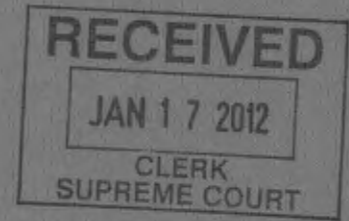


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
Case No. 2011-SC-000115-DG



JEFFREY L. HALE,

APPELLANT,

APPEAL FROM CHRISTIAN CIRCUIT COURT
CASE NO. 09-CR-00064

VS.

AND

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2009-CA-002273

COMMONWEALTH OF KENTUCKY,

APPELLEE.

BRIEF FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on all other parties by mailing copies to: **HON. JOHN L. ATKINS**, Judge, Christian Circuit Court, Div. II, Christian County Justice Center, 100 Justice Way, Hopkinsville, Kentucky 42240; **SAMUEL P. GIVENS JR.**, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; **JACK CONWAY, ESQ.**, Attorney General of Kentucky, and **MICHAEL J. MARSCH, ESQ.**, Assistant Attorney General, Office of Criminal Appeals, Attorney General's Office, 1024 Capital Center Drive, Frankfort, Kentucky 40601; and **JOHN LINDSEY ADAMS, ESQ.**, Foster, Soyars & Associates, 209 East Fourteenth Street, P.O. Box 24, Hopkinsville, Kentucky 42241-0024; this 13th day of January, 2012.

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INTRODUCTION

This is a case involving a single, consensual, sexual act by an adult with a willing minor in which Defendant, Jeffrey Hale, appeals from a judgment convicting him of unlawful transaction with a minor, first degree, and sentencing him to serve ten years in prison.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument in this matter. Oral argument would be helpful because Appellant, Jeff Hale, has raised multiple issues concerning the proper application of the unlawful transaction with a minor statute, and oral argument should assist the Court in determining how the statute was misapplied in this case. Oral argument also will allow the Court to better understand how the prosecutorial misconduct in this case deprived Jeff of his fundamental right to a fair trial.

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I. STATEMENT OF THE CASE

Appellant, Jeffery Hale ("Jeff"), a Christian County farmer, was convicted in the Christian Circuit Court of first-degree unlawful transaction with a minor. Jeff's conviction was based on a single, consensual, sexual encounter with a willing minor ("CP"), shortly before her 15th birthday.

Jeff's jury trial commenced on 24 September 2009. At the close of the Commonwealth's evidence, Jeff requested that the trial court grant a directed verdict of acquittal, arguing that there was no evidence that CP engaged in any illegal sexual activity, as required for a conviction for unlawful transaction with a minor in the first degree. (Trial Tape Day 1 16:42:40).

During the trial, the prosecution introduced the fact that CP was a virgin before her sexual encounter with Jeff. (Day 1 15:42:19). During closing argument, the prosecutor made numerous references to this and other irrelevant, inadmissible, and highly prejudicial evidence. The prosecutor compounded this prejudice by also encouraging the jury to rely on their emotions in reaching a verdict in this case. As argued below, the cumulative effect of the prosecutor's misconduct violated Jeff's constitutional right to receive a fair trial.

At the conclusion of the jury trial, Jeff was found guilty of the charge of unlawful transaction with a minor, first degree. (R.A. at 75-76). The jury fixed Jeff's sentence at ten years, and that sentence was imposed by the Circuit Court Judge at sentencing. (R.A. at 78).

On appeal to the Kentucky Court of Appeals, Jeff argued that, under KRS 530.064, the Commonwealth must prove that the minor engaged in activity that is illegal

for the minor to perform. Because CP herself did not engage in any criminal activity, the jury should have been allowed to consider third degree rape under KRS 510.060(1)(b), which provides that a person is guilty of rape in the third degree when “[b]eing twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than sixteen (16) years old.”

The Kentucky Court of Appeals found Jeff’s argument concerning the definition of illegal sexual activity to be compelling, but held that it was constrained by precedent set by this Court. The Court of Appeals expressed hope that this Court would reconsider its earlier ruling in this matter.

II. ARGUMENT

A. THE CIRCUIT COURT ERRED IN DENYING JEFF’S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL BECAUSE THERE WAS NO EVIDENCE OF ILLEGAL ACTIVITY ON THE PART OF THE MINOR

1. Preservation of Error and Standard of Review

This error was preserved when Jeff raised the issue numerous times before the Circuit Court. Jeff moved for a directed verdict of acquittal on these specific grounds at the close of the Commonwealth’s case, (Day 1 16:42:40); (R.A at 59-65); he repeated this request at the close of his own proof (Day 2 12:55:36); and, he raised it again in a post-verdict motion (R.A. at 84-88).

A jury’s verdict in a criminal case may only be sustained on appellate review if there is sufficient evidence to support it, taking that evidence in the light most favorable to the Commonwealth. *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994). To allow a conviction to stand despite a lack of sufficient supporting evidence denies a defendant his right to due process of law as guaranteed by the Fourteenth

Amendment of the United States Constitution.” *In re Winship*, 397 U.S. 358, 364 (1970); *Perkins v. Commonwealth*, 694 S.W.2d 721, 722 (Ky. App. 1985).

The dispositive issue in this assignment of error is the legal interpretation of KRS 530.064. Since the construction and application of statutes is a matter of law, the Court should interpret KRS 530.064 *de novo* without deference to the interpretations adopted by lower courts. *Wheeler & Clevenger Oil Co. v. Washburn*, 127 S.W.3d 609, 612 (Ky. 2004).

2. The Plain Language of the Unlawful Transaction with a Minor Statute Requires That the Minor Engage in Criminal Activity to Support a Conviction.

Jeff was convicted of unlawful transaction with a minor in the first degree, in violation of KRS 530.064(1)(a). KRS 530.064(1) provides that “a person is guilty of unlawful transaction with a minor in the first degree when he knowingly induces, assists or causes a minor to engage in illegal sexual activity.” A conviction under this statute requires the Commonwealth to prove beyond a reasonable doubt that both the defendant and the minor engaged in specific conduct. The Commonwealth must prove beyond a reasonable doubt that the defendant violated the “inducement” element, in that he knowingly induced, assisted, or caused a minor to engage in an activity specified under the unlawful transaction statutes. In a prosecution under KRS 530.064(1), the prosecution must prove that the specific activity the minor was induced to engage in was illegal sexual activity.

Therefore, to support a conviction under KRS 530.064, there must be evidence that the minor engaged in “illegal sexual activity.” The minor’s conduct in this case was not illegal; therefore, the offense charged in this case properly falls under the

statutory rape provision of KRS 510.060, rather than unlawful transaction with a minor statute.

“The most commonly stated rule in statutory interpretation is that the ‘plain meaning’ of the statute controls. [The Kentucky Supreme Court] has steadfastly adhered to the plain meaning rule ‘unless to do so would constitute an absurd result.’” *Wheeler & Clevenger Oil Co. v. Washburn*, 127 S.W.3d 609, 614 (Ky. 2004). Therefore, “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008). In other words, “[i]f the language is plain and unambiguous it must be given effect.” *Commonwealth v. Shivley*, 814 S.W.2d 572, 574 (Ky. 1991). “

Under the plain meaning of the language “engage in illegal activity,” the minor herself must have engaged in some illegal activity. A minor who has committed no crime, and in fact has been the victim of a crime, is not engaging in activity that is “illegal” under the plain meaning of the word. No person, employing the ordinary usage of the English language, would characterize the minor who has consensual sex with an adult as herself doing something “illegal.”

Nor would following the plain meaning of “illegal activity” constitute an absurd result. If a minor is the victim of a crime, then the defendant was engaging in illegal activity, and the defendant may be prosecuted for whatever crime he committed.

The phrase “illegal sexual activity” has been part of the unlawful transaction with a minor statute since it was first passed by the General Assembly as part of the Kentucky Penal Code in 1974. The statute, which was originally compiled within KRS 530.070(1)(b), was enacted contemporaneously with the rape statutes of

KRS Chapter 510. 1974 Ky. Acts, Ch. 406, §§ 81-95 and § 263. The original unlawful transaction with a minor statute provided in part that “a person is guilty of unlawful transaction with a minor when . . . he knowingly induces, assists or causes a minor to engage in illegal sexual activity, illegal controlled substances activity, illegal gambling activity or any other criminal activity.”

The current offense of unlawful transaction with a minor is divided into first degree, second degree, and third degree offenses. However, all three degrees of unlawful transaction with a minor keep the same language as the original statute. See KRS 530.064; KRS 530.065; KRS 530.070. KRS 530.064 still forbids inducing a minor to engage in “illegal sexual activity” (such as prostitution). KRS 530.065(1) involves inducing a minor to engage in criminal activity related to marijuana, gambling, or felonies not otherwise falling within the confines of KRS 530.064. KRS 530.070, the lesser misdemeanor offense of unlawful transaction with a minor in the third degree, still forbids a person from knowingly inducing, assisting, or causing “a minor to engage in any other criminal activity.”

Under the plain language of the statute, the General Assembly clearly intended to require that “illegal sexual activity” also qualify as “criminal activity.” The use of the word “other” demonstrates that the statute forbids inducing a minor to engage in criminal activity, whether the activity was a sex crime, drug crime, gambling crime, or any other crime. While the various types of crimes a minor may be induced to commit will result in a different punishment for the person who induces the minor to commit the crime, under the plain language of the statutes the minor must commit a crime. Just as the victim of a crime, who has done nothing illegal, cannot be considered to be

engaging in illegal activity, the victim of a crime cannot be considered to be engaging in “criminal activity” under the plain meaning of the phrase. No reasonable person would consider a minor, who has done nothing wrong, to be engaging in “criminal activity.”

This analysis draws further support from the present day KRS 530.064(2), which sets out the offense level for a violation of KRS 530.064(1). The felony level depends on the age of the minor at the time “the minor engaged in the prohibited activity.” The offense level is not determined by the age of the minor at the time the defendant engaged in the prohibited activity. It is the minor, and not the defendant, who must engage in the “prohibited activity”. In this case, it was Jeff, and not the minor, CP, who engaged in the prohibited sexual activity.

The statutes prohibiting unlawful transactions with a minor focus on the nature of the conduct in which the minor was induced to engage. This requires examining the conduct of the minor, not the conduct of the defendant. Under the plain meaning of the unlawful transaction with a minor statute, the minor must engage in an illegal, criminal, and prohibited activity. All of these words are synonyms for the plain meaning of the unlawful transaction with a minor statute, which requires that the minor commit a crime, in order for there to be a violation of KRS 530.064.

3. The Commonwealth’s Overly Expansive Interpretation of “Illegal Sexual Activity” Goes Against the Intent of the General Assembly.

Only if a statute is ambiguous or otherwise frustrates a plain reading do courts resort to extrinsic aids such as the statute's legislative history. *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193 (Ky. 2009). In this case, the unambiguous language of the statute demonstrates that KRS 530.064 applies to activity that is illegal for the minor, rather than the defendant, to perform. But, even if the statute were

ambiguous, the legislative history compels a finding that the General Assembly intended for the unlawful transaction with a minor statute to follow Jeff's interpretation, rather than the Commonwealth's.

It was a misdemeanor under pre-penal code law for an adult to "contribute to the delinquency, dependency or neglect of a child." Kentucky Crime Commission/Legislative Research Commission, *The Kentucky Penal Code Final Draft*, 332-33 (November 1971). However, the drafters of the penal code considered this language to be "vague" and "troublesome." For this reason, the drafters expressly intended to replace the vague and troublesome language of the old statute, with specific prohibitions against causing a minor to engage in criminal activity, habitual truancy, and parental disobedience. *Kentucky Penal Code Final Draft*, at 334.

Furthermore, at the same time the General Assembly passed a law limiting the unlawful transaction with a minor statute to certain specified activities, the General Assembly also passed KRS Chapter 510, which specifically included the "statutory rape" law. The logical conclusion is that the General Assembly intended that those who induce a minor to commit a crime be prosecuted under the unlawful transaction with a minor statute, while those who commit a sexual crime against a minor would be prosecuted under KRS chapter 510.

Finally, at the same time the General Assembly passed the law concerning unlawful transaction with a minor, the General Assembly also passed the "sexual misconduct" statute. KRS 510.140 provides that:

(1) A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.

(2) Sexual misconduct is a Class A misdemeanor.

To give meaning to KRS 510.140, a commentary accompanying KRS 510.140 was included, which provides in part as follows:

But the basic purpose of KRS 510.140 is to preserve the concept of statutory rape and statutory sodomy. When read in conjunction with the rape and sodomy statutes, KRS 510.140 is designed primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: (i) when the victim is 14 or 15 and the defendant is less than 21; or (ii) when the victim is 12, 13, 14, or 15 and the defendant is less than 18 years of age. In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under KRS 510.030.

The purpose in denominating such conduct between persons within the specified age groups as sexual misconduct rather than rape or sodomy is to eliminate an undesirable stigma. In such cases the defendant may well have been persuaded by the 'victim' to engage in the proscribed conduct. It seems unnecessarily harsh to have a defendant within the prescribed age limitation who has been convicted of such a statutory offense to bear a criminal record labeling him as a 'rapist' or 'sodomist.' KRS 510.140 takes a more realistic approach to the penalty imposed while at the same time prohibiting the undesirable conduct.

If the accused is 21 or over and the victim is less than 16, the offense constitutes third degree rape. If the accused is 18 or older and the victim is under 14, the offense constitutes second degree rape. Any sexual intercourse with a person less than 12 years old constitutes first degree rape regardless of the age of the accused."

Cooper v. Commonwealth, 550 S.W.2d 478, 479 (Ky. 1977).

For this reason, this Court's "longstanding rule' is that [KRS 510.140] was intended to apply only in cases where the victim is fourteen or fifteen and the defendant less than twenty-one, or when the victim is twelve to fifteen, and the defendant is less

than eighteen years of age.” *Deno v. Commonwealth*, 177 S.W.3d 753, 762-63 (Ky. 2005).

However, under the Commonwealth’s expansive interpretation of KRS 530.064 advanced in this case, the entire point of the sexual misconduct statute would be moot. Any 20-year-old who engages in consensual sexual intercourse with a 15-year-old would be guilty of unlawful transaction with a minor, in addition to being guilty of sexual misconduct. Likewise, any 17-year-old who engages in sexual intercourse with a 15-year-old also would be guilty of unlawful transaction with a minor. See Kentucky Attorney General Opinion OAG 82-624 (stating that a minor may be guilty of unlawful transaction with another minor). If all persons who are guilty of sexual misconduct, which is intended to be a less stigmatizing misdemeanor offense, are also guilty of the Class B felony of unlawful transaction with a minor, then the legislative purpose of the sexual misconduct statute is completely defeated.

In addition, one of the concerns that resulted in the legislature creating the offense of sexual misconduct was the stigma associated with certain sexual offenses being characterized as “rape.” However, under the Commonwealth’s suggested construction of KRS 530.064, any person guilty of sexual misconduct may be prosecuted for unlawful transaction with a minor in the first degree, which carries with it the stigma, as well as the harsh penal consequences, of “violent offender” status. KRS 439.3401(1)(g).

Such a result would go directly against the explicit intent of the General Assembly, who designed KRS 510.140 to be “less harsh” than other sexual crimes. For this reason, the Court should adopt Jeff’s interpretation of KRS 530.064.

4. An Overly Expansive Interpretation of “Illegal Sexual Activity” Leads to Absurd Results and Violates the Rule of Lenity.

In order to sustain a conviction in Jeff’s case, the Court must interpret the statutory requirement that the minor engage in “illegal sexual activity” as being satisfied by a defendant’s illegal, criminal, and prohibited activity. Under such an interpretation, a violation of Chapter 510 constitutes a lesser included offense of the greater crime of unlawful transaction with a minor in the first degree, such that a violation of Chapter 510 becomes a violation of KRS 530.064 if the defendant induced the victim’s participation.

Under the specific facts of this case, following the Commonwealth’s interpretation of KRS 530.064, the “illegal sexual activity” Jeff committed was rape in the third degree. Under this interpretation, the Commonwealth must have offered sufficient evidence to have proven beyond a reasonable doubt that Jeff committed the illegal sexual activity of rape in the third degree, and that he induced, assisted, or encouraged the minor’s participation.

The problems associated with such an interpretation of “illegal sexual activity” are made clear by examining how the statute would apply to a defendant who has sexual intercourse with an 11 year old, and comparing it to how it applies to a defendant that has sexual intercourse with a 12 year old. If an adult has sexual intercourse with an 11 year old, it is rape in the first degree, a Class A felony. KRS 510.040(2). However, by adding the inducement element, and assuming that the Commonwealth successfully proves that the defendant had sexual intercourse with the 11 year old, and that he induced the 11 year old into willingly participating, the defendant’s Class A felony is lowered to a Class B felony. Therefore, adding the extra element of “inducement” decreases the defendant’s criminal liability.

On the other hand, when a defendant has sexual intercourse with a 12 year old it is rape in the second degree, a Class C felony. KRS 510.050. However, inducing a 12 year old into participating in the defendant's violation of the rape statute increases the defendant's penalty to a Class B felony. Therefore, under the Commonwealth's interpretation of "illegal sexual activity" a person who induces an 11 year old to have sexual intercourse with him has a lower penalty than he would for committing the underlying offense without the inducement, while a person who induces a 12 year old to have sexual intercourse with him has an increased penalty.

The absurdity of this situation demonstrates why the Commonwealth's expansive interpretation of "illegal sexual activity" is incorrect. Under Kentucky law, courts should not construe a statute in such a way that "it would lead to an unreasonable or absurd result." *Newbolt v. Board of Education of Berea Independent School Districts*, 409 S.W.2d 513 (Ky. 1966); *Overnite Transp. Co. v. Gaddis*, 793 S.W.2d 129, 131 (Ky. App. 1990). The flaws in the Commonwealth's overly expansive interpretation of KRS 530.064 are further demonstrated when the offense of unlawful transaction with a minor in the first degree is compared to the offense of sexual abuse in the third degree. The sexual abuse statute, KRS 510.130, provides:

(1) A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent.

(2) In any prosecution under this section, it is a defense that:

(a) The other person's lack of consent was due solely to incapacity to consent by reason of being less than sixteen (16) years old; and

(b) The other person was at least fourteen (14) years old; and

(c) The actor was less than eighteen (18) years old.

(3) Sexual abuse in the third degree is a Class B misdemeanor.

A person who is over the age of 18, and who has any consensual sexual contact with a 15-year-old, is guilty of sexual abuse in the third degree, a Class B misdemeanor. However, under the Commonwealth's interpretation of KRS 530.064, that person also would be guilty of unlawful transaction with a minor in the first degree. This greatly increases the penalty that a defendant will face for sexual abuse in the third degree, for, instead of receiving either a jail term of a few months or even probation, the defendant will receive a mandatory prison term of 10 to 20 years, no chance of probation, and "violent offender" classification.

As discussed above, the Commonwealth's interpretation of KRS 530.064 makes statutory rape a lesser included offense of first degree unlawful transaction with a minor. As such, a person who induces, assists, or causes a minor to engage in consensual sexual activity is guilty of the greater offense of unlawful transaction with a minor. But given that virtually all sexual activity between consenting parties would require the other to "assist" in the sexual activity, the Commonwealth's interpretation provides that all those guilty of statutory rape are also guilty of unlawful transaction with a minor. This means that conduct that previously was a misdemeanor would now be a Class B felony offense.

It is absurd for the Commonwealth to suggest that the General Assembly intended the unlawful transaction with a minor statute to turn what would otherwise be a misdemeanor into a Class B felony. Therefore, the Commonwealth's argument that this

was simply a case where the General Assembly intended conduct to fall under both the statutory rape statutes and the unlawful transaction with a minor statute is incorrect.

This argument requires believing that the General Assembly intended for all consensual sexual relationships with a minor to be an unlawful transaction with a minor. But if a defendant is *per se* liable for an unlawful transaction with a minor for any consensual sex act in violation of a statutory rape law, there is no point in even having the statutory rape laws as enacted by our General Assembly.

As the Court of Appeals noted in its opinion below, “doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishments totally disproportionate to the gravity of the offense.” *White v. Commonwealth*, 178 S.W.3d 470, 483-84 (Ky. 2005). In this case, if the overly expansive construction of “illegal sexual activity” is not overturned, defendants who are guilty of minor sexual crimes will face punishments totally disproportionate to the gravity of their offense. Therefore, any interpretation of the term “illegal sexual activities” reasonably should be construed as only including the minor’s illegal activities, rather than a defendant’s illegal activities.

5. The Rationale Employed by the Court in *Young v. Commonwealth* does not Conflict with Jeff’s Interpretation of KRS 530.064.

While the Court of Appeals found Jeff’s arguments to be compelling, it ruled that it was constrained by this Court’s opinion in *Young v. Commonwealth*, 968 S.W.2d 670 (Ky. 1998), from ruling in his favor. In *Young*, the defendant was convicted of three counts of criminal attempt to commit unlawful transaction with a minor in the first degree. *Young*, 968 S.W.2d 670, 671 (Ky. 1998).

On appeal, Young argued that that KRS 530.064 “applies only to a circumstance in which the defendant induced, assisted or caused a minor to engage in illegal sexual activity with someone else, . . . but not to a circumstance in which the defendant induced, assisted or caused a minor to engage in illegal sexual activity with the defendant.” *Id.* at 673. The Court disagreed, ruling that the General Assembly did not intend such a result, because “it would have been a simple matter to have written the statute with that limitation, e.g., “to engage in illegal sexual activity with another.” *Id.*

Jeff is not asking the Court to overrule this legal analysis. He agrees that there is no reason why KRS 530.064 would apply differently depending on with whom, if anyone, the minor engages in illegal sexual activity.

What Jeff is requesting is that the Court hold that KRS 530.064 only applies when the minor engages in sexual activity that is illegal for her to perform. It is Jeff’s position that the identity of the person with whom the minor herself engages in illegal sexual activity is not relevant to this appeal.

Jeff’s interpretation of the unlawful transaction with a minor statute does not conflict with the Court’s analysis in *Young*. Because the reasoning of *Young*, if not the result, does not conflict with Jeff’s definition of “illegal sexual activity,” this Court should adopt Jeff’s interpretation of KRS 530.064. Furthermore, because Jeff’s interpretation of KRS 530.064 has never been raised before this Court, Jeff’s arguments are ripe for judicial review.

Given the above legal analysis, the Commonwealth produced insufficient evidence that Jeff committed unlawful transaction with a minor in the first degree. It is undisputed that CP did not engage in any criminal activity. As such, the lower courts’

failure to direct a verdict of acquittal as to KRS 530.064 resulted in a denial of his due process rights under Sections 2 and 11 of Kentucky's Constitution and the Fourteenth Amendment to the United States Constitution. Therefore, his conviction and sentence must be reversed.

B. THE CIRCUIT COURT ERRED BY ALLOWING INADMISSIBLE EVIDENCE INTO THE TRIAL, WHICH WAS THEN AMPLIFIED BY THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENTS.

1. Preservation of Error and Standard of Review

If prosecutorial misconduct occurs during closing argument, and defense counsel does not object at trial, an appellate court will reverse only if the misconduct is "flagrant." *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002). The error created by the prosecutor's misconduct was raised and presented to the trial court in Jeff's Motion for a New Trial and in his Memorandum in support thereof. (R.A. at 95-96) In addition, when an objection is not raised at trial, the appellate court reviews for palpable error "which affects the substantial rights of a party . . . and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26.

2. The Prosecutor's Closing Argument Undermined the Overall Fairness of the Proceedings and Deprived Jeff of a Fundamentally Fair Trial.

The most egregious instance of prosecutorial misconduct in this case involves the prosecutor's repeated references to CP's virginity during his closing argument. This evidence was introduced during the direct examination of CP. (Day 1 15:42:19). Even the introduction of CP's virginity into evidence was improper, because the state of CP's virginity is not relevant to the claims made against Jeff, and, therefore,

it should have been excluded under KRE 401. *Woodard v. Commonwealth*, 219 S.W.3d 723, 730 (Ky. 2007). The evidence was used solely to prejudice the jury against Jeff, in violation of KRE 403. In addition, its admission into evidence violates Kentucky's rape shield law. KRE 412.

However, it was the prosecutor's numerous references to CP's virginity during his closing argument that require the reversal of Jeff's conviction. (Day 2 14:04:22, 14:04:53, 14:19:15, 14:21:04). The fact that CP was a virgin was completely irrelevant to whether Jeff committed the offense of unlawful transaction with a minor. The only purpose behind the prosecutor's repeated invocation of CP's virginity was to elicit sympathy for CP and inflame the jury against Jeff. Such repeated instances could not have been accidental, and can only be described as flagrant.

Even in the penalty phase, prosecutors should take care not to glorify or enlarge the victim. *See Bowling v. Commonwealth*, 942 S.W.2d 293, 302-03 (Ky. 1997). But during the guilt phase of the trial, such arguments are improper victim impact arguments, and they denied Jeff his right to a fair trial. *See Ernst v. Commonwealth*, 160 S.W.3d 744, 763 (Ky. 2005).

The manifest injustice from the prosecutor's repeated references to CP's virginity were compounded by the rest of the prosecutor's closing argument. During his closing argument, the prosecutor used as a prop a "story book" (not in evidence) he had read during opening statement. (R.A. at 95-96). The story book obviously was written for toddlers, and was read in its entirety during the prosecutor's opening statement. (Day 1 12:55:35-12:57:58). During his opening, the prosecutor stated that the story was about innocence. (Day 1 12:59:38). However, after the prosecutor's repeated improper

references to CP's lost virginity, the use of the book as a prop was an attempt to create additional sympathy for CP and her alleged lost virginity and innocence. The prosecutor's repeated references to "rabbits" during the closing argument (Day 2 14:06:14, 14:09:49, 14:14:26), while using the story book about rabbits as a prop, was employed to invoke additional sympathy for the minor and prejudice against Jeff.

In addition, the prosecutor repeatedly told the jury that they should find the defendant and his lawyer offensive. He constantly told the jury that "it's offensive" or "you should be offended." (14:03:50, 14:06:40, 14:08:00, 14:09:07, 14:14:03, 14:16:07). This was done solely to invoke the jury's emotions against Jeff.

The prosecutor further prejudiced the jury against Jeff by improperly arguing that Jeff had failed to accept responsibility for his actions or show remorse. Such arguments are improper in the guilt/innocence phase of the trial. The prosecutor's actions were made more egregious by the fact that they were a misrepresentation of the record, because Jeff showed remorse in his interview with the detectives when Jeff told them that he thought he needed to be shot for his bad decision. (Day 1 14:14:35).

After stirring up the jury's emotions against Jeff, the prosecutor then encouraged the jury to decide this case based on their emotions. While the prosecutor paid lip service to the jury's constitutional duty to decide this case based on the evidence, he followed it up with an encouragement for the jury to decide Jeff's case based on their emotions.

You were requested by the defense to think with your mind. I will reiterate "think with your mind and your heart," in regard to [CP]. Because that's what this is about. This trial is not about fairness. This trial is about a 44 year old man who slept with a 14 year old girl.

(Day 2 14:09:23). This request that the jury decide this case on their emotions was not an accident, as it was a reiteration of the prosecutor's request during his opening statement. (Day 1 13:10:05).

Nor was the prosecutor telling the jury that Jeff's trial was not about fairness an accident. As he was concluding his closing argument, the prosecutor informed the jury that "nothing going on is about fairness; it is about protecting [CP]." (Day 2 14:22:51).

Finally, not only did the prosecutor give the jury license to decide this case based on their prejudices against Jeff and their sympathy for CP, he even implied that it was their duty to do so. During his summation, the prosecutor requested that the jury remember their promise to CP, an appeal which would serve to make the jury feel obligated to decide this case on an improper basis. (Day 2 14:06:00).

"It is a fundamental precept that a prosecutor must conduct himself with "due regard to the proprieties of his office and to see that the legal rights of the accused, as well as those of the Commonwealth, are protected." *Moore v. Commonwealth*, 634 S.W.2d 426, 437 (Ky. 1982) (citing *Bowling v. Commonwealth*, 279 S.W.2d 23, 24 (1955)). Furthermore, "it is the duty of the Commonwealth's attorney in his argument before a jury to make no statement that builds up prejudice in their minds." *May v. Commonwealth*, 285 S.W.2d 160, 164 (Ky. 1955). In this case, the prosecutor inflamed the jury's passions by vilifying Jeff and evoking sympathy for CP, and he then gave the jury license to act on those passions. In doing so, the prosecutor violated his strict obligation to see that Jeff received a fair trial. When the prosecutor specifically told the

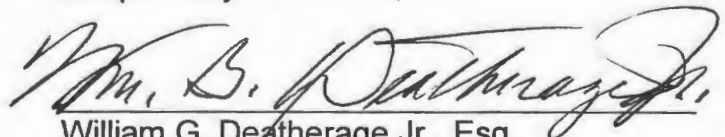
jury that the trial was not about fairness, he acted to deprive Jeff of his fundamental constitutional right to a fair trial under the due process clause.

The prosecutor's unrelenting focus on CP's virginity and "lost innocence" were improper victim impact evidence that constituted prosecutorial misconduct. See *Ernst v. Commonwealth*, 160 S.W.3d 744, 763 (Ky. 2005) (citing cases where improper victim impact evidence require reversal of a conviction). When combined with the prosecutor's arguments encouraging the jury to decide this case on emotional considerations, the cumulative effect of the prosecutor's closing argument was so improper, prejudicial, and egregious that it undermined the overall fairness of the trial. For these reasons, Jeff is entitled to receive a new trial.

III. CONCLUSION

For the reasons provided herein, Defendant, Jeffery L. Hale, respectfully requests that the Kentucky Supreme Court reverse and vacate his conviction and sentence. In the alternative, Jeff respectfully requests that the Court reverse and remand his case to Christian Circuit Court with instructions to grant a new trial, along with any other relief deemed appropriate by the Court.

Respectfully Submitted,



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TABLE OF APPENDICES

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