Pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-000353

GABRIELLA ALLEN — APPELLANT

APPEAL FROM COURT OF APPEALS OF THE
COMMONWEALTH OF KENTUCKY
CASE NO. 2009-CA-000504

v. and

JEFFERSON CIRCUIT COURT
HON. JUDITH McDONALD BURKMAN
CASE NO. 08-CR-1927

COMMONWEALTH OF KENTUCKY — APPELLEE

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REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing was forwarded via U.S. Mail, postage pre-paid on this 8th day of November, 2011, to Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 New Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601; Judge Judith McDonald Burkman, Jefferson Circuit Court Division Nine (9), 700 West Jefferson St., Louisville, KY 40202; Elizabeth Jones Brown, Assistant Commonwealth's Attorney, 514 W. Liberty Street, Louisville, KY 40202-2887; and to Jack Conway, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601. It is further certified that the record on appeal has not been removed from the Court of Appeals' Office.

DANIEL J. CANON

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

The Commonwealth does not address much of the substantive legal argument set forth in Allen's Principal Brief, and therefore a lengthy reply is not warranted. However, Appellant will briefly address the Commonwealth's noteworthy arguments below.

The Commonwealth insists throughout its brief that the trial court did not abuse its discretion in restricting the evidence Allen sought to introduce. However, to do so, the Commonwealth necessarily engages in guesswork. Any assertion as to the trial court's exercise of discretion is necessarily speculative because the court simply did not give any reason for its summary exclusion of the important evidence Allen sought to admit. As argued in Appellant's Brief, the exclusion of testimony that furthers a key defense strategy, without first weighing the factors of KRE 403, *automatically* constitutes an abuse of discretion. See, e.g., *Ferry v. Commonwealth*, 234 S.W.3d 358, 361 (Ky. Ct. App. 2007). Here, there is no indication that the trial court weighed those factors; indeed, had those factors been weighed properly in accordance with the prior opinions of this Court and the United States Supreme Court, there is no doubt that the evidence should have been admitted.

Similarly, in terms of appellate review, Appellee fails completely to address the undeniable differences in admissibility standards for evidence offered to further a defense, versus evidence offered *against* a criminal defendant. Notably, Allen's entire argument regarding *Blair v. Commonwealth*, 144 S.W.3d 801 (Ky. 2004) – one of the only cases decided by this Court regarding "reverse 404(b)" evidence in recent memory – is totally disregarded by the Commonwealth, and the case itself is only mentioned in

passing in Appellee's Brief.[1] Again, that case states that "**a lower standard of similarity should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor**." *Id.* at 811 (emphasis added) (citing *United States v. Stevens*, 935 F.2d 1380, 1404 (3rd Cir. 1991)). This principle is crucial to this case and cannot be ignored.

Instead of arguing *Blair,* the Commonwealth's 404(b) argument focuses on the factual commonality of the crimes committed by the witness. Appellee cites only two cases to support the idea that Weaver's prior acts were not sufficiently similar to show his modus operandi or other exception to 404(b): *Clark v. Commonwealth,* 223 S.W.3d 90 (Ky. 2007), and *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010). This again is guesswork, because the trial court never expressed any reservation about the similarity of the crimes, or any reasoning underlying its decision whatsoever. However, even if this Court assumes that the trial court excluded the evidence because of the dissimilarity, this too would be reversible error. Again, Weaver was convicted of lying to police officers and possessing forged instruments. Allen's theory was that Weaver forged her name on the loan documents, and subsequently lied to police officers about it to secure Allen's conviction. It does not take a great leap in logic to see the similarity in the prior acts.

Clark is distinguishable. In that case, the Court reversed a defendant's convictions on 404(b) grounds, and specifically discussed its reasoning thusly:

> In short, we find that the Commonwealth has not met its **heavy burden** to show that Clark's conduct toward M.M., E.H., and L.H. is so similar and distinctive as to be admissible under the modus operandi exception to KRE 404(b). That conclusion is reinforced by the twenty-year time gap with Clark's prior sexual bad acts toward M.M. Therefore, under the set of facts of this case, we find that "ultimate fairness" and the "fundamental demands of

1 This omission is especially curious because Appellant in her principal Brief went to great lengths to point out that this Court's decision in *Blair*, despite having been extensively briefed, was not addressed at all by the Court of Appeals. Furthermore, Allen's Motion for Discretionary Review specifically sets forth the interpretation of *Blair* as a focal point for this Court's consideration.

> justice and fair play" required Clark to be tried for only the crimes for which he was charged; and the trial court abused its discretion by permitting M.M. to testify about the offense committed by Clark.

223 S.W.3d, at 101 (emphasis added). A criminal defendant, however, has no such "heavy burden" to introduce testimony in furtherance of her defense. The notions of "ultimate fairness" and the "fundamental demands of justice and fair play" necessarily favor the *defendant* under every applicable constitutional principle.[2] Plus, there is no twenty-year time gap here, and the admissibility of sexual offenses is a different evidentiary ballgame altogether. *Montgomery*, another sex abuse case, also involves evidence of prior acts against a defendant. It – as with most cases nationwide – upheld the use of highly prejudicial uncharged prior acts evidence *against the accused*. Although the cases cited by the Commonwealth technically involve the same evidentiary rule, they are not comparable to the use of "reverse 404(b)" evidence – thus underscoring the importance of *Blair* to the instant case.

Appellee's arguments regarding KRE 609 essentially set up a straw man which is easily knocked down. Citing *Manns v. Commonwealth,* 80 S.W.3d 439 (Ky. 2002), the Commonwealth argues "if the appellant desires that the language of KRE 609 be expanded to include misdemeanors, then there must be an amendment to KRE 609[.]" However, it is clearly conceded in Appellant's principal brief that the testimony sought was likely inadmissible under KRE 609(a). Appellant clearly argues that the testimony had separate and distinct grounds for admissibility under KRE 608(b) and KRE 404(b).

The Commonwealth dismisses Allen's KRE 608(b) argument by asserting that

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2 Clark recognizes this principle in no uncertain terms stating: "Generally, a defendant's prior bad acts are inadmissible because "[u]ltimate fairness mandates that **an accused** be tried only for the particular **crime for which he is charged. An accused is entitled to be tried for one offense at a time, and evidence must be confined to that offense**. . . . The rule is based on the fundamental demands of justice and fair play." 223 S.W.3d, at 96.

such application of 608(b) would create an inconsistency with KRE 609 which "would only serve to confuse prosecutors and trial courts alike." (Appellee's Brief, p.6.) This argument apparently results from a misreading of KRE 608(b). As cited in Appellee's brief (p.4), that rule states: "Specific instances of the conduct of a witness . . . **other than conviction of crime as provided in Rule 609**, may not be proved by extrinsic evidence." (Emphasis in Commonwealth's Brief.) The rule therefore creates a blanket prohibition, followed by an exception to that prohibition found in Rule 609. KRE 608(b) goes on to create *another* exception to the blanket prohibition thusly: "They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness[.]" In other words, the rule does not say "thou shalt not ask about conduct for which a witness was convicted," but "thou shalt not talk about specific instances of conduct *except* convictions under 609 *and* acts that are probative of truthfulness." Determining whether the testimony was sufficiently probative requires a 403 balancing test, which the trial court did not do.

Additionally – and not to belabor the point – but the argument that *prosecutors* (or even trial judges) might be confused is not sufficient to ignore the basic constitutional premise that a criminal defendant is entitled to present a complete defense. This is not simply admitting inconsequential evidence of a crime against a witness to make his testimony less believable to some undefined degree; this witness's credibility was the Commonwealth's *entire case.*[3] Inconvenience to the prosecution must necessarily take a back seat to a criminal defendant's constitutional rights. Furthermore, alleviation of the "confusion" alluded to by the Commonwealth is precisely why Appellant requested

3 For this reason, the Commonwealth's argument that the exclusion of the testimony was "harmless error" is simply untrue. Weaver's credibility was everything, and if the jury had known about his prior acts it is highly likely that this case would have had a much different result.

discretionary review. There can be no better remedy than a clear pronouncement from this Court on this issue.

Finally, the Commonwealth argues that the failure to include her specific heading III from her Brief in her Motion for Discretionary Review makes the issue "not cognizable for review by this court[*sic*]." (Appellee's Brief, p.16.) No rule or case is cited in this two-sentence argument. Furthermore, Appellant's argument III merely reiterates the substantive arguments in her previous sections and specifically requests relief that would be granted by this Court anyway should she prevail on those arguments. There is no merit to the Commonwealth's argument, and its inclusion in its Brief is somewhat baffling.

CONCLUSION

For the foregoing reasons, Appellant's conviction should be reversed, the trial court should be instructed to enter a directed verdict in Appellant's favor on the charge of Theft by Deception, and Appellant should receive a new trial on the charge of Perjury.

Respectfully submitted,

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