

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-002249-MR

HARRY W. HUPP

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 05-CI-006020

COMMONWEALTH OF KENTUCKY,  
REAL PARTY IN INTEREST

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND WINE, JUDGES; MILLER,<sup>1</sup> SPECIAL JUDGE.

JOHNSON, JUDGE: Harry W. Hupp has appealed from the September 29, 2005, memorandum and order of the Jefferson Circuit Court which denied his motion for a writ of prohibition. Having concluded that the circuit court did not err by denying the motion, we affirm.

This case arose from a decision to retry Hupp in the Jefferson District Court on criminal charges of assault in the

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<sup>1</sup> Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

fourth degree,<sup>2</sup> terroristic threatening in the third degree,<sup>3</sup> and attempting to intimidate a participant in a legal process.<sup>4</sup>

These charges originated from an incident occurring on October 2, 2004, when Hupp allegedly choked and threatened his live-in girlfriend. The previous trial had been terminated by the granting of a mistrial when, during cross-examination of the victim, Hupp's counsel questioned the victim about her having sex in an automobile parked in a restaurant parking lot the night before the October 2nd incident. Hupp claimed that his cross-examination of the victim was proper impeachment of her credibility because she had lied under oath at a previous family court hearing regarding the incident in the parking lot.

The district court, in sustaining the Commonwealth's objection and its request for a mistrial, stated:

I don't believe that I was unclear in my ruling previously. There was an objection made when you attempted to elicit, attempted to discuss in the opening statement about her having sex with another man in a parking lot. I indicated at that time that I believed that it would be all right to discuss that she was with someone else, but not what they were expressly engaging in, because, I thought the prejudicial effect outweighed any probative value regarding that.

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<sup>2</sup> Kentucky Revised Statutes (KRS) 508.030.

<sup>3</sup> KRS 508.080.

<sup>4</sup> KRS 524.040 and KRS 506.010.

Hupp sought a writ of prohibition in the Jefferson Circuit Court on the basis that any retrial would violate the prohibition against double jeopardy because there was no manifest necessity for the district court to declare a mistrial. The circuit court denied the motion on September 29, 2005. This appeal followed.<sup>5</sup>

The Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution specifically provide that no person shall be tried twice for the same offense.<sup>6</sup> However, the principle of double jeopardy does not prevent a retrial if the previous proceedings were terminated because "[t]he trial court, in exercise of its discretion, [found] that the termination [was] manifestly necessary."<sup>7</sup> Manifest necessity has been described as an "'urgent or real necessity'" [citation omitted].<sup>8</sup> A finding of manifest necessity is left to the sound discretion of the trial court.<sup>9</sup> A grant of mistrial will only be

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<sup>5</sup> On December 19, 2005, a panel of this Court granted Hupp's motion for immediate relief and stayed his retrial pending the outcome of this appeal.

<sup>6</sup> Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky. 2000) (citing Tinsley v. Jackson, 771 S.W.2d 331 (Ky. 1989); and Leibson v. Taylor, 721 S.W.2d 690, 693 (Ky. 1987) (overruled on other grounds, Shaffer v. Morgan, 815 S.W.2d 402, 404 (Ky. 1991))).

<sup>7</sup> KRS 505.030(4)(b); Grimes v. McAnulty, 957 S.W.2d 223, 224 (Ky. 1997); Nichols v. Commonwealth, 657 S.W.2d 932, 933 (Ky. 1983).

<sup>8</sup> Miller v. Commonwealth, 925 S.W.2d 449, 453 (Ky. 1996) (overruled on other grounds, Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001)).

<sup>9</sup> Grimes, 957 S.W.2d at 225.

overturned if the ruling by the trial court was clearly erroneous or constituted an abuse of discretion.<sup>10</sup>

We conclude that the district court did not abuse its discretion in limiting the questioning of the victim regarding her sexual activity in the parking lot on October 1. A trial judge has broad discretion in establishing the proper boundaries on cross-examination.<sup>11</sup> While Kentucky Rules of Evidence section 611 permits a witness to be cross-examined on any matter relevant to any issue in the case, the trial judge is still allowed discretion to limit cross-examination. Such limitation is permitted when necessary to further the search for truth, avoid waste of time, or protect witnesses against unfair and unnecessary attack.<sup>12</sup>

In general, the role of cross-examination is to permit the defendant an opportunity to impeach a particular witness as to credibility. A defendant cannot be denied the opportunity to impeach a witness for bias, or from presenting facts from which the jury could draw inferences regarding the credibility of the

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<sup>10</sup> Tinsley, 771 S.W.2d at 332.

<sup>11</sup> Commonwealth v. Maddox, 955 S.W.2d 718, 720-21 (Ky. 1997). See also Moore v. Commonwealth, 771 S.W.2d 34 (Ky. 1988) (overruled on other grounds, McGuire v. Commonwealth, 885 S.W.2d 931 (Ky. 1994)).

<sup>12</sup> DeRossett v. Commonwealth, 867 S.W.2d 195, 1998 (Ky. 1993) (citing Lawson The Kentucky Evidence Law Handbook § 3.20(II) (3d ed. 1993)).

witness.<sup>13</sup> "The right to confrontation guarantees an opportunity for effective cross-examination, but not cross-examination in whatever way and to whatever extent the defense might wish" [citation omitted].<sup>14</sup> Placing limitations on cross-examination does not unduly infringe on the Confrontation Clause of the United States Constitution, which is "only implicated if the excluded cross-examination concerns a matter giving the witness reason to testify falsely during the trial at hand[.]"<sup>15</sup> The Confrontation Clause does not limit the discretion of the trial judge in imposing limits on cross-examination if there is a problem regarding confusion or relevancy.

Our examination of this case is greatly hindered by the pitiful quality of the recordings of the district court trial. Because we are unable to hear any of the bench conferences and since the appellant has not filed a narrative statement<sup>16</sup> concerning the discussion of whether a mistrial was manifestly necessary, we assume that the district court adequately explained that it would limit questioning of the victim to the fact that she was with another man, but "not what they were expressly engaging in." Hupp has failed to articulate

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<sup>13</sup> Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

<sup>14</sup> Epperson v. Commonwealth, 809 S.W.2d 835, 842-43 (Ky. 1991).

<sup>15</sup> Beaty v. Commonwealth, 125 S.W.3d 196, 206 (Ky. 2003).

<sup>16</sup> Kentucky Rules of Civil Procedure (CR) 75.13.

how such a limitation so impaired his examination of the victim that he was denied a fair trial. We cannot conclude that the district court's ruling in limiting Hupp's impeachment of the victim's credibility on cross-examination by prohibiting his questioning of her about her having sex in the automobile was an abuse of discretion. There existed other means of impeaching the victim's credibility than by expressly violating the trial court's ruling, such as simply asking the victim if she had previously perjured herself while under oath in the family court hearing.

Because the district court had addressed the matter during defense counsel's opening statement, we cannot conclude that it abused its discretion in limiting Hupp's questioning of the victim, or in finding a manifest necessity to grant a mistrial when counsel failed to abide by that ruling. The writ of prohibition Hupp sought from the circuit court is an extraordinary remedy which will be granted only in exceptional circumstances.<sup>17</sup> Whether to grant a writ of prohibition rests within the sound discretion of the trial court.<sup>18</sup> Accordingly, the circuit court did not abuse its discretion in denying Hupp's petition for a writ of prohibition based on its determination

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<sup>17</sup> James v. Shadoan, 58 S.W.3d 884, 885 (Ky. 2001).

<sup>18</sup> Commonwealth v. Ryan, 5 S.W.3d 113, 115 (Ky. 1999).

that the district court acted within its sound judicial discretion.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

WINE, JUDGE, CONCURS.

MILLER, SPECIAL JUDGE, DISSENTS.

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