

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001381-MR

ERIC HENDERSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NOS. 08-CR-001114 AND 08-CR-003427

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Eric Henderson appeals<sup>1</sup> his conviction and sentence of twelve years, enhanced by virtue of being a persistent felony offender in the first

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<sup>1</sup> Henderson has filed two notices of appeal from the same judgment of conviction—one under the indictment number charging him with a series of substantive criminal offenses including being a convicted felon in possession of a handgun of which he was convicted by a jury, and the other under a subsequent indictment number charging him with being a persistent felony offender in the first degree. Both notices reference the other indictment number and state that the two matters should be consolidated for purposes of appeal.

degree.<sup>2</sup> He argues the trial court erred in excluding hearsay and reverse KRE<sup>3</sup> 404(b) evidence. As we explain below, we deny review for lack of preservation.

The events culminating in Henderson's indictment, jury trial and conviction on a charge of being a convicted felon in possession of a handgun,<sup>4</sup> his conditional guilty plea to multiple other charges,<sup>5</sup> and the resulting concurrent sentence of twelve years, occurred on Christmas Eve of 2007 at Club Cedar in Louisville, Kentucky. Trial witnesses for the Commonwealth and for Henderson gave widely varying accounts of the events.

According to the Commonwealth's proof, Donnie Harris and his wife, Tori Williams, went to Club Cedar for drinks on Christmas Eve. They called Stefan Harbin, Williams's cousin, to join them. Williams testified Harbin joined them; Harris testified Harbin did not come to the club. When Harris and Williams arrived at the club, they saw Henderson there with a woman and another man. Harris had known Henderson since childhood and approached him inside the club as Henderson made a selection from the jukebox. As the two men walked down a hallway, Henderson made a derogatory remark about Williams and pointed a small

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<sup>2</sup> Kentucky Revised Statutes (KRS) 532.080.

<sup>3</sup> Kentucky Rules of Evidence.

<sup>4</sup> KRS 527.040, a Class C felony.

<sup>5</sup> Wanton endangerment in the first degree, KRS 508.060, a Class D felony; tampering with physical evidence, KRS 524.100, a Class D felony; and illegal possession of a controlled substance, marijuana, KRS 218A.1422, a Class B misdemeanor (although the indictment lists this offense as a Class A misdemeanor).

semiautomatic pistol toward Harris's stomach. Harris asked Henderson, "What are you gonna do with that," walked away, and returned to his table where he told Williams<sup>6</sup> about the incident. Harris did not know why Henderson had displayed the gun, but said Henderson appeared to be scared—as if he thought Harris was going to attack him for the derogatory remark he had made about Williams. Unbeknownst to Harris, Williams told the club owner about the incident and then went outside and telephoned police. When Williams returned to the table, she told Harris she had called the police which upset Harris greatly. Thereafter, the two couples, Williams and Harris, and Henderson and Monica Hatcher,<sup>7</sup> began "mean mugging"<sup>8</sup> one another. As Henderson and Hatcher prepared to leave the club, Henderson called Harris back to his table and the two spoke briefly before Henderson and Hatcher left. Harris and Williams waited a few minutes and then exited the club.

When Harris and Williams emerged from the club, Henderson and Hatcher were in Henderson's vehicle and about to leave. More words were exchanged between the two couples as Williams tried to keep Henderson at the club until police arrived. Henderson apologized for his prior remark about

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<sup>6</sup> Williams was born a male but underwent gender reassignment surgery to become a female. Henderson called her a "punk" and other names.

<sup>7</sup> Hatcher was indicted for tampering with physical evidence and tried jointly with Henderson but acquitted. No true bill was returned against her for possession of a handgun by a convicted felon.

<sup>8</sup> From Williams' testimony, we take this street phrase to mean staring or glaring at someone menacingly.

Williams. Williams testified that she never saw Henderson with a gun that night; she stated she called the police solely because her husband, Harris, had said Henderson had brandished a gun. Just before the police arrived and stopped Henderson and Hatcher from leaving, Williams saw Hatcher open the car's passenger door and fling something—she did not see what was thrown but believed it to be the gun Henderson had pointed at Harris. Williams thought the item hit a nearby house. Harris testified he heard metal hit concrete.

According to Officer Matt Ditch, police searched Henderson, Hatcher and the area for twenty minutes but found no weapon despite Harris and Williams being adamant that Henderson had a gun. When Henderson was finally allowed to leave, he backed his car about a car length revealing a puddle in which Officer Ditch located a small semiautomatic pistol matching the description provided by Harris. Upon being arrested, Henderson said in the direction of Harris and Williams, "This is some petty shit, I already apologized." Officer Ditch testified that Henderson told him he and Harris had a verbal argument inside the club during which Henderson put two fingers in Harris's chest to make him think he had a gun. Officer Ditch further testified that Henderson did not claim that Harris had tried to rob him inside the club. The parties stipulated Henderson is a convicted felon.

Monica Hatcher, Henderson's co-defendant, testified in her own defense. She said she had a platonic friendship with Henderson and went to Club Cedar with him on Christmas Eve. She said she did not know Harris or Williams.

Hatcher testified she did not see Henderson argue with Harris inside the club, but she did see the two men talk. She said Henderson was not mad while they were inside the club and she was unaware he had pulled a gun on Harris. Hatcher stated she left the club with Henderson and got into the passenger side of his car when Henderson threw a gun in her lap and told her to get rid of it. Being a convicted felon herself, she wanted no part of the gun and declined to do as Henderson had said. Henderson then raised the gun at her in a threatening manner and ordered her to dispose of it. Knowing Henderson was a convicted felon and fearing he would hit her with the gun, she believed she had no choice but to hide it under the car, which she did just before the police arrived. The gun was found when Henderson backed up to leave. Both she and Henderson were arrested and taken to jail.

Ashley Robertson was one of two witnesses called by Henderson. She said she was walking to a family get-together across the street from Club Cedar when she saw two people talking to Hatcher and something just did not seem right—it was as if they were being sneaky. Later, she saw a woman (it is unclear whether she meant Williams or Hatcher) plant something under a car and believed Hatcher was involved in planting the gun under Henderson's car. After Henderson and Hatcher were arrested, the others celebrated as if their mission had been accomplished.

Henderson was the final witness at trial. He testified that he accepted Hatcher's invitation to accompany her to Club Cedar on Christmas Eve. He said he had known her about a year. After ordering drinks, he went to the jukebox

where he was accosted by someone telling him to empty his pockets. Henderson explained that he did not know who was behind him and thought he was being robbed. In response, he spun around and placed two fingers in the person's chest to make it appear as though he had a gun. It was not until he spun around that he recognized Harris as the man who had accosted him—just as he had done two weeks earlier. Harris responded that he was just asking Henderson to buy him a beer. Henderson testified that he knew Harris from prison, he did not pull a gun on Harris inside the club, and he firmly stated that he did not have a gun with him that night.

Contrary to Harris's testimony, Henderson testified that Harbin, a man with whom he does not get along, was sitting with Harris and Williams inside the club. Henderson stated he did not get along with Harbin because he was involved in another case with him. Harbin's presence in the club concerned Henderson because there had been several attempts on his life and people had tried to extort him because they knew he could not "pack a gun." Henderson also stated that while Hatcher said she did not know Harris and Williams, she was actually well acquainted with them.

Henderson testified that Harris and Williams left the club first. Henderson and Hatcher followed suit fifteen to twenty minutes later. As Henderson got into his car, the police arrived and Williams yelled that Henderson had a gun which caused police to canvas the area for a gun. Henderson testified

that police found nothing on him when they searched him, but acknowledged he was charged with possession of marijuana.

Recalled to the stand on rebuttal, Officer Ditch testified that a bag of marijuana was found in Henderson's front pants pocket during a search that was conducted after his arrest. Officer Ditch explained that the search incident to Henderson's arrest was more complete than the initial pat down for weapons that revealed no gun.

With all the proof closed, jurors deliberated and found Henderson guilty of being a convicted felon in possession of a handgun. Hatcher was acquitted of tampering with physical evidence. This appeal followed.

#### LEGAL ANALYSIS

The thrust of this appeal is that Henderson was denied the opportunity to present a complete defense to the jury due to two evidentiary rulings by the trial court. His first argument is that the trial court erroneously excluded reverse KRE<sup>9</sup> 404(b) evidence—proof of prior prison altercations between himself and Harris—that would have established Harris's grudge against Henderson and his motive for setting up Henderson to be arrested on the handgun charge.<sup>10</sup> His second

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<sup>9</sup> Kentucky Rules of Evidence.

<sup>10</sup> In a bench conference, defense counsel stated she was trying to show the relationship between Henderson and Harris, not to establish that Harris was a convicted felon. The Commonwealth responded that Harris being a convicted felon was off-limits; the defense had the chance to establish Harris was a convicted felon when he testified and chose not to do so; the relationship between Harris and Henderson was irrelevant; and any probative value was outweighed by prejudice. Defense counsel then stated that she had concluded that line of questioning. After defense counsel asked Henderson a few more questions, the Commonwealth objected and argued the testimony about an altercation between the two men that had occurred two weeks earlier should be excluded because the defense had not provided advance notice of its intent to

complaint is that the trial court erroneously excluded evidence that Henderson's accusers considered him to be a snitch and consorted to have him arrested in retribution for snitching on Harbin. Henderson admits this proof met the technical definition of hearsay, but claims it should have been admitted anyway for impeachment purposes. As a third argument, Henderson alleges either of these errors is sufficient by itself to merit reversal, but when combined with the other, demands reversal. We disagree.

We begin with a discussion of preservation of error. In 2007, KRE 103, dealing with rulings on evidence, was amended to read in pertinent part:

- (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
  - (1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
  - (2) Offer of proof. **If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer** or was apparent from the context within which questions were asked.

(Emphasis added). Prior to this amendment, an avowal stating what a witness would have said was required for an appellate court to determine whether excluding the testimony constituted prejudicial error. *Cain v. Commonwealth*, 554

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introduce prior bad acts evidence to the Commonwealth as required by KRE 404(c). The trial court stated that notice was required and sustained the Commonwealth's objection. We agree with Henderson's reading of KRE 404(c). The responsibility to provide notice under that provision lies solely with the prosecution.



S.W.2d 369, 375 (Ky. 1977). According to the notes of the Evidence Rules Review Commission, under the old rule, the witness whose testimony was excluded had to appear and testify by avowal, whereas now, an attorney may summarize a witness's excluded testimony—otherwise known as a proffer.

With this historical perspective in mind, we address the facts at hand. We have no avowal testimony to consider. We also have no proffer to review. Despite viewing the videotape of the trial several times, we cannot ascertain the “substance” of the desired evidence from the record. Thus, the only option available to us is to deem these two allegations unpreserved and therefore unreviewable. As stated in *Commonwealth v. Ferrell*, 17 S.W.3d 520, 525 (Ky. 2000), a case that predates the amendment of KRE 103, “[w]ithout an avowal, or a crystal ball, reviewing courts can never know with any certainty what a given witness's response to a question would have been if the trial court had allowed them to answer. Appellate courts review records; they do not have crystal balls.”

Another concern is that the arguments advanced on appeal are not the same arguments advanced at trial. For example, at trial, Henderson tried to explore an altercation he had with Harris two weeks earlier. On appeal, however, he claims he should have been allowed to explore a series of altercations the two men had in prison. As we have reiterated numerous times, an appellant may not “feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

Furthermore, at trial, Henderson wanted to ask Harris whether he had told Henderson he was going to tell on him just as he had told on Harbin.<sup>11</sup> Harris had already testified he had called Henderson a snitch and believed him to be a snitch because he had told on Harbin, although he could not recall when or to whom Henderson had snitched. On appeal, however, he argues for the first time that the exclusion of this testimony violated *Jett v. Commonwealth*, 436 S.W.2d 788, 789-90 (Ky. 1969), KRE 801A(a)(1) and KRE 613. It is well-settled that potential appellate issues must first be presented to the trial court. *Todd v. Commonwealth*, 716 S.W.2d 242, 248 (Ky. 1986). Since the grounds argued on appeal were not argued to the trial court, they are not properly before us. Nevertheless, it appears the point Henderson wanted to make to the jury—that Harris considered him to be a snitch and believed he had snitched on his wife’s cousin—was indeed heard by the jury and anything more would have been cumulative.

Contrary to Henderson’s brief, neither of his claims was preserved for our review. Discerning no error, and therefore no cumulative error, the judgment of conviction and sentence entered by the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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<sup>11</sup> The Commonwealth objected to this testimony on grounds of hearsay. When the trial court asked defense counsel for an applicable hearsay exception, counsel responded that she was trying to show Harris’s bias. Thereafter, the court sustained the Commonwealth’s objection.

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