Supreme Court of Kentucky

No. 08-SC-731

LUTHER WILBERT SEXTON — **APPELLANT**

v.

Appeal from Pulaski Circuit Court
Hon. Jeffrey Thomas Burdette, Judge
Indictment No. 05-CR-267

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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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 3rd day of November, 2009 to Hon. Jeffrey Thomas Burdette, Chief Judge, 100 N. Main Street, P.O. Box 1324, Somerset KY 42502; Hon. Samuel N. Potter, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601, Counsel for Appellant; and via electronic mail to: Hon. Eddy Montgomery, Commonwealth's Attorney, 236 East Mt. Vernon, Somerset KY 42501..

Todd D. Ferguson
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INTRODUCTION

The Appellant, Luther Wilbert Sexton, was convicted of Tampering with Physical Evidence, Disorderly Conduct, and Persistent Felony Offender in the First Degree and sentenced to twelve (12) years imprisonment and a fine of $250.00. The Court of Appeals affirmed the judgment of the Pulaski Circuit Court, and then this Court granted discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary, or would be helpful, in this case.

STATEMENT REGARDING REFERENCE TO THE RECORD

The record in this case consists of two (2) volumes of original Pulaski Circuit Court documents, which shall be referenced individually hereinafter as "TR I" and "TR II," and four (4) videotapes. The first videotape contains various hearings from 10-20-05 through 12-21-06, and shall be referenced hereinafter as "VR I." The second videotape is marked "11-20-06," contains the first part of trial, and shall be referenced hereinafter as "VR II." The third videotape is marked "Day 2 of Jury Trial," contains the second part of the trial, and shall be referenced hereinafter as "VR III." The fourth videotape is marked "Tape 1 of 1," contains excerpts from a criminal case against the Appellant in Wayne County, and will not be referenced herein.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellant, Luther Wilbert Sexton, was indicted, on September 21, 2005, on Tampering with Physical Evidence, Disorderly Conduct, and Persistent Felony Offender in the First Degree. (TR I: 1-2).

The Appellant was tried by a jury on November 20 and 21 of 2006. The evidence presented at trial, in pertinent part, was as follows.

The Pulaski County Public School Child Care Program offers day-time child care for five- to twelve-year-old children during the summer. (VR 2, 11-20-06, 11:46:21-11:46:32). On July 21, 2005, the Director of the Program, Brenda McDowell, took approximately twenty-four (24) children on a field trip to go swimming in a pool at General Burnside Island State Park. (VR 2, 11-20-06, 11:47:37-11:47:55, 11:11:50:05-11:55:10). While the children swam in the pool, Ms. McDowell and some parents noticed a man crouched down, "not that far" away from the pool, who appeared to be videotaping the children on a camcorder. (VR 2, 11-20-06, 11:48:35-11:49:11, 11:51:00-11:51:25, 11:56:45-11:57:01, 11:52:04-11:52:18). Ms. McDowell and the parents at the pool were "alarmed" and "panicked" by the man, because they did not know him to be a relative of any of the children and so they did not believe he had any innocent reason to videotape the children. (VR 2, 11-20-06, 11:51:39-11:52:00, 11:54:00-11:54:39, 11:57:48-11:57:53, 12:02:00-12:02:09). As Ms. McDowell and the parents gathered to discuss the man, he seemed to realize that he had been noticed, and "immediately left" in his pickup truck with a camper on top. (VR 2, 11-20-06, 11:50:25-11:50:58,11:51:32-11:51:38, 11:57,56-11:58:02). One of the parents noted the

make, model, and license plate number of the man's pickup truck as it drove away. (VR 2, 11-20-06, 11:49:08-11:49:19, 11:53:17-11:53:26). One of the parents then called the police to report the man and the make, model and license plate number of his pickup truck. (VR 2, 11-20-06, 11:53:11-11:53:17).

Pulaski County Sheriff's Deputy, Troy McClin, received a dispatch through 911, relaying the report from General Burnside Island State Park. (VR 2, 11-20-06, 02:02:25-02:02:46). A check of the pickup's license plate returned that the truck was registered to the Appellant. (VR 2, 11-20-06, 02:02:48-02:02:56). Deputy McClin acquired the Appellant's home address and also learned that he was a lifetime registered sex offender due to two convictions in Florida. (VR 2, 11-20-06, 02:03:39-02:04:22).

Deputy McClin went to the Appellant's house and asked the Appellant if he had been at pool at General Burnside Island State Park. (VR 2, 11-20-06, 02:08:53-02:09:06). The Appellant denied having been at the pool. (Id.). Deputy McClin informed the Appellant that witnesses had seen his truck at the pool. (VR 2, 11-20-06, 02:09:07-02:09:24). The Appellant then admitted having been at the pool. (Id.). Deputy McClin asked the Appellant if he had been videotaping while at the pool. (VR 2, 11-20-06, 02:09:24-02:09:37). The Appellant denied having videotaped anything at the pool. (Id.). The Appellant then admitted that he had his camcorder at the pool, but said that he was videotaping a houseboat. (VR 2, 11-20-06, 02:09:39-02:10:24). Deputy McClin asked to see the videotape from the park and the Appellant produced a videotape which he alleged to have been the one used. (VR 2, 11-20-06, 02:10:32-02:13:31). Deputy McClin briefly reviewed a portion of the videotape, and found that it contained

only television recordings, and did not contain any footage of either the pool or a houseboat. (VR 2, 11-20-06, 02:10:32-02:13:55, 02:25:18-02:25:30). Deputy McClin was unsure if the tape the Appellant had given him was the one the Appellant had used at the park. (VR 2, 11-20-06, 02:30:05-02:30:17). Deputy McClin did not know if there were other videotapes at the Appellant's house. (VR 2, 11-20-06, 02:40:12-02:40:43).

Deputy McClin left the Appellant's house and contacted the Detective in charge and the Detective advised him to request a search warrant for the Appellant's residence. (VR 2, 11-20-06, 02:15:00-02:16:02, 02:52:26-02:52:58, 03:25:00-03:25:57). Deputy McClin then learned that the Appellant was on bond for three (3) counts of sexual abuse in Wayne County. (VR 2, 11-20-06, 02:21:23-02:22:29).

Deputy McClin got a search warrant for the Appellant's house, as well as an arrest warrant for the Appellant for having committed the misdemeanor crime of Disorderly Conduct at the pool earlier that day. (VR 2, 11-20-06, 02:16:05-02:16:32, 02:26:44-02:27:33). Deputy McClin and other officers returned to the Appellant's home approximately two hours after the initial encounter, to serve both the search warrant and the arrest warrant on the Appellant. (VR 2, 11-20-06, 02:42:25-02:42:35).

When searching the Appellant's house, Deputy McClin and the other officers could not find the videotape which the Appellant had shown Deputy McClin a few hours earlier. (VR 2, 11-20-06, 02:16:59-02:17:23). Deputy McClin wanted to thoroughly review the videotape because he had not seen everything on it earlier. (VR 2, 11-20-06, 02:39:40-02:39:56; VR 3 11-20-06, 04:43:52-03:44:12). Deputy McClin asked the Appellant where the videotape was, and the Appellant told Deputy McClin that he would not tell him where it was. (VR 2, 11-20-06, 02:18:44-02:18:56). Deputy

McClin advised the Appellant that if the Appellant did not give him the videotape, he would charge the Appellant with Tampering with Physical Evidence. (VR 2, 11-20-06, 02:19:19-02:19:48). The Appellant continued to refuse to give the tape to Deputy McClin. (Id.). As a result, the Appellant was charged with Tampering with Physical Evidence. If the Appellant had told the officers where the tape was, he would not have been charged with Tampering with Physical Evidence. (VR 2, 11-20-06, 02:37:15-02:37:20).

The Commonwealth introduced select evidence of the Appellant's other crimes, wrongs, or acts at trial pursuant to KRE 404(b)(1), so as to show the Appellant's motive, intent, and absence of mistake in tampering with the videotape evidence. Pretrial notice of such evidence was given pursuant to KRE 404(c). (TR I: 102-103).

At trial, testimony was given that the Appellant pled guilty to two counts of Gross Sexual Imposition in Ohio in 1985. (VR 2, 11-20-06, 05:13:11-05:14:22, 05:21:20-05:21:53). When that testimony was given, the trial court admonished the jury:

> As we go forward, do not consider the evidence of other crimes or acts for any purpose except in so far as they may tend to show, if they do, a motive on the part of the [Appellant] to commit the offense for which this [Appellant] is being tried in this case. In other words, I've decided that this evidence is admissible and that you should be allowed to hear it. I've done so because the prosecution has indicated that they are using this evidence to prove motive. When it comes time to deliberate the facts of this case, if you believe that these other acts do not go to motive, then disregard them. But, they are being offered for purposes of motive of the case we are trying today.

(VR 3, 11-20-06, 05:15:17-05:16:20).

Testimony was given that the Appellant pled no contest, in Florida, to one count of Committing a Lewd and Lascivious Act with a Child and one count of Attempt to commit the same, in 1999. (VR 3, 11-20-06, 05:33:02-05:34:38, 05:40:57-05:41:31, 05:06:50-06:07:15). When that testimony was given, the trial court admonished the jury:

> Ladies and Gentlemen, again, as you know, I have allowed certain evidence to be admitted in this case. You're hearing some of that evidence. I have done so because the prosecution has indicated to me that the evidence is being offered to prove the motive as to Tampering with Physical Evidence - the "why factor" is what we call it sometimes. It is not, then, to be considered as evidence concerning any purpose except in so far as it may tend to show, if it does show, a motive on the part of this [Appellant] to commit the offense [for] which the [Appellant] is being tried in this case.

(VR 3, 11-20-06, 05:35:11-05:35:58).

Part of the testimony concerning the Florida case was that the execution of a search warrant at the Appellant's house revealed a videotape of young children in swimsuits playing at the beach. (VR 3, 11-20-06, 05:38:10-05:38:55). The videotape was recorded by the Appellant, and focused on "the breast area of young little girls, on the vagina area, and on the buttocks." (VR 3, 11-20-06, 05:42:15-05:44:33). The children in the video ultimately proved to be victims of the Appellant's sexual abuse. (VR 3, 11-20-06, 05:38:10-05:38:55, 05:42:15-05:44:33, Commonwealth's Exhibit #13). The videotape was played for the jury. When it was finished, the court admonished the jury:

> Ladies and Gentlemen, you have just viewed that videotape. As you know, you cannot consider the evidence concerning this video for any purpose [except] in so far that it may tend to show, if it does, a motive on the part of the [Appellant] to commit the offense for which the

> [Appellant] is being tried in this case. If you find that these other acts that we've dealt with today, including this video, tend to prove that which it was offered to prove, that being motive in this Tampering with Physical Evidence case, then you can give it such weight and effect as you deem appropriate as it helps you to deliberate and come to a verdict on the charges brought in this particular case.

(VR 3, 11-20-06, 06:04:00-06:04:45). A Detective involved in the Appellant's prosecution in Florida said the videotape in that case was a crucial part of his investigation and the eventual charges brought against the Appellant, which he later pled guilty to. (VR 3, 11-20-06, 06:10:00-06:10:45). Deputy McClin testified if the tape the Appellant refused to give him had been found to contain footage similar to that of the tape from the Florida case, he would have seized it for the criminal investigation of the Appellant. (VR 2, 11-20-06, 02:50:33-02:51:07).

At trial, testimony was also given about a criminal proceeding against the Appellant in Wayne County, Kentucky. It had been agreed before trial that the Wayne County proceedings would only be admissible in this case for establishing whether the Appellant was subject to a bond condition on July 21, 2005 - that he not to be around children - which the Appellant was alleged to have violated, and therefore, may have gone to his motive to Tamper with Physical Evidence. (VR 2, 11-20-06, 11:21:16-11:22:48). It was agreed that the nature of the charges in the Wayne County action would not be disclosed to the jury, and that the jury would be admonished that they were not to speculate as to what those charges may have been. (Id.). However, during his opening, the Appellant stated that he had been charged with three (3) counts of First Degree Sexual Abuse in Wayne County, but he alleged that he had been found not guilty of those charges. (Id.). The trial court then found that, by doing so, the Appellant

had opened the door for the Commonwealth to then present evidence of the Wayne County action. (Id.). Thus, testimony was given that the Appellant was charged with three (3) counts of First Degree Sexual Abuse against two minor children in Wayne County, Kentucky, in 2004. (VR 2, 11-20-06, 12:05:06-12:05:52). The trail court then admonished the jury:

> Ladies and Gentlemen of the jury, you are not to consider evidence of other crimes for any purpose, except, in so far as it may tend to show, if it does show, a motive on the part of the [Appellant] to commit the offense for which he is being tried for today. You shall not consider evidence of other crimes for any purpose, except, in so far as it may tend to show motive on the part of the Defendant to commit the crime that we are here trying today.

(VR 2, 11-20-06, 12:07:55-12:08:31).

The Assistant Commonwealth's Attorney for Wayne County testified that, on July 21, 2005, the Appellant was out on bond, subject to certain conditions, including that he stay away from children and that he not commit any new violations of law. (VR 2, 11-20-06, 12:08:40-12:09:22). The Assistant Commonwealth's Attorney further testified that, had the videotape been found and had it contained footage of children, the Commonwealth would have used it to attempt to revoke the Appellant's bond and also would have tried to introduce the videotape at the Appellant's trial. (VR 2, 11-20-06, 12:12:05-12:12:43, 12:14:06-12:14:28). Indeed, the Assistant Commonwealth's Attorney testified that they used the charges brought against the Appellant in this case, even without the production of the videotape, to attempt to revoke the Appellant's bond in the Wayne County case. (VR 2, 11-20-06, 12:11:34-11:12:04). However, the Assistant Commonwealth's Attorney testified on cross-examination, that a subsequent bond

instrument did not contain the prohibition about being around children, so that condition may not have been in effect on July 21, 2005. (VR 2, 11-20-06, 01:34:52-01:42:39).

After the Assistant Commonwealth's Attorney finished testifying, the trial court once again admonished the jury:

> I would like to reiterate, again, we have been talking about the case down in Wayne County and the bond conditions, and whether or not the [Appellant] was prohibited from this or that. Please understand that you cannot consider the evidence concerning those bond conditions of that case that was down there for any purpose except in so far as it may tend to show the motive of this [Appellant] in the Tampering with Physical Evidence case that we've got ... The allegation is that, that was the motive for him Tampering with the Physical Evidence. That's what we're dealing with, the motive.

(VR 2, 11-20-06, 02:00:07-02:00:58).

The trial court gave a final admonition to the jury before they retired to deliberate:

> We've got a lot of evidence coming into this case that is used for a specific purpose, it's been offered for a specific purpose. I've decided to let that evidence in and let it be admissible, that is that you should be allowed to hear it. I've done so because the prosecution has indicated to me that the evidence is being offered to prove - I've been talking about "motive" - [but] that have offered to utilize that evidence also to show "absence of mistake," "modus operandi," "motive," and "intent" ... If you find that these other acts, criminal acts, or other bad acts evidence, tends to prove what the prosecutors claim that it proves, then you can give it what weight and effect that you deem appropriate as it helps to deliberate and come to a verdict on the charges brought in this case. If you believe that it does not prove these things we've talked about: "motive," "modus operandi," "absence of mistake," then, you are instructed to disregard the evidence entirely.

(VR 3, 11-20-06, 06:54:20-06:55:45).

The jury found the Appellant guilty of Tampering with Physical Evidence and Disorderly Conduct. (VR 3, 11-21-06, 12:10:28-12:10:52; TR II: 191-199). The Appellant then pled guilty to Persistent Felony Offender in the First Degree. (VR 3, 11-21-06, 12:41:10-12:43:30). As a First Degree Persistent Felon, the Appellant was eligible to receive between ten (10) and twenty (20) years for Tampering with Physical Evidence, and the Appellant was also eligible to receive up to ninety (90) days in jail and a $250 fine for Disorderly Conduct. The jury recommended that the Appellant serve twelve (12) years for Tampering with Physical Evidence and receive a $250 fine for Disorderly Conduct. (VR 3, 11-21-06, 02:14:39-02:15:18; TR II: 200-203). The trial court entered a Trial Verdict and Judgment on November 28, 2006, in which the court found the Appellant guilty of Tampering with Physical Evidence, Disorderly Conduct, and Persistent Felony Offender in the First Degree. (TR II: 240-242). The trial court accepted the jury's recommendation and sentenced the Appellant to serve twelve (12) years in prison and to pay a $250.00 fine.

On appeal, the Kentucky Court of Appeals affirmed the judgment on September 5, 2008. This Court then subsequently granted discretionary review.

Additional facts may be discussed below as necessary.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR DIRECTED VERDICT ON TAMPERING WITH PHYSICAL EVIDENCE.

In establishing the standard for sufficiency of the evidence, the United States Supreme Court has ruled that the reviewing court must resolve conflicting inferences in the evidence in favor of the prosecution, and then decide if any rational trier-of-fact could have found the essential elements of the offense beyond a reasonable doubt. In Jackson v. Virginia, 443 U.S. 307, 319 and 326, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the U.S. Supreme Court discussed the standard for sufficiency of evidence, stating:

> [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. Instead, the relevant question is whether, after reviewing evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play the responsibility of the trier of fact fairly to resolve conflicts in the testimony, and to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.... [U]pon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.
>
> * * * *
>
> [A reviewing] court faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. [Citations omitted.]

On a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Edmonds v. Commonwealth, 906 S.W.2d 343 (Ky., 1995); Commonwealth v. Benham, 816 S.W.2d 186 (Ky., 1991). The directed verdict standard announced in Jackson v. Virginia was adopted by Kentucky in Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky., 1983) and reiterated in Benham, 816 S.W.2d at 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 the purpose 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; Yarnell v. Commonwealth, 833 S.W.2d 834 (Ky., 1992); Farler v. Commonwealth, 880 S.W.2d 882 (Ky. App., 1994). "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 at 187. Lastly, it has been held that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, then the defendant is not entitled to a directed verdict of acquittal. Trowel v. Commonwealth, 550 S.W.2d 530 (Ky., 1977).

The Appellant argues that the trial court erred in denying his motion for directed verdict on Tampering with Physical Evidence, because the Commonwealth failed to prove that the Appellant "had no reason to believe the tape he showed to Mr.

McClin would ever be used as evidence in any official proceeding." (Brief for Appellant p. 8).

In its Opinion affirming, the Kentucky Court of Appeals observed of this issue:

> Sexton argues that he had no way of knowing that an investigation was proceeding against him because Deputy McClin never indicated he would be back after the initial viewing of the videotape. Sexton's argument is not well taken....
>
> * * * *
>
> The Commonwealth did not have to prove that criminal evidence was possessed by Sexton. The Commonwealth only had to prove that Sexton *believed* that the evidence may be used in an official proceeding and that Sexton intended to impair the availability of such evidence. Sufficient evidence was presented at trial for the jury to find that Sexton believed that the videotape constituted evidence that would be used against him....
>
> * * * *
>
> Given the facts of the case, Sexton was on notice that the videotape was evidence.... ...Sexton was well aware of the evidentiary value of a videotape; such was used to convict him in Florida. Lastly, Sexton offered no excuse for the absence of the videotape when the officers arrived with a search warrant but, instead, flatly refused production of it. The crime of tampering with physical evidence was then complete.

(Opinion pp. 6-8)(Citations omitted).

KRS § 524.100 provides in pertinent part:

> A person is guilty of tampering with physical evidence when, ***believing that an official proceeding*** is pending or ***may be instituted, he***:
>
> > (a) ***Destroys***, mutilates, ***conceals***, ***removes*** or alters ***physical evidence which he believes is about to be produced or used in the***

official proceeding with intent to impair its verity or ***availability in the official proceeding***.

KRS § 524.100 (*Emphasis added*).

To survive the Appellant's motion for directed verdict, the Commonwealth simply had to produce sufficient evidence, such that it would not be "clearly unreasonable" for the jury to find that the Appellant: (1) believed that an official proceeding may be instituted, (2) destroyed, concealed, or removed physical evidence which he believed was about to be used in the official proceeding, and that he (3) did so the intent to impair that evidence's availability in the official proceeding. The Commonwealth presented sufficient evidence:

- A police officer came to the Appellant's house to investigate his videotaping children at a swimming pool.
- The police officer asked to see the videotape the Appellant used at the pool.
- The Appellant produced a tape which he purported to be the one he used at the pool.
- The Appellant had been convicted of sexually abusing children in Florida, and a crucial piece of evidence in that case had been a provocative videotape the Appellant recorded of children playing at the beach.
- Police officers returned to the Appellant's house with a search warrant, but could not find the videotape the Appellant had produced a few hours earlier.
- The police officers asked the Appellant for the videotape and the Appellant refused to give it to them.
- The police officers advised the Appellant that they would charge him with Tampering with Physical Evidence if he did not give them the videotape, but the Appellant continued to refuse to give the officers the videotape.
- Had the videotape been found, and had it contained footage of children at the pool, the Wayne County Commonwealth's Attorney would have tried

to use that tape both to revoke the Appellant's bond and at the Appellant's trial in that county.

Under the evidence as a whole, it was not clearly unreasonable for the jury to find the Appellant guilty of Tampering with Physical Evidence. The trial court correctly denied the Appellant's motion for directed verdict.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING THE APPELLANT'S OBJECTIONS TO THE INTRODUCTION OF EVIDENCE OF HIS OTHER BAD ACTS THAT WENT TO MOTIVE, INTENT, KNOWLEDGE, AND THE ABSENCE OF MISTAKE ON HIS PART IN TAMPERING WITH THE PHYSICAL EVIDENCE.

In its Opinion, the Kentucky Court of Appeals observed of this issue:

> ...[W]e may reverse a trial court's decision to admit evidence only if the decision was an abuse of discretion,...
>
> * * * *
>
> We agree with the trial court that the evidence of Sexton's prior crimes, as testified to by the investigating officers, tends to show motive for the tempering charge. Sexton's prior conviction also involved usage of videotape evidence against him. This prior similar experience certainly gave him motive, knowledge, and absence of mistake for tampering with the physical evidence that might be used in the current proceeding.
>
> * * * *
>
> We agree with the trial court that the probative value of the prior crimes evidence was not substantially outweighed by the danger of undue prejudice, especially given the multiple admonitions to the jury by the trial court.

(Opinion pp. 4-6)(Citations and footnote omitted).

This Court recently observed, because "the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence," an appellate court should review "whether the trial court abused its discretion" when it allowed evidence of the Appellant's prior crime to be admitted. Clark v. Commonwealth, 223 S.W.3d 90, 95 (Ky.,2007); Brewer v. Commonwealth, 206 S.W.3d 313, 320 (Ky.,2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky.1999); Brewer v. Commonwealth, 206 S.W.3d 313, 320 (Ky.,2006); Clark v. Commonwealth, 223 S.W.3d 90, 95 (Ky.,2007). Accordingly, the trial court's decision to admit evidence of the Appellant's other crimes or bad acts should not be rebuked by this Court, unless this Court is convinced that the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id. The trial court's decision was perfectly proper in this case, because KRE 404(b) allowed for the evidence of the Appellant's other crimes and bad acts to be admitted to show motive, intent, knowledge, and the absence of mistake in tampering with the physical evidence, and because the probative value of the evidence was not "substantially outweighed" by the danger of undue prejudice under KRE 403.

The evidence of the Appellant's other crimes or bad acts was of paramount importance in this case. Although the evidence carried a danger of being prejudicial, in light of its high probative value, the danger of that undue prejudice did not "substantially outweigh" its probative value. KRE 403. Furthermore, the danger of any undue prejudice to the Appellant was checked by the trial court's thorough and repeated

admonitions to the jury that they were only to consider that evidence for the limited purposes of motive, intent, knowledge or absence of mistake in committing the crime of Tampering with Physical Evidence. As a result, the trial court did not commit reversible error in overruling the Appellant's objection to the introduction of evidence of his other crimes or bad acts on grounds that it violated KRE 403.

In addition to not being inadmissible under KRE 403, evidence of the Appellant's other crimes or bad acts was admissible under KRE 404(b)(1). KRE 404(b) allows for evidence of a defendant's other crimes, wrongs, or acts to be introduced for certain purposes. Specifically, KRE 404(b)(1) provides that evidence of a defendant's other crimes, wrongs, or acts may be admissible if offered "for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1).

The evidence of the Appellant's other crimes or bad acts in this case, as a whole, established the Appellant's motive, intent, knowledge, and absence of mistake in Tampering with the Physical Evidence. More specifically, the Appellant's convictions in Ohio went toward showing that the videotape likely contained footage of the children at the pool, which is why the Appellant tampered with the physical evidence. The Appellant's convictions in Florida went toward showing that the videotape likely contained provocative footage of the children at the pool, that the Appellant had knowledge that videotapes of that kind could be used as evidence against him in a criminal proceeding, and also to the Appellant's motive to tamper with the videotape so as to prevent it from possibly being used against him as evidence in a criminal proceeding.

The Appellant opened the door for the introduction of evidence of the criminal charges against him in Wayne County by discussing the specifics of that case in his opening argument; therefore, the Appellant's objection to evidence of this instance of other crime of bad acts is not preserved. That said, evidence of the Wayne County charges were introduced in an attempt to show that the Appellant was under a bond condition to stay away from children on July 21, 2005, and the possible violation of that condition was a motive for tampering with the videotape so as to prevent it from being used to revoke his bond. Although the Appellant was ultimately able to cast doubt on whether or not he was actually subject to such a bond condition at the time, the Assistant Commonwealth's Attorney for Wayne County did testify that, had the tape been found, and had it proven to contain footage of children at the pool, the Commonwealth would have attempted to use that videotape both to attempt to revoke the Appellant's bond and in the Appellant's trial in the Wayne County case.

The trial court did not abuse its discretion in overruling the Appellant's objection to the introduction of his other crimes or bad acts.

CONCLUSION

Based upon the foregoing, the Commonwealth respectfully urges this Court to affirm the judgment of the Kentucky Court of Appeals and the Pulaski Circuit Court.

Respectfully submitted,

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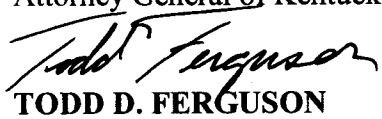
Attorney General of Kentucky



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