underage females—not Tampering with Physical Evidence charges. The Commonwealth never claimed that the Tampering with Physical Evidence charge was a signature crime. Thus, identity was never an issue during Luther's trial.

7. The issue of absence or mistake or accident was never an issue during Luther's trial so that exception does not apply.

It was never argued at trial by either the Commonwealth or Luther Sexton that Luther accidently or mistakenly destroyed a videotape. Again, the defense was that Luther was

free to do with the video as he chose because after Mr. McClin looked at the videotape, he gave it back to Luther and left Luther's residence after warning him not to go back to the Burnside Island State Park. Indeed, if Luther did destroy the tape, the defense presupposed he did so intentionally because the tape was his to do with as he pleased. Therefore, absence of mistake or accident was never an issue in Luther's trial.

Further, the Florida, Ohio, and Wayne County incidents have nothing to do with absence of mistake or accident evidence in relation to the events stemming from the Burnside Island allegations. Again, there is no claim that the Burnside Island criminal allegations were a signature crime. The Florida, Ohio, and Wayne County allegations were, vastly, factually different from the Burnside Island criminal allegations. As such, the Florida, Ohio, and Wayne County acts would have no bearing on any absence of mistake or accident evidence regarding the criminal allegations stemming from the Burnside Island allegations.

The third inquiry a court must make when conducting a KRE 404(b) analysis is whether the probative value of the other acts evidence outweighs the potential for prejudice against the accused. *Daniel*, 905 S.W.2d at 78, *citing Drumm*, 783 S.W.2d at 381. The third KRE 404(b) inquiry can only be made only if the court finds the proposed KRE 404(b) evidence both relevant and probative. The law presumes that KRE 404(b) evidence is extremely prejudicial, which is exactly why the prejudicial effect must be weighed against the probative value of the KRE 404(b) evidence. *Id.* Prejudice is evidence that is unnecessary and unreasonable. *Partin v. Commonwealth*, 918 S.W.2d 219, 223 (Ky. 1996).

No one, including prosecutors, can say with a straight face that the proposed KRE 404(b) evidence offered against Luther during his trial was not extremely prejudicial and inflammatory. Luther's prior sexual abuse convictions from Ohio and Florida were introduced during his trial. Allegations of sexual abuse from Wayne County, Kentucky, for which Luther was acquitted on two counts and the jury hung on a remaining count, was introduced against Luther during his trial. All the Commonwealth's putative KRE 404(b) evidence against Luther pertained to prior convictions for allegations that Luther unlawfully touched minor children. Nothing regarding the Commonwealth's proffered KRE 404(b) evidence had anything to do with Luther destroying evidence, concealing evidence, or attempting to impair its availability in an official court proceeding. The sole purpose of the Commonwealth's KRE 404(b) evidence was to prejudice Luther by getting the jury to believe he was a child molester who needs to be punished.

It is hard to imagine anything more prejudicial than the jury discovering that Luther was convicted of unlawfully touching children in Ohio. It is hard to imagine anything more prejudicial than the jury discovering that Luther was convicted of unlawfully touching children in Florida. It is hard to imagine anything more prejudicial than the jury discovering that Luther was accused of unlawfully touching children in Wayne County, Kentucky. This triggers an automatic dislike, distrust, and animosity against Luther. Who would want a man convicted of harming children on the street? What juror, who also happens to be a parent, would not convict Luther, if given the opportunity, merely to protect society—regardless of the strength of the present charges against Luther? It is impossible for any citizen accused to receive a fair trial when the Commonwealth is allowed to focus almost exclusively on propensity evidence during the trial.

With regard to the Tampering with Physical Evidence and the Disorderly Conduct charges, what probative value did the KRE 404(b) evidence have? It is not like law enforcement did not know that Luther Sexton was at Burnside Island State Park. In fact, Luther Sexton **admitted** to being at Burnside Island State Park. It is not like law enforcement did not view the videotape that was allegedly missing. In fact, law enforcement reviewed the videotape and gave it back to Luther. It is not like that law enforcement did not see the footage on the videotape. In fact, law enforcement viewed the footage and testified at trial that there were no scenes from Burnside Island State Park on the videotape. It is not like law enforcement kept the videotape and it somehow ended up missing due Luther's conduct. In fact, law enforcement gave the videotape back to Luther and testified it was his to keep forever and to do with as he wished. So the probative value, if any, from the Commonwealth's alleged KRE 404(b) evidence is non-existent and certainly outweighed by its prejudicial effect.

The only reason Luther was convicted was because of his past record. The proof in Luther's trial was consumed by the Commonwealth's purported KRE 404(b) evidence. Defense counsel in Luther's trial had to keep acknowledging Luther's past before making a comment on why Luther was innocent. Luther was convicted of his past wrongs and paid his debt to society for them. Luther's case was a classic case in which the Commonwealth impermissibly used character evidence to cause the jury to convict Luther because of the previous wrongs in his life. Our justice system demands better. Our justice system demands fairness, protection, and due process to everyone—especially those upon whom society frowns. Affirming Luther's conviction would only encourage law enforcement and the Commonwealth to seek out those with criminal pasts to

prosecute regardless of the strength of any current case against them. Reversal for a new trial is required.

Conclusion

For these reasons, and those stated in the Brief for Appellant, 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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