IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: October 24, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000631-MR

CHESTER DEAN ALLEN — APPELLANT

V. — ON APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE KIMBERLY CORNETT CHILDERS, JUDGE
NO. 10-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Chester Dean Allen (Allen) appeals from the judgment of the Magoffin Circuit Court convicting him of two counts of first-degree sodomy, two counts of incest, two counts of first-degree sexual abuse, and one count of first-degree attempted rape of his daughters, Tammy and Janet.[1] Following the jury's recommendation, the court sentenced Allen to a total of twenty years' imprisonment.

On appeal, Allen argues that the trial court erroneously: (1) excluded evidence that Tammy had made allegations of sexual abuse against other people; (2) permitted Sandra Reynolds (Reynolds), an investigator for the Cabinet for Families and Children (the Cabinet) to bolster the girls' testimony; (3) permitted the introduction of evidence of other crimes committed by Allen;

[1] "Tammy" and "Janet" are pseudonyms employed in this opinion to protect the children's true identities.

and (4) permitted a witness, Jennifer Porter (Porter),[2] to invoke her Fifth Amendment right not to testify about certain activities. The Commonwealth argues to the contrary. Having reviewed the record and the arguments of the parties, we affirm.

I. FACTS.

Tammy was born on April 12, 1992, and Janet was born on December 24, 1993. The girls' mother left the family when the girls were very young, and they lived primarily with Allen until the fall of 2002. In the fall of 2002, while visiting their mother, the girls alleged that Allen had forced them to watch pornography and had sexually abused them. The girls were then removed from Allen's care and placed with their mother.[3] The girls lived with their mother for several months and were returned to Allen's care sometime in 2003 after they stated that they had fabricated the allegations of sexual abuse. The girls continued to live with Allen until sometime in 2005 when they were placed with a paternal aunt. This placement followed an incident when Tammy consumed sufficient alcohol to get alcohol poisoning. Janet never returned to Allen's home; however, Tammy returned in May 2006.

---

[2] We note that Ms. Porter is also referred to as Jennifer Jordan and/or Jennifer Porter-Jordan. However, she is primarily referred to as Jennifer Porter; therefore, we refer to her by that name.

[3] We note that the record is somewhat unclear on the date the girls were removed from Allen's care and placed with their mother. There is some testimony that it was in the fall of 2002 and some testimony that it was sometime in early 2003. The exact date is not significant; therefore, we have chosen the date that seems to have been mentioned more often.

In July 2006, Porter, Allen's then live-in girlfriend, reported that she had seen Allen in a sexually inappropriate position with Tammy. The Cabinet removed Tammy from Allen's home, initially placing her with her maternal grandmother, then moving her to foster care. Thereafter, the Cabinet undertook an investigation. The girls reiterated the allegations of sexual abuse that they had made in 2002, and Tammy, after first denying that any sexual activity occurred between her and Allen in July 2006, stated that it had.

Based on the girls' allegations, Allen was indicted by the grand jury and charged with sexual abuse, sodomy, and incest involving both girls and with the attempted rape of Tammy in July 2006. Allen was tried four times. The first trial, in 2008, ended in a hung jury. In 2009, the court declared a mistrial because of allegations of jury tampering. The court also declared a mistrial in 2010 because of the introduction of improper evidence. In 2012, a jury convicted Allen as set forth above.

As noted above, Allen raises four issues with regard to his trial. We address each issue and set forth additional facts as necessary below.

II. STANDARD OF REVIEW.

The issues raised by Allen generally concern the admission and exclusion of evidence. The standard of review on evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

III. ANALYSIS.

A. Porter's Invocation of Her Fifth Amendment Right to Refrain From Self-Incrimination.

We first address issues raised by Allen regarding Porter's testimony. With regard to the allegation of attempted rape, Porter testified that she, Allen, Tammy, and Tammy's brother had been swimming on July 2, 2006. After dropping Tammy's brother off near his grandmother's house, the other three returned to Allen's residence. Porter went into the house and Allen and Tammy went into a barn to feed and water a horse. Porter testified that, after fifteen to thirty minutes, she went out to the barn to see what Allen and Tammy were doing. When she entered the barn, she saw Tammy bent forward over a bale of hay with her pants around her ankles and Allen standing behind her. According to Porter, Allen had his shorts on but his penis was partially sticking out of the leg of his shorts and erect. Porter stated that she screamed, got in her car, and drove to Allen's mother's house. She then drove to a friend's house and had the friend contact the police.

On cross-examination, Porter admitted that she had "a problem" with pain medication, that she and Allen had discussed her problem, and that she had been getting treatment at a methadone clinic in July 2006. When Allen asked Porter if she had taken illegal drugs, the Commonwealth requested a bench conference. During that conference, the Commonwealth asked the court to advise Porter that she had the right refrain from making any statements that might be self-incriminating. Over Allen's objection, the court advised Porter of

her Fifth Amendment right and, when Allen repeated his question, Porter refused to answer.

Allen then asked Porter if she had ever provided alcohol to Tammy. Porter denied doing so. Allen then advised Porter that Tammy had testified that Porter had provided her with alcohol, and he asked Porter if Tammy had lied. Following a bench conference, Porter refused to answer, invoking her Fifth Amendment right not to do so. Allen then moved onto a different topic of questioning.

Although somewhat confusing because he intertwines the two arguments, Allen argues that the trial court erroneously advised Porter that she had the Fifth Amendment right to refrain from incriminating herself regarding: (1) allegations that she provided alcohol to Tammy; and (2) her alleged use of illegal drugs. Initially, we note that the court only directly instructed Porter about her Fifth Amendment right with regard to her alleged use of illegal drugs. The court did not directly instruct Porter about her Fifth Amendment right with regard to questions about providing alcohol to Tammy. In fact, Porter directly denied providing alcohol to Tammy. Porter only invoked her Fifth Amendment during this line of questioning when Allen asked her if Tammy had lied. Whether Porter could have been incriminated if she had responded that Tammy had or had not lied may be arguable; however, that is not the issue raised by Allen on appeal. Because Porter did address Allen's questions about whether she provided alcohol to Tammy, his argument that she failed to do so is without merit, and we do not further address it.

As to whether the trial court erred by advising Porter of her Fifth Amendment right when asked if she used illegal drugs, Allen argues that the trial court erred because: (1) Porter previously testified regarding her drug use, and she had not been prosecuted; (2) the Commonwealth's failure to prosecute Porter following her prior testimony acted as a bar to any future prosecution under the doctrine of laches; and (3) the ruling violated his right to confront a witness against him. Initially, we note that these specific issues were not preserved because Allen only made a general non-specific objection to the trial court's Fifth Amendment instruction. Because Allen did not properly raise these specific issues before the trial court our review is limited to one for palpable error. *See Elery v. Commonwealth*, 368 S.W.3d 78, 97-98 (Ky. 2012). To be palpable, an "error must be so 'fundamental as to threaten a defendant's entitlement to due process of law.'" *Id. (Citing Martin v. Commonwealth,* 207 S.W.3d 1, 3 (Ky. 2006).

In support of his argument, Allen cites in his brief: Porter's testimony from the 2009 trial that "she had had a drug and alcohol problem 'for quite a while;'" and that she would have continued taking drugs if Allen had not "insisted that she find a methadone clinic." Allen argues that "Porter was not charged in 2008, 2009, 2010 or 2011, even though she had testified at least three times and the government had knowledge that she was a drug addict and had been a drug addict in 2005 and 2006." While Porter admitted to using and being addicted to drugs, she was not asked during the first three trials if she

had used illegal drugs, and she did not testify that she had used illegal drugs.[4] Notwithstanding Allen's argument to the contrary, being addicted to drugs is not, in and of itself, a crime, and Porter's admitted addiction was not something for which she could have been prosecuted. Therefore, Allen's argument that the Commonwealth could have prosecuted Porter for using illegal drugs before her 2012 testimony is factually baseless, as is his argument that any prosecution in 2012 would have been barred under the doctrine of laches.[5]

Allen's argument that Porter's invocation of her Fifth Amendment right interfered with his right to confront a witness against him is also meritless. In *Combs v. Commonwealth,* 74. S.W.3d 738 (Ky. 2002), Combs was convicted of selling illegal drugs to a confidential informant on two separate occasions. Combs's defense was that she was not present when the drug deals took place. Combs was prepared to present a witness who would testify that she and Combs were shoplifting at K-Mart the day one of the drug deals took place. The trial court advised the witness that she had the right not to incriminate herself. The witness consulted with an attorney and, in a hearing outside the presence of the jury, the witness asserted her Fifth Amendment right to remain silent when asked about the shoplifting. The trial court then determined that,

---

[4] Porter testified live during the 2008, 2009, and 2012 trials. In 2010, the Commonwealth advised the court that it could not find Porter and her testimony from the 2009 trial was played for the jury during the 2010 trial. During the 2008 trial, Porter was not questioned about drug use or about the alcohol poisoning incident.

[5] We note that the Commonwealth argues that the doctrine of laches cannot apply to a witness. We do not address this argument because the doctrine of laches has no application herein.

because the witness was going to assert her right not to testify about certain matters, she could not testify at all. *Id.* at 740-43.

We held that complete exclusion of the witness was an abuse of the trial court's discretion. *Id.* at 745. In doing so, we noted that the Commonwealth was free to cross-examine the witness on other issues - her relationship to Combs and other aspects of the shopping trip - which could have called into question the witnesses' credibility. *Id.* at 746. As in *Combs,* Allen was free to and did cross-examine Porter on a number of issues that went to her credibility - her use of and addiction to pain pills, her treatment for substance abuse at a methadone clinic, and her sometimes rocky relationship with Allen. Thus, permitting Porter to assert her Fifth Amendment right not to testify about illegal drug use did not unduly impede Allen's right to cross-examine and/or confront Porter.

Finally, we note Allen's argument that the trial court should have held an evidentiary hearing before advising Porter of her Fifth Amendment right. As set forth in *Combs,* holding an evidentiary hearing is the proper course for the court to take. In this case, Allen had previously questioned Porter about a number of factors related to her credibility. The judge had been present during that testimony and Allen has not offered what other testimony he would have elicited during a *Combs* style hearing. Therefore, the court's failure to hold a *Combs* style hearing was not palpable error.

B. Introduction of Other Crimes Evidence.

Allen argues that the following testimony from both girls was erroneously admitted into evidence. Janet testified on direct-examination that she was placed with her aunt following Tammy's alcohol poisoning incident because Allen was in jail. Tammy testified during cross-examination that, when she got alcohol poisoning, Allen was "in jail for killing a man." Allen did not raise any objections and did not request any admonitions following either of the girls' testimony. Because Allen did not do so, the Commonwealth argues that any issues related to Janet's and Tammy's testimony about other crimes are unpreserved and reviewable only for palpable error. Allen argues that he preserved the issues when he mentioned this testimony in his motion for a new trial. Furthermore, Allen argues that admission of the testimony was palpable error because the jury asked the court during its deliberations when Allen had been released from jail.

To preserve an issue regarding the introduction of evidence for review, an objection must be made at the time the evidence is offered. A post-conviction motion for a new trial is not sufficient to cure the failure to make a contemporaneous objection. *See Couch v. Commonwealth*, 256 S.W.3d 7, 10 (Ky. 2008). Because Allen did not properly preserve this issue for review, we review it for palpable error, which is an error "so 'fundamental as to threaten a defendant's entitlement to due process of law.'" *Id. (Citing Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

We agree with the Commonwealth that any error in the admission of this evidence was not palpable for four reasons. First, we note that the complained

of testimony from Janet was spontaneous and not in response to a direct question. Second, Janet and Tammy had been in and out of Allen's home numerous times. Therefore, we agree with the Commonwealth that Janet's testimony, which was in response to a question regarding a change in her living arrangements, was "a way of piecing together the time frame." Third, Tammy's testimony came in response to a line of questioning by Allen regarding her incident of alcohol poisoning. Specifically, Allen asked Tammy to tell the jury about that incident and asked her if she remembered "what year that might have been - what occurred - how that happened." Tammy responded, "Dad was in jail for killing a man. Jennifer took us back on the hill and got me drunk." We agree with the Commonwealth that Tammy's answer was, at least in part, responsive to Allen's question. Therefore, Allen cannot now complain that he did not like the answer. *Estep v. Commonwealth,* 663 S.W.2d 213, 216 (Ky. 1983) ("One who asks questions which call for an answer has waived any objection to the answer if it is responsive.").

Finally, we agree with Allen that this testimony played some part in the jury's deliberations, as evidenced by the question they submitted to the trial court. However, we agree with the Commonwealth that Allen's conclusion that the jury question shows that the result would have been different had this evidence been excluded or stricken is speculative. As the Commonwealth notes, it is as likely that the jury was attempting to establish a time line as it is that they were using the evidence to reach a conclusion regarding Allen's guilt.

Therefore, we hold that the admission of this testimony by Janet and Tammy, while arguably inappropriate, was not palpable error.

C. Bolstering by Reynolds.

As we understand it, Allen argues that the following testimony by Reynolds improperly bolstered the girls' testimony. Reynolds testified that she is an investigative worker for the Cabinet, not an "on-going" social worker. As such, when she receives a report of sexual abuse, she has one hour to contact and interview the alleged victim. She then interviews any "collaterals," and finally she interviews the alleged perpetrator. Based on those interviews, she tries to determine whether the abuse occurred or not and may refer the matter to family court. An on-going worker will then be assigned to attempt to re-unify the family.

When the Commonwealth asked Reynolds what facts and circumstances led to her contact with Janet and Tammy, Allen objected. The objection was that Reynolds could not bolster the girls' testimony or say what they said. The trial court held that Reynolds could answer "as to how she first became involved in this case" but Reynolds could not say what the girls told her. The Commonwealth repeated its question and Reynolds testified that she had received allegations that Allen had shown the girls pornography and "had done oral sex and other [sexual] acts." Reynolds also testified that she had received a report about the incident in the barn. On cross-examination, Reynolds testified that if there is evidence of sexual abuse a child will be removed from the home.

In *Hoff v. Commonwealth*, 394 S.W.3d 368, 371-72 (Ky. 2011), a physician who examined an alleged victim of sexual abuse testified at length about what she told him about the abuse. He also testified that his examination findings were consistent with abuse and that he had "no reason not to believe this child." *Id.* at 375. We held that this testimony was impermissible bolstering because a witness "cannot vouch for the truthfulness of another witness" either directly or indirectly. *Id.* at 376. However, the case herein differs from *Hoff* because, unlike the physician in *Hoff*, Reynolds never related what Janet and Tammy said to her.[6] She simply stated that, as an investigator for the Cabinet, she received allegations of sexual abuse. Furthermore, she never commented on whether she believed that any abuse had occurred. She simply set forth the process that she followed as part of her job responsibilities, *i.e.* if there is an allegation of sexual abuse she conducts an investigation and refers the matter to an on-going worker. She did testify that she attempts to determine if the abuse did or did not happen, but she did not state whether she thought abuse had occurred in this case. Furthermore, the portion of Reynolds's testimony that Allen most complains of - that when abuse is substantiated a child is removed from the home - came in response to a direct question on cross-examination. Allen cannot complain about a response he elicited. *Hodge*, 17 S.W.3d at 845.

[6] We note that Reynolds did read allegations from the Cabinet's records during re-direct examination. However, she only did so after Allen had referred to the records, cited her to them, and asked her about their contents.

Reynolds did not directly vouch for the truthfulness of the girls and any arguably indirect vouching was elicited in large part by Allen. Therefore, we hold that there was no impermissible bolstering.

D. Exclusion of Evidence of Allegations of Sexual Abuse by Others.

In 2010, this Court rendered *Dennis v. Commonwealth*, 306 S.W.3d 466 (Ky. 2010). In *Dennis*, Dennis's step-daughter accused him of subjecting her to oral and anal sodomy. Dennis denied the charges and sought to admit evidence that the step-daughter had made allegations of sexual abuse against her father, her adult sister, and her sister's boyfriend. Those allegations arose from an incident involving the adults examining the step-daughter for injury after a dog had jumped into her lap. The Cabinet and police investigated those allegations and they were deemed unsubstantiated. Prior to trial, Dennis sought discovery of the Cabinet's records and moved for permission to impeach the step-daughter based on the prior allegations. The trial court granted the discovery request and, following a hearing, refused to permit any evidence of the prior allegations. Dennis appealed arguing, in pertinent part, that the court had improperly excluded the evidence. *Id.* at 469-70.

On appeal, we noted the tension between the rape shield rules and a defendant's right to cross-examine witnesses and held that:

> [E]vidence, including cross-examination, concerning an alleged sex-crime victim's allegations of sexual impropriety against another is not admissible at trial unless the proponent of the evidence establishes at a KRE [Kentucky Rule of Evidence] 104 hearing that the prior accusation was demonstrably false. To meet that standard, the proponent must show that there is a distinct and substantial probability that the prior accusation was false. This heightened standard of proof is meant to exclude the evidence

> where the proponent's only proof of falsity is the alleged perpetrator's denial and/or an inconclusive investigation of the allegation. Self-serving denials and investigations that do not exonerate but merely fail to substantiate are not sufficiently probative of falsity to justify breaching the alleged victim's shield. Applying the shield and excluding the evidence where there is no proof that the prior allegations were "demonstrably false" is neither arbitrary nor disproportionate.

Id. at 475.

During Dennis's KRE 104 hearing, the Cabinet investigator testified that the incident described by the step-daughter probably occurred but she could not substantiate that the response by the adults - examining the step-daughter for injury - was sexual in nature. We concluded that this evidence did not meet a preponderance of the evidence standard, let alone the demonstrably false standard. However, because the Cabinet had not provided all of the records related to the incident, we remanded to the trial court so that it could review those records and make findings of fact, if necessary.

In 2013, we re-visited the issue of what constitutes demonstrably false evidence in *Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2013). Perry, based on his adopted son's accusations of sodomy, was convicted of one count of first-degree sodomy and sentenced to 45 years' imprisonment. Prior to trial, the trial court conducted a KRE 104 hearing during which Perry presented evidence that the son had made allegations

> that he was sexually abused by "a man on the railroad tracks," by a "homeless man in a dumpster," by a man named "Lance," by his two brothers, by his birth mother, by a young man named "Cody" who was in placement with him, by a stranger who let him use the phone when he ran away from another placement, by a girl named "Charmaine," and by his adoptive mother. He claims he attempted to rape two girls named "Molly" and "Diane." He made all these

> allegations around the same time he accused the Appellant, who is his uncle and adoptive father.

Id. at 124. Following the hearing, the trial court determined that two of the allegations had been proven to be demonstrably false but the others had not. Therefore, the court only permitted cross-examination on those two allegations. Perry appealed.

On appeal, we noted that the demonstrably false standard "can be difficult to apply" and that the trial judge indicated that under that standard Perry was required to "prove actual or absolute falsity." *Id.* at 130. We held that the trial court had misinterpreted the standard. Rather than actual or absolute falsity, when seeking

> to show that a prior accusation is demonstrably false, the proponent of the evidence must show that the prior accusation had a distinct and substantial probability of being false. We reiterate that this does not require absolute proof of falsity. A distinct and substantial probability of falsity is like any other fact to be shown by an appropriate level of proof. We have settled on distinct and substantial probability of falseness in recognition that completely excluding this type of evidence does not give due deference to the Sixth Amendment right to confront and cross-examine witnesses, but admitting allegedly false prior allegations without substantial proof of their falsity likewise prejudices crime victims. This level of proof fairly balances both concerns.

Id. at 130. We went on to note that proof sufficient to establish that an accusation was demonstrably false could include: a recantation by the victim, circumstances strongly suggesting "a motive to fabricate" allegations, if the victim "told different stories to different people or at different times," or the "sheer number and variety of allegations." *Id.* at 132. We held that, although the trial court held a KRE 104 hearing

> it did not conduct a proper *Dennis* hearing where the actual statements of [the son] were before the court or where the Appellant was able to offer anything more than the actual alleged statements when there were records and witnesses that could have reflected on the veracity of the allegations. On a remand, the trial court would have more information about these stories and would be able to determine the purposes for which Appellant is attempting to admit this evidence.

Id. at 134.

Allen argues that the trial court herein misapplied *Dennis* and erroneously excluded evidence that Tammy had made allegations of sexual abuse/misconduct against other people. We agree that the trial court's insistence on a recantation is a misinterpretation of *Dennis*. However, we agree with the Commonwealth that, even applying the correct standard, Allen has not offered sufficient proof that Tammy's allegations were demonstrably false.

In support of his argument, Allen cites to Tammy's testimony from the first three trials. As noted by Allen, Tammy testified in the 2008 and 2009 trials that she had accused a foster father of sexually abusing her. Furthermore, she testified that, to her knowledge, no hearings had taken place or been scheduled regarding those accusations. As noted by the trial court and by this Court in *Dennis,* "investigations that do not exonerate but merely fail to substantiate are not sufficiently probative of falsity" to meet the evidentiary requirement. 306 S.W.3d at 475.

In 2008 and 2009, Tammy testified that she had made sexual abuse allegations against her roommate at a residential treatment facility. She also admitted that she did not like this roommate. During the 2009 trial, Tammy

admitted that she had accused her cousin of sexual misconduct. Other than pointing out that Tammy made a number of allegations, Allen has not cited to any evidence that these allegations were false.

During the 2009 trial, Allen asked Tammy if she had made allegations that a boy on her bus had tried to force her to kiss him. He also asked her if she had alleged "sexual misconduct" by a former boyfriend. According to Allen, both of these allegations were set forth in the Cabinet's records. Tammy denied making the allegations. Denying that she made allegations against others is not the same as making false allegations against others. Therefore, this evidence would not fall with the purview of *Dennis* or *Perry*.

We note that Allen questioned Tammy based on the statements in the Cabinet's records. However, those records are not in the court record before us; Allen did not place them in evidence; and Allen did not present any testimony from any Cabinet on-going social worker regarding those allegations. Furthermore, the trial judge was the same for all four trials and had the opportunity to observe and judge Tammy's credibility during her 2008, 2009, and 2010 trials. Taking the above into consideration, although the trial court did so with a misunderstanding of what constitutes demonstrably false, it properly excluded evidence that Tammy had made prior allegations of sexual abuse against others.

IV. CONCLUSION.

Based on the preceding, we affirm.

Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Scott, JJ., concur. Venters, J., concurs in result only.

VENTERS, J., CONCURS IN RESULT ONLY: I disagree with the Majority's assertion that Tammy's testimony, "Dad (meaning Appellant) was in jail for killing a man," was a fair response to Appellant's question about how and when she had alcohol poisoning. That answer was not the least bit responsive and I would not sanction it by pretending Appellant's counsel somehow provoked the interjection of that clearly prejudicial and inadmissible matter. Nevertheless, the taint of that improper testimony could have been dissipated by a prompt admonition to the jury, which appellant never requested. I cannot fault the trial court for refusing to grant a new trial after the fact when an admonition would have cured the problem. For that reason, I concur only in result with the Majority opinion.

COUNSEL FOR APPELLANT:

Julia Karol Pearson
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway,
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General

William Robert Long, Jr.
Assistant Attorney General