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**Commonwealth of Kentucky
Supreme Court**

Case No. 2010-SC-000353

GABRIELLA ALLEN

APPELLANT

v.

Appeal from Jefferson Circuit Court
Hon. Judith McDonald Burkman, Judge
Indictment No. 2008-CR-1927

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

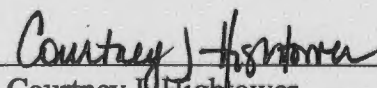
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CERTIFICATE OF SERVICE

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 11th day of October, 2011 to Hon. Judith McDonald Burkman, Judge, Jefferson Circuit Court, Division 9, 700 West Jefferson St., Louisville, Ky. 40202; Hon. Daniel J. Canon, Clay Frederick Adams, PLC, 462 South Fourth Street, 101 Meidinger Tower, Louisville, Ky. 40202, Counsel for Appellant; and via e-mail to Hon. David Stengel, Commonwealth's Attorney.



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INTRODUCTION

Gabriella Allen, hereinafter referred to as appellant, was convicted on one count of Theft by Deception over \$300 and one count of Perjury. Appellant received a sentence of three and one-half (3½) years, probated for a period of five (5) years. On direct appeal, the Kentucky Court of Appeals affirmed her conviction. This court granted the appellant's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal, as the issues are plainly set forth in the briefs and the circuit record. However, should this court decide that oral argument would be helpful, the Commonwealth will gladly appear before the Court to present its case.

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COUNTERSTATEMENT OF THE CASE

On January 25, 2005, Curtis Weaver, the appellant's boyfriend at the time, purchased a 2002 Ford F-150 truck from Oxmoor Toyota in Louisville, Kentucky. Mr. Weaver needed a co-signor because he had not been approved for a loan by himself. Appellant volunteered to co-sign for Mr. Weaver so that he could obtain a loan and buy the truck from Oxmoor Toyota. Appellant came to Oxmoor Toyota and signed all of the pertinent documents so that Mr. Weaver could purchase the truck. (VR 1: 1/21/09; 12:05 - 12:11). Ralph Dawkins, the car salesman, witnessed appellant signing all the documents on the hood of appellant's police cruiser. (VR 1: 1/21/09; 2:21 - 2:26).

Appellant also insured the truck through State Farm Insurance. Such insurance began on February 7, 2005, approximately two weeks after Mr. Weaver purchased the truck, and continued through February 2007. (VR 1: 1/22/09; 9:38 - 9:47). Mr. Weaver paid appellant for such insurance. (VR 1: 1/21/09; 12:11 - 12:13). Mr. Weaver had the truck for approximately two years and then was hurt at work. Mr. Weaver was not receiving any pay and the truck was eventually repossessed. (VR 1:1/21/09; 12:11 - 12:13).

On December 12, 2006, appellant signed a criminal complaint in Jefferson District Court alleging that Mr. Weaver had forged her signature on several documents and obtained a 2002 Ford truck. Amy Goldsmith, Jefferson County Attorney's Office, informed appellant that she was under oath. Appellant informed Ms. Goldsmith that what she put in the complaint was the truth. The complaint was signed by appellant and then notarized by Ms. Goldsmith. (VR 1: 1/21/09; 3:31 - 3:43).

On December 19, 2006, appellant submitted papers to Toyota Motor Credit affirming that Mr. Weaver had forged her signature in obtaining his 2002 truck. As a co-signor on the loan, appellant was facing a debt of \$7487.84 on the truck. Such papers consisted of an affidavit by appellant, proof of appellant's residence, proof of identification and a copy of the police report filed by appellant in Jefferson District Court. The Fraud Department at Toyota Financial Services investigated the allegation and found appellant was a victim of fraud. Toyota then forgave appellant's debt and cleared her account. (VR 1: 1/22/09; 11:12 - 11:27).

In February 2007, Mr. Weaver was arrested and spent 8 - 10 hours in jail based upon the criminal complain sworn out by appellant in Jefferson District Court. (VR 1: 1/21/09; 12:13 - 12:16).

On March 12, 2008, Mr. Weaver saw appellant at Club Cedar. Appellant threatened to have Mr. Weaver killed. (VR 1: 1/21/09; 12:16 - 12:19). Right around March 12, or 13, 2008, Weaver filed a complaint with the Louisville Metro Police regarding the appellant. On March 13, 2008, Sergeant Martet spoke with Weaver and began investigating this case. (VR 1: 1/22/09; 9:50 - 9:51).

At trial, appellant was convicted on the aforementioned charges. Appellant was acquitted of the charge of Terroristic Threatening. (Transcript of the Record, hereinafter referred to as TR, 32).

On appeal, the Kentucky Court of Appeals affirmed the appellant's conviction. The court determined that evidence of the nature of Weaver's prior convictions was inadmissible under KRE 609, KRE 608(b) and KRE 404(b), there was

sufficient evidence of theft by deception and the trial court did not abuse its discretion by denying the appellant's motion for a new trial and/or a directed judgment of acquittal.

The appellant filed a motion for discretionary review. This court granted the appellant's motion.

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE APPELLANT'S CROSS-EXAMINATION OF CURTIS WEAVER.

A. The standard of review is abuse of discretion.

The standard of review of an evidentiary ruling is abuse of discretion. Woodard v. Commonwealth, 147 S.W.3d 63 (Ky.2004). The test for an abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. Goodyear Tire & Rubber Co. V. Thompson, 11 S.W.3d 575, 581 (Ky.2000).

B. KRE 609(a) prohibits the admission of the identity of Weaver's prior convictions.

KRE 609(a) provides that:

For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. **The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction.** However, a witness against

whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

Thus, under specific language of KRE 609, the nature of Mr. Weaver's prior convictions was inadmissible. Only evidence that he was a convicted felon was admissible.

This argument is supported by Blair v. Commonwealth, 144 S.W.3d 801(Ky.2004). In Blair, the Kentucky Supreme Court concluded that admission of evidence of prior convictions could only be admitted to impeach the appellant's credibility under KRE 609(a). Id. at 808. The Kentucky Supreme Court reiterated that the KRE 609(a) permits impeachment only be evidence of a prior felony conviction and prohibits disclosure of the nature of the conviction "unless the witness has denied the existence of the conviction." Id.

Thus, evidence pertaining to the nature of Mr. Weaver's prior convictions was inadmissible under KRE 609(a). The trial court did not abuse its discretion in limiting appellant's cross-examination of Mr. Weaver.

C. KRE 608(b) is inapplicable to convictions.

Appellant argues that KRE 608 allows for the cross-examination about the character for truthfulness or untruthfulness of another witness. The pertinent language of KRE 608(b) is as follows:

- (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, **other than conviction of crime as provided in Rule 609**, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be

inquired into on cross-examination of the witness:
(1) concerning the witness' character for
truthfulness or untruthfulness, ...

Therefore, KRE 608 was inapplicable to this case as appellant was inquiring into the nature of Mr. Weaver's past convictions.

The appellant argues that following the amendment of KRE 608 in 2003, the plain language of the rule indicates that cross-examination into the nature of Weaver's acts should have been allowed. This argument is contrary to the specific language contained in KRE 609 which precludes cross-examination in the specific nature of previous convictions. Further, the rule leaves the scope of cross-examination regarding the witness' character in the sound discretion of the trial court. The trial court did not abuse its discretion in limiting appellant's cross-examination of Mr. Weaver because KRE 609 specifically prohibits the cross-examination into the identity of the crime upon which the conviction was based.

The Commonwealth's argument is supported by the recent Kentucky Supreme Court opinion in Childers v. Commonwealth, 332 S.W.3d 64 (Ky.2011). In Childers, the defendant wanted to cross-examine a detective as to whether the crimes for which a confidential informant had been convicted were crimes involving dishonesty. The trial court agreed with the Commonwealth and ruled that the defense could do no more than establish that the confidential informant was a convicted felon. Id. At 68. The Kentucky Supreme Court held that the trial court had not abused its discretion in limiting the scope of cross-examination because the nature of the confidential informant's previous convictions were not admissible under KRE 608 or KRE 609. Id. at 72-73. The

court reasoned that a majority of the federal Circuit Courts have made a similar distinction between specific instances of conduct that lead to a criminal conviction and those in which there has been no conviction. Id. at 69. The former are governed exclusively by Rule 609, the latter by Rule 608. Id.

The Kentucky Supreme Court's conclusion in Childers is consistent with the language in KRE 608 and KRE 609. KRE 609(a) contains specific language that the identity of the prior conviction should not be disclosed.¹ Thus, the language of KRE 609 implicitly precludes inquiry into the nature of the witness' previous convictions. Further, KRE 608 refers to specific instances of misconduct, but carves out an exception for previous convictions covered by KRE 609. As the court in Childers acknowledged, these two rules address two different types of evidence, a witness' prior conviction and a witness' prior misconduct probative of truthfulness or untruthfulness. If this court interprets KRE 608(b) the way the appellant argues it should, there will be a clear inconsistency between KRE 609 and KRE 608. KRE 609 would preclude cross-examination into the identity of the witness' previous conviction, but KRE 608(b) would allow such cross-examination into the nature of the conviction if it is probative of truthfulness or untruthfulness. Such inconsistency in the Kentucky Rules of Evidence would only serve to confuse prosecutors and trial courts alike.

The appellant argues that under KRE 609, evidence of a misdemeanor conviction can never be admitted and this prejudiced her because she sought to introduce evidence that Weaver was convicted of being untruthful in the information he provided to police officers.

¹FRE 609(a)(1) contains no such language.

The Federal Rules of Evidence have a specific subsection which allows for a misdemeanor conviction to be used for impeachment purposes. FRE 609(a)(2) allows for a witness to be impeached with a misdemeanor conviction if the conviction involved dishonesty or a false statement. However, KRE 609 does not presently contain this subsection.

In Manns v. Commonwealth, 80 S.W.3d 439, 445 (Ky. 2002), the Kentucky Supreme Court acknowledged that the drafters of the Kentucky Rules of Evidence had proposed the adoption of a rule identical to Federal Rule (FRE) 609. Evidence Rules Study Committee, Final Draft, KRE 609 (1989). The General Assembly initially adopted KRE 609 in the form proposed by drafters of the evidence rules, KRS 422A.0609, 1990 Ky.Acts, ch. 88, § 42, subject to the approval of the Supreme Court. *Id.*, § 93. The court, however, disapproved the draft insofar as subsection (a) permitted impeachment by evidence of a misdemeanor conviction Id at 446.

Accordingly, if the appellant desires that the language of KRE 609 be expanded to include misdemeanors, then there must be an amendment to KRE 609 to include language similar to FRE 609(a)(2).

D. Evidence of Weaver's prior convictions was not admissible pursuant to KRE 404(b).

The appellant argues that evidence of Weaver's past criminal convictions was admissible pursuant to KRE 404 (b) to show his modus operandi for lying to the police.

In Clark v. Commonwealth, 223 S.W.3d 90 (Ky.2007), the Kentucky Supreme Court emphasized the narrowness of this "modus operandi" exception to KRE

404(b)'s general rule of exclusion by recognizing:

the fundamental principle that conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the modus operandi exception. Instead, the modus operandi exception is met only if the conduct that meets the statutory elements evidences such a distinctive pattern as to rise to the level of a signature crime.

Montgomery v. Commonwealth, 320 S.W.3d 28, 34 (Ky. 2010). It is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi. So, as a prerequisite to the admissibility of prior bad acts evidence, the proponent of the evidence is required to demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual. Clark v. Commonwealth, 223 S.W.3d 90, 97 (Ky. 2007).

In this case, the appellant's argument is without merit for two reasons. First, the appellant's allegation that Weaver forged her signature on the loan documents was speculative. In fact, the charges supporting this alleged forgery were dismissed because there was no evidence, other than the appellant's own statement, that Weaver forged appellant's signature at all. (VR 1: 1/21/09; 12:13 - 12:16). More importantly, Weaver's avowal testimony revealed that Weaver had previously entered a guilty plea to twenty-five counts of possession of a forged instrument, counterfeit money, and giving the police a false name. (VR 1: 1/21/09; 12:33 - 12:44). The offense of possession of counterfeit money was not sufficiently similar to allegedly forging someone else's name on a loan document so as to establish a modus operandi. The trial court did not abuse its discretion in excluding such evidence.

Additionally, appellant's argument that Mr. Weaver's prior convictions were admissible as substantive evidence under KRE 404(b) is incorrect. Under KRE 404(b), evidence of other crimes is not admissible to prove the character of a person in order to show action in conformity therewith. In her argument, appellant confuses character evidence with substantive evidence. Character evidence is evidence of truthfulness or untruthfulness and a person's propensity to act in a certain way. KRE 404(b)(1) relates to substantive evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake to commit the underlying offense. Appellant even admits in her brief that the actual purpose of cross-examining Mr. Weaver was to show that he was an untruthful person, and he was capable of forgery and lying to police officers. By her own admission, appellant's purpose was to impeach Mr. Weaver's credibility and introduce evidence of his bad character. Under KRE 404(b), appellant was not allowed to show Mr. Weaver's propensity to lie. This was not proper KRE 404(b) evidence, but character evidence governed by KRE 609. The trial court did not abuse its discretion in limiting appellant's cross-examination of Mr. Weaver with regard to the identity of his prior convictions.

E. That appellant was permitted to establish that Weaver had previously been on probation.

During the appellant's cross-examination of Curtis Weaver, she was allowed to elicit testimony that Weaver was on probation when all this happened. Weaver stated that he had a felony conviction in 2002 and was sentenced to five (5) years probation. Weaver stated he was not on probation currently. (VR 1: 1/21/09; 12:22 - 12:25). Accordingly, the appellant's argument that she was denied her right to cross-

examination Weaver about his probationary status as of the date he made his complaint to Louisville Metro Police is without merit.

Further, Weaver did not file his complaint against the appellant with the Louisville Metro Police until March of 2008. (VR 1: 1/22/09; 9:50 - 9:51). Weaver's complaint was filed right after his confrontation with the appellant at Club Cedar. (VR 1: 1/21/09; 12:16 - 12:18). In March of 2008, the terms of Weaver's probation would have been satisfied, so he was not even on probation when he made these charges against the appellant. Thus the appellant's argument regarding Weaver's alleged motive to fabricate charges against the appellant is also without merit.

F. Any error was harmless under RCr 9.24.

Appellant argues that Mr. Weaver's credibility was the linchpin of the Commonwealth's case. Pursuant to the evidence presented at the trial, the Commonwealth had sufficient evidence aside from Mr. Weaver's testimony which established appellant's guilt. The Commonwealth also introduced evidence which disproved appellant's defense that Mr. Weaver forged her signature on the loan documents.

The most damaging evidence came from appellant. In her statement to Sergeant Martet, the appellant first denied ever stepping foot on Oxmoor Toyoto property. Then, when confronted with the fact that Ralph Dawkins, the salesman, specifically remembered her in uniform signing the loan documents on the hood of the her police cruiser, appellant explained to the sergeant and the jury that she didn't know that she was signing papers for Mr. Weaver to get the truck. (VR 1:1/22/09; 10:02 -

10:11, VR 2: 1/22/09; 12:46 - 12:51). The appellant acknowledged that the signature on the loan documents looked like her signature. The appellant also admitted that when she discovered that her name was on the title of Weaver's truck, she took out insurance to protect herself. However, she did not file her complaint alleging that Weaver stole her identity until a year and a half later. (Id.).

Other evidence presented by the Commonwealth came from Ralph Dawkins, the salesman at Oxmoor Toyota, who testified that he saw appellant sign all the loan documents. (VR 1: 1/21/09; 2:21 - 2:26). Charleton Grant from State Farm Insurance testified that appellant took out an insurance policy on the vehicle. (VR 1: 1/22/09; 9:38 - 9:47). Amy Goldsmith from the Jefferson County Attorney's Office testified that appellant signed a criminal complaint alleging Mr. Weaver had stolen her identity by forging her signature on the car loan documents. (VR 1: 1/21/09; 3:31 - 3:43). Shannon Hamblin from Toyota testified that appellant submitted an affidavit averring that Mr. Weaver had forged her signature on the loan documents and appellant was facing a debt of \$7487.84. (VR 1: 1/22/09; 11:12 - 11:27). The Commonwealth had sufficient evidence to establish that appellant was guilty of perjury and theft. There was an abundance of evidence establishing that the appellant was guilty of theft by deception and no reversible error in limiting appellant's cross-examination of Mr. Weaver.

II.

THE COMMONWEALTH PRESENTED SUFFICIENT EVIDENCE THAT APPELLANT WAS GUILTY OF PERJURY AND THEFT BY DECEPTION OVER \$300.

Appellant argues that the trial court erred in denying her motion for a directed verdict of acquittal. More specifically, appellant alleges that the Commonwealth did not present sufficient evidence that she was guilty of theft by deception as no property or services of another were obtained by her pursuant to KRS 514.040.

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 credibility and weight to be given to such testimony. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991); Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992); Farler v. Commonwealth, Ky. App., 880 S.W.2d 882 (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. As the United States Supreme Court has observed:

[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 weight and credibility of a witness's testimony is a matter for the jury to decide.

Commonwealth v. Cox, Ky., 837 S.W.2d 898 (1992). Additionally, "[i]t is sufficient if the victim's testimony taken as a whole could induce a reasonable belief by the jury that the crime occurred." Id. at 900.

The pertinent sections of KRS 514.040, Theft by Deception, reads as follows:

A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:

- (a) Creates or reinforces a false impression, including false impressions as to the law, value, intention or other state of mind;

In this case, the Commonwealth presented sufficient evidence that appellant was guilty of theft by deception over \$300. The Commonwealth presented the following:

- The appellant swore out a criminal complaint against Weaver, alleging that he had stolen her identity. (VR 1: 1/21/09; 3:31 - 3:43)
- Shannon Hamblin testified that appellant had a debt to Toyota Motor Services in the amount of \$7487.84. (VR 1: 1/22/09; 11:12 - 11:27)
- Shannon Hamblin testified that appellant avoided paying this debt by submitting an affidavit claiming that Curtis Weaver forged her signature on the loan documents. (VR 1: 1/22/09; 11:12 - 11:27)

- Appellant knew that Curtis Weaver did not forge her signature on the loan documents. The Commonwealth established this through evidence that appellant admitted to signing papers at the dealership, admitted that the signatures looked the same and Ralph Dawkins, the car salesman, saw appellant sign all the loan documents and appellant obtained an insurance policy for the truck. (VR 1:1/22/09; 10:08 - 10:11, VR 2: 1/22/09: 12:42 - 12:51, VR 1: 1/21/09; 2:21 - 2:26, VR 1: 1/22/09; 9:38 - 9:47)).
- The appellant's guilty knowledge was also established when she changed her story considerably. First she told Sergeant Martet that she had never stepped foot on Oxmoor Toyota Property. Then, when confronted with the fact that Ralph Dawkins specifically remembered her, she said that she did go to the dealership. (VR 1:1/22/09; 10:08 - 10:11, VR 2: 1/22/09; 12:46 - 12:51)
- The appellant also changed her story as to what documents she signed at Oxmoor Toyota. First, she stated she didn't sign any documents. Then, she said she signed a credit application, but she didn't sign anything entitling Weaver to purchase the truck. (VR 2; 1/22/09: 9:53 - 10:11).
- Finally, Shannon Hamblin testified that Toyota Motor Credit Corporation cleared appellant's account and forgave the loan in reliance on appellant's affidavit. (VR 1: 1/22/09; 11:12 - 11:27).

Likewise, the Commonwealth presented sufficient evidence that appellant was guilty of perjury. The Commonwealth presented the following:

- Amy Goldsmith testified that appellant stated, under oath, in a criminal complaint that Curtis Weaver forged her signature on car loan documents. (VR 1: 1/21/09; 3:31 - 3:43)
- Appellant knew that Curtis Weaver did not forge her signature on the loan documents. The Commonwealth established this through evidence that appellant admitted to signing papers at the dealership, Ralph Dawkins, the car salesman, saw appellant sign all the loan documents and appellant obtained an insurance policy for the truck. (VR 1:1/22/09; 10:08 - 10:11, VR 2: 1/22/09; 12:42 - 12:51, VR 1: 1/21/09; 2:21 - 2:26, VR 1: 1/22/09; 9:38 - 9:47)).
- The appellant's guilty knowledge was also established when she changed her story considerably. First she told Sergeant Marthet that she had never stepped foot on Oxmoor Toyota. Then, when confronted with the fact that Ralph Dawkins specifically remembered her, she said that she did go to the dealership. (VR 1:1/22/09; 10:08 - 10:11, VR 2: 1/22/09; 12:46 - 12:51).

Appellant argues that she obtained no property or services. This is incorrect. Appellant had a debt to Toyota Motor Services and would have had to repay such debt but for her affidavit, along with the criminal complaint, submitted to Toyota averring that she was a victim of fraud. Therefore, appellant obtained a monetary amount by not having to repay the debt. Appellant alleges that there was no evidence that anyone ever attempted to collect this debt. However, appellant stated during her direct examination that after she received phone calls from the repossession company, she took out a criminal complaint against Weaver in Jefferson District Court on December 12, 2006. Appellant immediately submitted her affidavit and the criminal complaint to Toyota on December 19, 2006. (VR 2: 1/22/09; 12:46 - 12:51). Toyota then began its own investigation based upon appellant's affidavit. There was no opportunity to collect on the debt. Finally, appellant argues that Toyota did not rely on her affidavit, but generated its own investigation in determining she was a victim of fraud. This is also incorrect. Shannon Hamblin testified that Toyota utilized appellant's affidavit and the criminal complaint that appellant swore out in conducting its own fraud investigation in this case. (VR 1: 1/22/09; 11:12 - 11:21). There was sufficient evidence presented establishing appellant's guilt and the trial court acted correctly in denying appellant's motion for a directed verdict.

III.

THE APPELLANT'S ISSUE III WAS NOT INCLUDED IN HER MOTION FOR DISCRETIONARY REVIEW AND IS NOT COGNIZABLE FOR REVIEW.

The appellant also argues that the trial court erred in not granting her motion for a new trial and/or a judgment of acquittal. This argument was not included in her motion for discretionary review is not cognizable for review by this court.

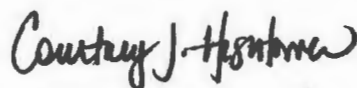
CONCLUSION

Wherefore, based upon all of the foregoing, the Kentucky Court of Appeals opinion should be affirmed.

Respectfully submitted;

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