SUPREME COURT OF KENTUCKY
FILE NO. 2013-SC-291-DG
(COURT OF APPEALS CASE NUMBER 2012-CA-628)

ETHAN HUGHES **MOVANT**

VS.

Appeal from Crittenden Circuit Court
Hon. Rene Williams, Judge
Case No. 10-CR-00044

COMMONWEALTH OF KENTUCKY **RESPONDENT**

REPLY BRIEF FOR MOVANT

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CERTIFICATE OF SERVICE

This is to certify that a copy of the enclosed Reply Brief for Movant has been served by mailing to the Hon. Rene Williams, Judge, Crittenden Circuit Court, Judicial Annex, 35 U.S. Hwy. 41AS, P.O. Box 126, Dixon, Ky., 42409; Hon. Zac Greenwell, Commonwealth's Attorney, 215 N. Main Street, P.O. Box 341, Marion, Ky., 42064; Hon. Paul Sysol, DPA, 739 S. Main Street, P.O. Box 695, Henderson, Ky., 42419; and to the Hon. Jack Conway, Attorney General, Frankfort, Kentucky, 40601, on this the 28th day of March, 2014. The record was not checked out in preparation of this Brief for Movant.

GENE LEWTER

STATEMENT OF POINTS AND AUTHORITIES

REPLY BRIEF

It is the purpose of this brief to address certain matters from the Commonwealth's [hereinafter CW) brief which may be misleading or confusing to this Court, and not to reargue each issue. For instance, at the top of page 9 of the CW's brief it makes the very misleading statement, "defense counsel's argument that C.H.'s ***makeup might have been different during the sexual encounter than what it was in the photographs, was not borne out by the testimony of the witnesses.*** (Emphasis added.) Strangely, on the preceding page, the CW stated that C.H. had testified that at the time of intercourse she was wearing makeup, eyeliner and eye shadow. CW's brief, page 8. Then, in the middle of page 9, it repeated, "Furthermore, it should be again emphasized that C.H. testified that, at the time of intercourse, she was wearing makeup, but only eyeliner and eye shadow." Again, on page 10 of its brief, the CW quoted from the Court of Appeals which also stated that C.H. testified she was wearing eye makeup at the time of the sexual encounter. Since the evidence showed that she was not wearing makeup in the hospital in the photograph with her baby, the testimony did, in fact, bear out the difference in the photographs. Somehow, the CW ignored the testimony.

Apparently, the CW's confusion over the possible difference in makeup not being borne out by the testimony was caused by the CW's argument that Hughes did not "***claim that the makeup which C.H. was wearing at the time of the sexual encounter convinced him that she was 16 years old."*** (Emphasis added) CW's Brief, page 9. The CW has simply created a fiction that everyone can tell why someone looks older or younger. The CW did not produce an expert witness to testify that when a person looks at another he or she can explain why the other person looks a certain age. That is, when we say, "That person looks like he is 25 years old," the CW claims we can explain why that is, whether the person is actually 35 or 19. That simply is not true.

Men generally do not wear makeup, but it is still almost impossible to explain why a man does not look his "stated" or "known" age, or even why they do. When a man looks at a woman and thinks she appears to be in her 30s, it may be that her makeup has performed the desired miracles and she is really 50. When the makeup really works, we don't know that's why she looks so young: that's the beauty of makeup. All faces are different, and we all know that when we look at a face we get a certain sense of the person's age, within a range, but we never formulate the reason for it. If a person is known to be 60, but everyone says he or she looks much younger than that, it would be impossible to explain why that is. It is the overall appearance that we notice, unless we happen to be professional artists. The CW here has merely created a fiction that when we look at a person, young or old, we know exactly why we get a sense of their age and we can express it. As the dissenting opinion noted, "Curiously, makeup often has the effect of making the old look younger and the young look older. C.H. wearing makeup on the date in question would likely make her appear older and the introduction of a photograph to the jury of C.H. without makeup would, in all likelihood, give her a younger appearance." Hughes original brief, page 5. The miracle of makeup is that it actually does change the appearance of a person's face, without being obtrusive. Of course, when too much is worn it is noticeable, but the purpose and function of makeup is to change the appearance without being obvious. Is there a man in the entire world who is so crass as to say to a woman, "Your makeup makes you look so much younger than you really are." When makeup works, we simply look and enjoy without thinking, "Wow. What great makeup."

Even more importantly, however, is that if Hughes had testified the way the CW claims he should have, "that the makeup which C.H. was wearing at the time of the sexual encounters convinced him that she was 16 years old," CW's brief, page 9, it would have been a very stupid thing for him to have told the jury. It would have been clearly self-contradictory, and it would

have been the equivalent of a slow plea of guilty. If Hughes testified that he knew that it was the makeup that made her look 16, he would have been admitting to the jury that he actually knew she was not 16, and it was only the makeup she was wearing that made her look 16. This, of course, would have been a ridiculous statement to make, especially since, as stated above, that is not the way people think. If makeup does its job, the outside world does not know what it covers up, and what it does to the face. The CW's entire argument on the photograph issue is based upon this unrecognized but self-contradictory theory.

It is important also to note what the CW quoted from the majority opinion of the Court of Appeals, "A trial judge has broad discretion in determining the admissibility of photographic evidence." CW's brief, page 10. This actually ignores what the trial court said when it allowed the photograph into evidence. When overruling the objection, the court stated, "Well, I don't think he's denying that he fathered this child, so I don't see how that could be prejudicial to him." VR No 1: 1/27/12; 01:15:20. That clearly shows the court did not understand the issue and did not weigh the prejudicial effect of the photograph with its probative value, of which there was none. Neither the photograph nor the trial itself had anything to do with who fathered the child. Obviously the court was not using its discretion in making the decision: it simply did not understand the issue.

Moreover, the CW repeatedly emphasizes in its brief that Hughes and C.H. both said the photograph looked "similar" to the way C.H. looked when he met her, then segues from the word "similar" to "accurately depicted the way she looked" at the time they had sexual relations. CW's brief, page 9. That is not what "similar" means. When any attorney seeks to introduce a photograph, he asks the witness if the photograph "accurately depicts" the item photographed at a certain time. The attorney does not ask the witness, if he wants to introduce a photograph, "Does this look similar to the scene when you observed it?"

A photograph of a single engine Cessna 150 airplane and a photograph of a Boing 747 Jumbo Jet Airliner can accurately be described as appearing "similar." Both are heavier than air machines that fly through the air with wings, based on the flow of air above and below the wings, created by the thrust of an engine. Yet a picture of a Cessna 150 cannot be said to "accurately depict" a Boeing 747.

The same is true of the hospital photograph of C.H. and the actual appearance of C.H. on the night this incident occurred. They are similar, as are practically all photographs of the same person taken at different times in their lives, even years apart, but they are not the same, and the CW's statement on page 9 of its brief is simply false: "So Hughes' (sic) own trial testimony ***indicates that the photograph accurately depicted C.H. at the time they engaged in intercourse.***" (Emphasis added) No one testified that the hospital picture "accurately depicted" the way she looked when she was having sex with Hughes nine months earlier, including Hughes and C.H.

Inexplicably, the majority of the Court of Appeals assumed, with no evidence to support it, that C.H. looked older in the hospital photograph then she did during the sexual encounter, solely because nine months had passed. The appellate Court then concluded that the photograph was actually beneficial to Hughes, saying "If anything, a photograph taken that much later could ***only have benefited*** Hughes because of the added maturity of nearly another year of age." (Emphasis added) Majority opinion, page 9. That is an unwarranted conclusion, completely unsupported by the record, which unjustifiably ignores the difference makeup can make.

The Opinion then added, "Additionally, we note that Hughes admitted that he had fathered the child." Ibid. This statement shows that the majority opinion, as did the trial court before it, missed the entire point of the trial, and therefore every issue involved. The issue was never about who fathered the child, but rather, did Hughes believe that C.H. was 16 years old at

the time he had sexual intercourse with her, regardless of whether she became pregnant and had a child. Since Hughes admitted that he had sex with C.H., the pregnancy and birth of a child were totally irrelevant to the only issue in the entire trial, his belief that C.H. was 16.

Concerning Argument Two, it appears that the CW has completely misunderstood Hughes's Argument. In the CW's response to Hughes's second argument to this Court, page 12 of the CW's brief, the CW begins by stating "the trial judge properly refused to permit Hughes to introduce a ***prior consistent statement because Hughes made no claim that C.H. had recently fabricated evidence.***" This is simply not the issue at all, and never was. Hughes never asked to introduce a prior consistent statement. Hughes attempted to show a ***prior inconsistent*** statement by C.H., which is proper impeachment.

The CW then stated, on page 13 of its brief, that counsel for Hughes told the court and the prosecutor that "he intended to introduce the testimony of Brian Brown [sic Reynolds] whom counsel claimed would confirm that C.H. told him, in an unrelated incident, that she was 16 years of age."

A casual glance at Hughes's original brief, page 9, shows that counsel never stated any intentions to call Brian Reynolds, or Brian Brown, or whatever his name was. The CW specifically asked counsel for Hughes if he intended to call ***the police detective*** who, the CW explained to the court, had first investigated another boy, Brian Reynolds, concerning the fatherhood of the child. The discussion quoted on pages 9 and 10 of Hughes's original brief is all about calling the detective, not the boy himself. In addition, neither the issue nor the argument was ever about "a prior consistent statement" or any "recently fabricated evidence." The issue is well stated and well argued in Hughes's original brief, which the CW does not actually address at all in its Argument Two.

Moreover, the quotation from the opinion of the Court of Appeals majority by the CW on

page 13 of its brief is improperly identified. That quote from the Court of Appeals was ***not*** in reference to the impeachment evidence sought to be introduced by Hughes. The quoted portion of the Opinion was in reference to an argument that Hughes did not raise before this Court either in the MDR or his brief. It related to Hughes's answer to a sarcastic question by the CW, "You weren't a little bit suspicious that a baby was born nine months after intercourse with this girl, that you were going to be the daddy?" Hughes responded, "I was suspicious, but I wasn't the only person that she was sexually active with." VR 1/27/12; 03:32:00. The CW objected to the answer and obtained an admonition from the court to the jury to disregard it. Counsel argued to the Court of Appeals that Hughes was merely answering the question asked by the CW and the answer should stand, without an admonition. This issue was never raised before this Court, and the quote from the Court of Appeals is not applicable to any argument made before this Court by Hughes.

On page 14 of its brief, the CW quotes from KRE 801 concerning prior statements of a witness, then provides an erroneous conclusion which does not apply to Hughes's Argument Two. As stated previously, Hughes never wanted to call Reynolds to testify, never wanted to introduce evidence of prior sexual activity by C.H. as the Court of Appeals stated in its opinion from which the CW quoted, and never wanted to introduce prior consistent statements of anyone. Hughes wanted to call the police officer to impeach the testimony of C.H., which is permitted by KRE: 801(a)(1). All of this is set forth clearly in Hughes's opening brief, Argument Two, and need not be repeated here since the CW never addressed it.

Concerning Argument Three, on page 15 of the CW's brief, the CW correctly points out in its footnote number six that Hughes referred to the testimony of the witness, Jeffrey "Stretch" McNary in chambers as a "deposition" in its brief before the Court of Appeals, and changed that reference in its brief before this Court to a "pseudo-deposition." The reason for the change in nomenclature is for the simple reason that both the CW and the Court of Appeals focused on

form rather than substance, and missed the forest for the trees. Each pointed out that a deposition requires subpoenas, court reporters, advance notice, etc., and cited the Kentucky Rules of Civil Procedure and its very specific requirements for a deposition, which were not followed in this proceeding.

Both the CW and the Court of Appeals essentially ignored the fact that Hughes's witness was being questioned under oath by the CW, the court, and Hughes's own attorney without Hughes being present. There is an old saying in the country where undersigned counsel was raised, that if it walks like a duck and quacks like a duck, chances are really good that it is a duck. Counsel never intended for the focus to be placed on advance notices, subpoenas, court reporters, and technical requirements of depositions, but simply wanted to discuss the essence of a formal questioning of Hughes's witness by everyone in a "deposition like" setting without Hughes's presence. The Court of Appeals, as quoted extensively in the CW's brief, pages15 and 16, focused on the word "deposition" and its technical requirements, which included the presence of the defendant. Therefore, the Court had to call this something other than a deposition, so it referred to it as "an in camera review for the purpose of determining if McNary's testimony would be admissible as a matter of law. We cannot agree with his characterization as a deposition." CW's brief page 16. By referring to the nonetheless formal questioning of the witness in chambers as merely an "in camera review" the Court was able to rely on **Caudill v. Commonwealth,** 120 S.W.3d 635 (Ky. 2003), where this Court held that a defendant did not have to be present when only matters of law are being determined. The Court of Appeals stated the purpose of the "in camera hearing" was to determine if a witness's proffered testimony was admissible. This characterization would have been appropriate and correct if only the attorneys were present with the court discussing what the testimony would be and the legal issues involved. This is done in almost every trial, whether it involves instructions or complex legal issues which are better

discussed sitting around a table, rather than standing in front of the bench in the courtroom.

However, that is not what happened in this case. The court called Hughes's potential witness and everyone present proceeded to question him, including the judge. That is far different from a bench conference which is transferred to chambers and only legal issues are discussed. Calling a witness to testify under oath is not "legal issues." It is more like a deposition, if we forget prior notice and court reporters. Hughes was entitled to be there for the fact gathering mission.

Strangely, on page 15 of its brief, the CW states that ***Hughes's trial counsel requested the "in camera testimony"*** of McNary. Two pages later, on page 17 of its brief, the CW states "***the trial judge suggested that McNary testify, in camera***, as to what he knew about C.H.'s representations regarding her age." VR 01/27/12; 02:49:50. The CW can't have it both ways.

The CW then argues, "There has been no sufficient showing of how this event somehow prejudiced Hughes' (sic) defense." CW's brief, page 15. However, the testimony was used for discovery purposes by the CW, who then proclaimed that it was not that harmful to the CW. The court then agreed with the CW that it was a two edged sword, and together their opinions swayed defense counsel into not calling the witness. Even though whether to call a witness is within the choices to be made by the attorney, he could have benefited immensely by the presence of Hughes to hear the testimony, and it was Hughes's absolute right to be present. McNary was Hughes's friend, and presumably Hughes knew him better than his attorney did. The in chambers pseudo-deposition not only gave the CW advance knowledge of McNary's testimony, but directly led to McNary's absence from the witness stand. There is no question that some of his statements in chambers would have helped Hughes, and some which the CW could have used. His testimony was not complete in chambers, but merely a portion of what might have been asked in front of the jury. No one can say for certain how it would have affected the jury, because Hughes never had the chance to present the testimony to the jury.

In **Delaware v. Van Arsdale**, 475 U.S. 673, 681 (1986) the United States Supreme Court stated, "Since Chapman [v. California, 386 U.S. 18 (1967)], we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside ***if the reviewing Court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.***"

Here the questioning of a defense witness in chambers by the court, the CW, and defense counsel without Hughes present led directly to the failure to call Hughes's witness to testify in front of the jury. Since he had direct evidence concerning C.H., how she looked and acted, and her proclivity to pass herself off as 16, it is impossible for this court to say that the error was "harmless beyond a reasonable doubt."

The CW makes various attempts in its brief to show that Hughes's counsel waived Hughes's presence, pointing out that the court asked counsel if Hughes needed to be present and the latter said no. The CW neglected to say that this question was asked at the beginning of the actual legal discussions on calling the police officer to testify. Counsel correctly stated that Hughes was not necessary for that. It was much later that the court suggested that McNary be brought in. The situation changed then from a legal conference only, to a deposition-like setting. Counsel could not waive Hughes's right to be present during the fact gathering pseudo-deposition without some indication that Hughes knew of and specifically waived that right. There is no such indication.

In the CW's response numbered IV, it states that the jury instruction complained of by Hughes was correct because the defendant does bear the burden of proving that he believed that the victim was at least 16 years of age.

However, the commentary to **KRS 510.030**, as quoted by the CW on page 15 of its brief, merely states that "the defendant must raise lack of knowledge of the particular condition as a

defense." Nowhere does any statute provide for an instruction telling the jury that the burden of proof is on the defendant to prove that he believed she was 16 years of age. It merely provides that the defendant has to bring up the issue, rather than require the CW to prove something that may not have any significance in a particular trial.

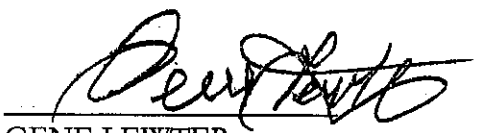
In its argument on this issue, the CW completely ignores the commentary to **KRS 500.070(3)** as quoted on page 30 of Hughes's original brief. Subsection (3) provides that the defendant has the burden of proving an element where the statute says that the defendant "may prove such element" in exculpation of his conduct, as here. However, the commentary plainly states, "***Subsection (3) does not affect the manner in which juries are instructed as to such elements.***"

There is no legal authority for such an instruction as was given here. An erroneous instruction is presumed to be prejudicial to Hughes. **Drury v. Spalding**, 812 S.W.2d 713, 717 (Ky. 1991). It clearly was here, since that encompassed the CW's entire closing argument, and the jury even sent out a question concerning it.

CONCLUSION

Based upon the foregoing, and the original brief submitted by Hughes, Hughes requests this Honorable Court to vacate the judgment herein.

Respectfully submitted,



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