



**COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-SC-000467**

JEREMY RUSSELL BREWER

APPELLANT

**APPEAL FROM COURT OF APPEALS
FILE NO. 2012-CA-000622-MR
v. APPEAL FROM FAYETTE CIRCUIT COURT
HON. JAMES D. ISHMAEL, JR., JUDGE
INDICTMENT NO. 11-CR-000622**

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT, JEREMY RUSSELL BREWER

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. James D. Ismael, Jr., Judge, 551 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; the Hon. Benjamin D. Willis, Assistant Commonwealth's Attorney, 116 N. Upper Street, Lexington, Kentucky 40507; the Hon. Shannon Brooks English, Assistant Public Advocate, 111 Church Street, Lexington, Kentucky 40507; and to be served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on July 15, 2014.



BRANDON NEIL JEWELL

PURPOSE OF BRIEF

This reply brief responds to selected points made by Appellee. As to matters not argued, Appellant stands on his opening brief.

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ARGUMENT

- I. **The trial court improperly applied Lisle v. Commonwealth, 290 S.W.3d 675 (Ky. App. 2009) in ruling that evidence of Mr. Brewer's two prior convictions for fourth-degree assault (domestic violence) could be admitted in the guilt phase of his trial.**

The disputed issue in this case is whether Mr. Brewer's two prior convictions for fourth-degree assault, as well as the details of those convictions, were admissible in the guilt phase of his trial for fourth-degree assault. The Appellee argues that Lisle not only permitted but required prior fourth-degree assault (domestic violence) convictions to be introduced in the guilt phase of trials on fourth-degree assault (domestic violence, third or greater offense within five years) charges under KRS 508.032. Appellee Brief at 5. However, Lisle does not say this anywhere. Appellee is mistaken.

In Lisle, the jury first convicted the defendant of fourth-degree assault in the guilt phase and then—in a subsequent phase—convicted him of the enhanced offense of fourth-degree assault, third offense. The briefs filed in Lisle in the Court of Appeals Clerk's Office clearly state this. Additionally, the Lisle Opinion states that the proceedings were trifurcated and that the first phase consisted of a trial on both fourth-degree assault and violation of a domestic violence order charges and that Lisle was later convicted of PFO. 290 S.W.3d at 677, 680. Moreover, the underlying conviction for fourth-degree assault (misdemeanor) was affirmed, but the enhanced conviction for fourth-degree assault, third offense (felony) was reversed. Id. at 678. This could only have occurred if the jury first convicted Lisle of fourth-degree assault (misdemeanor) in the guilt phase and then convicted him by finding the elements necessary for enhancement to fourth-degree assault, third offense (felony) in a subsequent phase.

In the case at hand, the Court of Appeals erroneously concluded that evidence of the prior fourth-degree assault convictions are admissible in the guilt phase of a trial because the Lisle Court labeled the prior conviction an “essential element” of the felony assault offense rather than as a “sentencing enhancement.” Brewer v. Commonwealth, slip opinion pg. 3-4. The wording used in Lisle is irrelevant. Labeling the proof required for the enhancement of a fourth-degree assault as a misdemeanor to a felony offense as “elements” does not necessitate that such proof must be introduced in the guilt phase of a trial as opposed to a subsequent phase.

Indeed, there is significant case law to support the idea that evidence of prior convictions of crimes should come in during a phase subsequent to the guilt phase. “When a prior misdemeanor conviction is used to enhance a subsequent offense to a felony, [] the jury must make the finding with respect to the prior conviction during the penalty phase.” Stewart v. Commonwealth, 306 S.W.3d 502, 508 (Ky. 2010) (citing Commonwealth v. Ramsey, 920 S.W.2d 526-29 (Ky. 1996) (dealing with DUI as a subsequent offense elevated to a felony). The rationale here is clear—to avoid prejudice that would undoubtedly result from the early introduction of evidence regarding a defendant’s prior convictions. Ramsey, 920 S.W.2d at 528.

Furthermore, Galloway v. Commonwealth, 424 S.W.3d 921 (Ky. 2014) is relevant to this case as to the question of whether the trial court erred in ruling that the Commonwealth could introduce evidence of the defendant’s two prior convictions of fourth-degree assault during its case-in-chief. Appellee Brief at 3. In Galloway, the defendant was charged with fourth-degree assault (domestic violence, third or greater offense within five years) and the case was trifurcated. Id. at 925. During the first phase,

the jury convicted Galloway of fourth-degree assault. During the second phase, the jury convicted Galloway of fourth-degree assault, third offense based on two prior convictions of fourth-degree assault. Id. This Court stated that this “was a reasonable approach because the jury had to first determine whether Galloway was guilty of fourth-degree assault before it could determine whether he was guilty of fourth-degree assault, third offense.” Id. n. 1.

Again, the rationale against introducing evidence of prior convictions in the guilt phase is to prevent unavoidable prejudice. “The recognition of this prejudice is the foundation on which KRE 404(b) rests.” Ramsey, 920 S.W.2d at 528. This rule of evidence codified a “well known fundamental rule that evidence that a defendant on trial committed other offenses is never admissible unless it comes within certain exceptions.” Id. (quoting Jones v. Commonwealth, 198 S.W.2d 969, 970 (Ky. 1947)). Previous fourth-degree assault convictions do not fall within exceptions outlined by KRE 404(b) or any other exceptions recognized by this Court. Moreover, as this Court has previously held:

Ultimate 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.

O’Bryan v. Commonwealth, 634 S.W.2d 153, 156 (Ky. 1982). By introducing evidence of Mr. Brewer’s prior convictions during the guilt phase rather than a subsequent phase, the trial court violated his right to fundamental fairness. Reversal is required.

II. Mr. Brewer’s arguments on appeal were properly preserved for review.

Appellee next argues that Mr. Brewer’s arguments on appeal were not preserved for review. This is simply not true. Although defense counsel may have felt that the Commonwealth’s misinterpretation of Lisle was correct, defense counsel did not concede

that evidence of the prior assault convictions and the victim's identity should be introduced during the guilt phase. Appellant's Brief at 9. Instead, defense counsel said that prior to reading Lisle, she intended to ask the trial court to treat this case like a DUI enhancement and that it is more appropriate to introduce evidence of prior convictions during sentencing as opposed to during the Commonwealth's case-in-chief. Id. Defense counsel also stated she did not think a defendant could get a fair shake if prior offenses were introduced in the guilt phase in a trial on fourth degree assault, third offense and she specifically reserved this issue for appeal. Id.; VR: 11/2/12; 2:13:21; TR 68.

Appellee argues that because the defense counsel never argued for trifurcation, this argument is not preserved for review. Appellee Brief at 7. This is untrue. RCr 9.22 states that,

Formal exceptions to rulings or orders of the court are **unnecessary**; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or any objection to the action of the court the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party.

Ky. RCr 9.22 (emphasis added). This requires a defendant "to present to the trial court those questions of law which may become issues on appeal." Todd v. Commonwealth, 716 S.W.2d 242, 248 (Ky. 1986) (quoting Turner v. Commonwealth, Ky., 460 S.W.2d 345, 346 (1970)). In this case, the question of law that is at issue on appeal is whether the defendant's two prior convictions should have come in during the guilt phase or in a phase subsequent to the guilt phase. Mr. Brewer specifically put the trial court on notice of this question of law both when it reserved the right to appeal the issue, specifically stating, "Defendant reserves the right to appeal the Court's ruling on Commonwealth's

404(b) motion. Particularly[, the] Court’s ruling on admission of details of two prior convictions and convictions themselves in [the Commonwealth’s] case in chief.” TR 68.

The issue in this case is whether Mr. Brewer’s two prior convictions should have been admitted during the Commonwealth’s case in chief or in a subsequent phase, not whether the case should have been bifurcated or trifurcated. Mr. Brewer explicitly preserved this issue for appeal.

III. Palpable Error Existed

Assuming arguendo that this Court finds Mr. Brewer’s issues on appeal unpreserved and subject to palpable error review, this Court may review unpreserved issues that result in “palpable” harm, which affect the defendant’s “substantial rights,” resulting in “manifest injustice.” RCr 10.26; Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003). Palpable error is said to exist when the error is “so fundamental as to threaten a defendant’s entitlement to due process of law.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

In this case, introducing 404(b) evidence during the Commonwealth’s case in chief rather than in a subsequent phase would have been irrelevant and unduly prejudicial, thereby violating Mr. Brewer’s right to due process and a fair trial as well as his right to be presumed innocent. The right to fundamental fairness and a fair trial by an impartial jury is guaranteed by Section Eleven of the Kentucky Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Irvin v. Dowd, 366 U.S. 717, 721-22 (1961). In this case the extent to which the trial court “thoughtfully reviewed Lisle and carefully explained its understanding of the case,” (Appellee Brief at 8) does not matter. The trial

court's misunderstanding and misapplication of Lisle to the case at hand still violated Mr. Brewer's right to a fundamentally fair trial. Violating Mr. Brewer's constitutional rights and entitlement to due process of law meets the standard of "manifest injustice." Palpable error existed.

CONCLUSION

For the reasons stated above, this case must be reversed and remanded to the Fayette Circuit Court in accordance with RCr 8.09, which allows a defendant to withdraw his guilty plea upon prevailing on appeal, and with instructions that Mr. Brewer's prior fourth-degree assault (domestic violence) convictions should not be introduced until a phase subsequent to the guilt phase.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brandon Neil Jewell", written over a horizontal line.

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