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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MAY 22, 2003
NOT TO BE PUBLISHED
AS MODIFIED: AUGUST 21, 2003

Supreme Court of Kentucky

FINAL
DATE 8-21-03 ELIA Grace Pd

2000-SC-0526-MR
2001-SC-0910-TR

ALAN L. STANDIFER — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY L. WILLETT, JUDGE
NO. 98-CR-2978

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

I. INTRODUCTION

Appellant was convicted of first-degree manslaughter and was sentenced to twenty years in prison. In two separate matter-of-right appeals,[1] Appellant makes eleven (11) arguments in support of a reversal of his conviction. In the direct appeal of his conviction,[2] he argues that ten (10) reversible errors occurred during the course of his trial, and additionally, he appeals the denial of his motion for a new trial based on newly discovered evidence.[3] The ten arguments related to his trial are as follows: (1) denial of defense counsel's motion to strike two jurors for cause; (2) admission of testimony regarding the owner of a knife found in close proximity to the victim's body at

[1]Ky. Const. §110(2)(b).

[2]Appeal No. 2000-SC-526-MR.

[3]Appeal No. 2001-SC-910-TR, which was transferred from the Court of Appeals.

the crime scene; (3) admission of police officer's testimony that she first became aware of Appellant's self-defense claim during opening statements; (4) admission of police officer's testimony that the stabbing of the victim was aggressive; (5) admission of irrelevant evidence that Appellant gave two young women a knife that they later discarded in the Ohio River; (6) admission of alleged irrelevant threats made to Appellant's girlfriend; (7) use of juvenile conviction to impeach Appellant during the guilt phase of his trial; (8) erroneous jury instruction on self-protection; (9) erroneous jury instructions on second-degree manslaughter and reckless homicide; and (10) erroneous omission of a jury instruction on extreme emotional disturbance. We reverse Appellant's conviction and remand for a new trial because the trial court committed reversible error in allowing the use of Appellant's juvenile adjudications for impeachment during the guilt phase of the trial.

II. BACKGROUND

The charges against Appellant arise out of a drug transaction gone awry in a West Louisville neighborhood. Appellant testified that on Halloween night, while en route to a party at the residence of his friend, Tony Young, he met Bobby Lee Whitaker at the intersection of 25th and Columbia Streets. Perhaps prompted by Appellant's reputation in the Portland area as a drug dealer, Whitaker indicated an interest in purchasing some cocaine from Appellant. The two men continued down Columbia Street, Appellant on a bike and Whitaker on foot, until they reached the home of Whitaker's friend, Billy Hensley. Hensley was home along with friend Robin Hurt. While Appellant waited outside, Whitaker knocked on the door and asked to borrow a dollar to purchase a beer at a nearby liquor store. While Whitaker was inside, presumably waiting to receive the dollar and/or to get some money for the crack cocaine, Hurt

emerged from the Hensley home and asked Appellant his name. According to Appellant, she repeatedly urged him to come in the house, and Appellant chose instead to wait for Whitaker on the street outside the home. Shortly thereafter, Whitaker returned to join Appellant and Hurt outside, and both of them asked Appellant to "front" them some crack cocaine but he refused.

Appellant testified that, after his refusal to give her any drugs without immediate payment, Hurt went back inside, and Appellant, straddling the bicycle, walked down Columbia Street with Whitaker following along to his right and slightly to his rear. Next, Appellant claims that he was taken by surprise when Whitaker attacked him from his right rear. Appellant states that he could not see Whitaker from this angle because he is blind in his right eye as the result of an injury received when he was the victim in a previous robbery. According to Appellant, Whitaker grabbed him around the neck and forcibly removed him from the bicycle, and a struggle ensued with Appellant screaming to no avail for Whitaker to let go of him. Whitaker then pulled out a knife and began swinging it at Appellant. In his defense, Appellant claims that he pulled out his own knife, which he regularly kept on his person because it reminded him of his grandfather. The two men continued to struggle with Whitaker attempting to pull Appellant's shirt over his head. Next, Whitaker fell and Appellant noticed that he was bleeding.

Appellant claims that he was unaware that he had stabbed Whitaker until he looked down and saw his knife in his hand. Appellant testified that he retaliated against Whitaker in self-defense because he feared that, as on previous occasions in this particular neighborhood, he was again a robbery target. Furthermore, when Whitaker began brandishing a knife, he testified that he felt the need to protect himself. Appellant

claimed that when Hurt came running outside and began screaming, that he did not know what to do, so he fled on his bike.

III. IMPEACHMENT WITH JUVENILE ADJUDICATIONS

During the guilt phase of the trial and in response to a question from the prosecutor, Appellant denied having been convicted of a felony. In an effort to attack Appellant's credibility, the Commonwealth was then allowed over Appellant's objection to introduce evidence of Appellant's previous juvenile adjudications for charges of receipt of stolen property and of third-degree burglary. This evidence was ruled admissible on the theory that the charges would have been felonies if committed by an adult and thus admissible for purposes of impeachment.

This precise issue was recently addressed in Manns v. Commonwealth,[4] and we will not burden this case by repeating again Justice Cooper's thorough analysis of this issue. In that case, we held that a defendant's prior juvenile adjudication shall not be admissible during either phase of a trial for the purpose of impeachment. Here, like in Manns, the juvenile adjudications were introduced during the guilt phase of Appellant's trial for impeachment purposes. Accordingly, Appellant's conviction must be reversed.

IV. OTHER ISSUES

Because we are reversing and remanding for a new trial, we will address other issues likely to affect retrial.

A. THREATS MADE BY APPELLANT TO GIRLFRIEND

Jackie Witt, Appellant's girlfriend and the mother of his child, was called as a witness for the Commonwealth, and she testified that Appellant, during his pre-trial incarceration on the present charge, threatened her when she declined to marry him. It

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[4]Ky., 80 S.W.3d 439 (2002).

was the Commonwealth's theory that Appellant's threats were an attempt to keep Witt from testifying against him because he thought, albeit mistakenly, that Witt could not testify against him if she was his wife.[5]

"Any attempt to suppress a witness' testimony by the accused, whether by persuasion, bribery, or threat, or to induce a witness not to appear at the trial or to swear falsely, or to interfere with the processes of the court is evidence tending to show guilt."[6] Accordingly, relevant threats in support of the Commonwealth's theory were admissible. But, here, the Commonwealth failed to make the threats relevant. The Commonwealth admits to the lack of direct evidence supporting its theory that Appellant's attempted coercion of marriage was to prohibit Witt's testimony; rather, the Commonwealth maintains that Appellant's threats to harm her, when coupled with his attempts to have her lie and tamper with evidence, supported a reasonable inference that the attempted coercion of marriage was for the purpose of suppressing her testimony. We disagree; the evidence is just too attenuated to support such an inference. The evidence is not sufficient to support a finding that Appellant believed that his marriage to Witt would silence her. In fact, the only evidence as to Appellant's state of mind regarding the availability of husband-wife privilege came from Appellant during the Commonwealth's cross-examination of him and during his redirect examination when he testified that he did not know whether a wife could testify against her husband in Kentucky.

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[5]Husband-wife privilege extends only to events occurring after marriage and communication occurring during marriage. KRE 504.

[6]Foley v. Commonwealth, Ky. 942 S.W.2d 876, 887 (1996). See also, Graves v. Commonwealth, Ky., 17 S.W.3d 858 (2000); KRE 402.

"While reasonable inferences are permissible, a jury verdict must be based on something other than speculation, supposition or surmise. It is, of course, often difficult to draw the line between a reasonable inference and speculation. But evidence that will support a reasonable inference must indicate the probable, as distinguished from a possible cause."[7] Here, the evidence was insufficient to establish a reasonable inference that Appellant believed marriage would silence Witt. This was a condition of fact that the Commonwealth was required to fulfill before the threats became relevant.[8] If the Commonwealth had fulfilled this condition of fact, then the jury could reasonably believe that the purpose of the threats were to suppress Witt's testimony. However, the Commonwealth failed to fulfill this condition of fact, and if upon retrial the Commonwealth again fails to fulfill this condition of fact and make Appellant's threats relevant, the threats shall be excluded from evidence. Because of the highly prejudicial nature of the threats and because of the Commonwealth's failure in the first trial to show the relevancy of the threats, the trial court on retrial shall require the Commonwealth to make a preliminary showing of relevancy before allowing Witt to testify as to Appellant's threats.[9]

B. JURY INSTRUCTIONS ON SELF-DEFENSE

Appellant claims error regarding the self-protection instructions given by the trial court. Rather than specifically addressing this argument – with which we tend to agree

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[7]Briner v. General Motors Corp., Ky., 461 S.W.2d 99, 101 (1970).

[8]KRE 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").

[9]KRE 104(a) & (b).

– we will simply refer the trial court and the parties to Commonwealth v. Hager,[10] which was rendered subsequent to the trial in this case. With the benefit of Hager, the claimed errors in the instructions should not be repeated on retrial.

C. EXTREME EMOTIONAL DISTURBANCE

Appellant argues that the trial court erred in failing to instruct the jury regarding extreme emotional disturbance (EED). We agree; however, because Appellant was not convicted of murder but first-degree manslaughter, this error was harmless.

> Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be.[11]

Appellant testified that he believed Whitaker was attempting to rob him when he stabbed Whitaker. While an attempted robbery may justify the use of deadly force by the intended victim,[12] additionally, it may "so enrage[ ], inflame[ ], or disturb[ ] [one] as to

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[10] Ky., 41 S.W.3d 828 (2001).

[11] McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468-469 (1986).

[12] KRS 503.050:

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury,

overcome one's judgment, and cause one to act uncontrollably from the impelling force of the extreme emotional disturbance." Thus, the jury could have reasonably concluded that Appellant was acting under the influence of EED when he stabbed Whitaker and thereby caused his death, and "[o]nce evidence is introduced to prove the presence of EED, its absence becomes an element of the offense of murder."[13] Consequently, in addition to entitling Appellant to an instruction on self-protection, his belief that Whitaker was attempting to rob him was also sufficient to warrant an instruction setting forth the absence of EED as an element of murder. Further, we would note that Appellant testified that he had been the victim of multiple robberies while traveling through this particular West Louisville neighborhood. In the course of one such robbery, Appellant stated that he was shot with a pellet gun and lost the sight in his right eye. When Appellant's past history is also included, the evidence undisputedly required an instruction on EED.

Although the trial court erred in failing to incorporate EED into the murder instruction, the error was harmless. Evidence of EED is only a defense to an intentional murder charge and entitles a defendant to an instruction on the lesser offense of first-degree manslaughter, the crime of which Appellant was convicted. Accordingly, he was not prejudiced by the failure of the trial court to incorporate EED into the murder instruction. However, if the evidence is the same on retrial, in addition to an instruction under KRS 507.030(1)(a), an instruction will be warranted under subsection (b).

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kidnapping, or sexual intercourse compelled by force or threat.

. . .

Id.

[13]Coffey v. Messer, Ky, 945 S.W.2d 944, 946 (1997).

D. POLICE OFFICER'S TESTIMONY

After receiving his Miranda[14] warnings, Appellant denied to the police that he had any involvement in Whitaker's death. Instead, he told police that he was with his girlfriend on the night that Whitaker was killed. Detective Amy Phelps was permitted by the trial court to testify that she was not aware of a self-defense claim until defense counsel's opening statement at trial. Appellant claims that this testimony should have been excluded. We agree, but not for all of the reasons advanced by Appellant.

We would exclude Detective Phelps's testimony because she did not interview Appellant, and therefore, her testimony was necessarily based on what she was told by other officers. In other words, her testimony was pure and simple hearsay[15] and does not fall under any exception to the hearsay rule. Accordingly, it was inadmissible.[16]

Additionally, Appellant argues that Detective Phelps's testimony was inadmissible because it was "prejudicial." This argument might be relevant on retrial so we will briefly address it. We would first note that a claim of evidence being prejudicial, standing alone, is not grounds for its exclusion. Most evidence that parties seek to introduce is prejudicial. At least, they hope it is. That usually means that it is probative. It is only where the evidence's probative value is outweighed by danger of "undue prejudice" that it is not admissible.[17]

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[14]384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

[15]KRE 801.

[16]Id.

[17]KRE 403.

For his "prejudice" argument, Appellant cites Romans v. Commonwealth[18] and Doyle v. Ohio.[19] Romans, which relied on Doyle, held that the trial court erred when "the Commonwealth was permitted over objection to elicit from a police detective, and also from the defendant himself on cross-examination, that when he was arrested and interrogated and after he had received the Miranda warnings [the defendant] did not come forth with the explanation or story upon which he ultimately relied for his defense. . ."[20] In Doyle, the Supreme Court "conclude[d] that use of the defendant's post-arrest silence in this manner violate[d] due process. . ."[21] and reversed the defendant's conviction. We therefore assume that Appellant, under his prejudice argument, seeks to exclude this evidence as being an improper use by the Commonwealth of Appellant's post-arrest silence. If so, we disagree. Although Romans and Doyle clearly prohibit the introduction of evidence, including cross-examination of the defendant, about the defendant's post-arrest silence, they are clearly distinguishable from what happened in this case. Here, Appellant was not silent; rather, he made a statement to the police denying any involvement in Whitaker's death. Appellant's statement was admissible[22] – but only by a person who heard the statement – and it is Appellant's post-arrest statement, not his silence, that the Commonwealth used in his trial. Appellant's lawyer informed the jury during his opening statement that Appellant killed Whitaker in self-defense, and Appellant, himself, also testified that he

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[18]Ky., 547 S.W.2d 128 (1977).

[19]426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

[20]Romans v. Commonwealth, supra note 18, at 130.

[21]Doyle v. Ohio, supra note 19, at 426 U.S. 611, 96 S.Ct. 2241, 49 L.Ed.2d 94.

[22]KRE 801A(b)(1).

was acting in his self-protection when he caused Whitaker's death. Accordingly, Appellant's contradictory post-arrest statement, if properly admitted into evidence, may be inquired into during the trial and commented upon during closing argument by the Commonwealth's Attorney. This is not a comment upon his silence, but proper comment upon a statement made by Appellant.

E. KNIFE THROWN IN RIVER

During the trial, it was established that the knife thrown in the river by Appellant's friends was not relevant to this case. Accordingly, evidence regarding this knife should not be admitted during Appellant's retrial.

F. HENSLEY'S KNIFE

The trial court correctly sustained Appellant's hearsay objection to Detective Phelps's testimony that the knife found near Whitaker's body was owned by Hensley. We therefore assume that the Commonwealth will not attempt on retrial to elicit such testimony again from Detective Phelps. We would also caution the Commonwealth not to refer in closing argument to evidence that has been excluded by the trial court.

G. POLICE OFFICER'S DESCRIPTION OF STAB WOUNDS

Detective Phelps described Whitaker's stab wounds as "very aggressive." The trial court ruled that Detective Phelps was testifying on the basis of her observations and experience as a homicide detective and overruled Appellant's objection to her description of the stab wounds. Appellant argues that Detective Phelps was not qualified to express such an opinion. We agree.

Before a witness may render an expert opinion on a subject matter, in addition to other requirements,[23] the witness must be "qualified as an expert by knowledge, skill,

[23]Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997) ("Expert opinion

experience, training, or education" to render such opinion,[24] and the subject matter must be one properly subject to expert opinion.[25] A determination of these matters are committed to the discretion of the trial court,[26] and therefore, the trial court's ruling on these matters is reviewed under an abuse of discretion standard.[27] We conclude that the trial court abused its discretion in allowing Detective Phelps to testify on this subject.

First, the record does not support a finding that the matter is one properly subject to expert opinion. A matter is proper for expert opinion only if it is subject to "scientific, technical, or other specialized knowledge [and] will assist the trier of fact to understand the evidence or to determine a fact in issue."[28] Although stab wounds have been the subject of expert testimony as to whether the wounds were of the "defensive-type,"[29] the Commonwealth did not establish in this case, nor did the trial court find, that stab wounds are subject to "scientific, technical, or other specialized knowledge" in

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evidence is not admissible unless the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.")

[24]KRE 702.

[25]R. Lawson, The Kentucky Evidence Law Handbook § 6.15 II, at 287 (3rd ed. Michie 1993).

[26]KRE 104(a).

[27]Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000).

[28]KRE 702.

[29]Rogers v. Commonwealth, Ky., 86 S.W.3d 29 (2002)(autopsy revealed that victim had defensive wounds on his hands and arms); Smith v. Commonwealth., Ky., 904 S.W.2d 220 (1995) (corner classified certain cuts on victim as "defensive-type" wounds).

determining whether they are of the "aggressive-type." Second, assuming that such determination is a proper subject matter for expert testimony, Detective Phelps was not shown to possess the required qualifications to express an expert opinion. The Commonwealth was required to show that she was "qualified as an expert by knowledge, skill, experience, training, or education."[30] This too, the Commonwealth failed to do. Based on the record, Detective Phelps's qualifications consisted of having investigated 4 or 5 stabbing cases as a homicide detective. This does not qualify her to express an expert opinion that the stab wounds were "very aggressive." We would note that the pathologist refrained from characterizing the manner in which the stab wounds were inflicted. Detective Phelps based her opinion on the facts that Whitaker had more than one stab wound, that the wounds were deep, and that all of the wounds were centrally located around the heart and lung area. Considering the facts on which Detective Phelps based her opinion, we doubt that her opinion will assist the jury in understanding the evidence or in determining a fact in issue.[31] Accordingly, the trial court abused its discretion in allowing Detective Phelps to testify as an expert witness regarding Whitaker's stab wounds, and upon retrial, if the evidence remains the same, Detective Phelps should not be allowed to testify that the stab wounds were "very aggressive."

For the foregoing reasons, we reverse Appellant's conviction and remand the indictment to Jefferson Circuit Court for a new trial.

Lambert, C.J.; Cooper, Graves, Johnstone, Keller and Stumbo, JJ., concur. Wintersheimer, J., dissents by separate opinion.

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[30]KRE 702.

[31]Id.

COUNSEL FOR APPELLANT:

Daniel T. Goyette
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202

Frank William Heft, Jr.
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202

J. David Niehaus
Office of the Public Defender for
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202

COUNSEL FOR APPELLEE:

A. B. Chandler, III
Attorney General

Courtney J. Hightower
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204

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2000-SC-0526-MR
2001-SC-0910-TG

ALAN L. STANDIFER — APPELLANT

V.

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NO. 98-CR-2978

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from the majority opinion because the trial judge did not commit error when he permitted the prosecution to impeach Standifer by using a prior juvenile adjudication.

The Commonwealth asked Standifer on cross-examination if he had previously been adjudicated a felon. He denied any such adjudication. After a bench conference, the trial judge rejected the argument by defense counsel that such impeachment was impermissible because the statutes forbidding it did not go into effect until after the adjudication. The trial judge determined that KRS 610.320(4) and KRS 532.055(1)(a) allowed such adjudications to be used for impeachment purposes. On the advice of counsel, Standifer conformed his testimony accordingly. The Commonwealth then asked him if he had been adjudicated a felon and he replied affirmatively.

Pursuant to KRS 610.320(4) and KRS 532.025(1)(a), certain juvenile court records can be properly used for impeachment during the guilt phase and at sentencing. KRS 610.320(4) reads as follows:

> Subject to the Kentucky Rules of Evidence, juvenile court records of adjudications of guilt of a child for an offense which would be a felony if committed by an adult shall be admissible in court at any time the child is tried as an adult, or after the child becomes an adult, at any subsequent criminal trial relating to that same person. Juvenile court records made available pursuant to this section may be used for impeachment purposes during a criminal trial, and may be used during the sentencing phase of a criminal trial. However, the fact that a juvenile has been adjudicated delinquent of an offense which would be a felony if the child had been an adult shall not be used in finding the child to be a persistent felony offender based upon that adjudication.

I agree with the Commonwealth that the statutes allow a procedural change rather than a substantive one. Trial procedure is governed by rules which exist at the time of trial, and not the rules of procedure that existed at the time the defendant was adjudicated of these offenses in juvenile court. See Commonwealth v. Reneer, Ky., 734 S.W.2d 794 (1987). Thus, the trial judge properly permitted the impeachment of Standifer using the offenses and the introduction of the same during the sentencing phase.

To the average layman, there is something fundamentally flawed in reasoning that results in allowing a record of serious criminal offenses being ignored simply because they were committed when the defendant was a juvenile. Here, Standifer was ultimately convicted of first-degree manslaughter. In this case, the entire criminal episode arose out of a drug transaction which had gone bad. The previous juvenile adjudications were for charges of receiving stolen property and third degree burglary. Such offenses would have been felonies if committed by an adult.

Understandably, the majority relies on Manns v. Commonwealth, Ky., 80 S.W.3d 439 (2002). As I noted in my dissent in that case, the decision was incorrect. A defendant may be properly impeached under the plain language of KRS 610.320 and KRS 532.055. Those statutes control, and to the extent that KRS 610.320(4) and KRS 635.040 are in conflict, the former statute controls. In Manns, supra, the defendant was convicted of first-degree manslaughter for killing a victim during an argument over the outcome of a computer basketball game. The defendant was 18 years of age at the time of the killing. The principal issue on appeal was the admission of a prior juvenile adjudication for first-degree wanton endangerment.

In this case, as well as in Manns, I continue to believe that the trial judge was correct in allowing impeachment by means of using prior juvenile adjudications both at the guilt and penalty phase of the trial.

I would affirm this conviction in all respects.

Supreme Court of Kentucky

2000-SC-0526-MR and 2001-SC-0910-TR

ALAN L. STANDIFER — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY L. WILLETT, JUDGE
NO. 98-CR-2978

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR MODIFICATION AND MODIFYING OPINION

The Court having considered the Petition for Modification filed by the Appellee, hereby denies said Petition and, on motion of Appellant, modifies the Opinion rendered May 22, 2003, by correcting a typographical error located in the third full sentence on page 8 of the opinion, wherein "Whitaker" be replaced with "Appellant."

Lambert, C.J.; Cooper, Graves, Johnstone, Keller and Stumbo, JJ., concur. Wintersheimer, J., would grant Appellee's petition and would also grant Appellant's motion.

Entered: August 21, 2003

CHIEF JUSTICE