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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 21, 2003
NOT TO BE PUBLISHED

FINAL
DATE 9-11-03 ELA Greenup, D.C

Supreme Court of Kentucky

2001-SC-0088-MR

TIMOTHY CHAMBERS — APPELLANT

V.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS NICHOLLS, JUDGE
00-CR-00001 & 00-CR-00055

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Appellant, Timothy R. Chambers, was convicted in the Greenup Circuit Court of eight counts of criminal attempt to commit an unlawful transaction with a minor, three counts of second-degree sodomy, four counts of use of a minor in a sexual performance, and one count of promoting a sexual performance by a minor. Although the jury recommended that the sentences be served consecutively for a total of two hundred years imprisonment, the trial court imposed a seventy year sentence as required by KRS 532.110 (1)(c). The trial court also mandated that Appellant register as a lifetime sex offender. Appellant appeals as a matter of right.[1]

In November 1999, Detective Roy Ison of the Raceland Police Department was contacted by Michelle Clark, who reported that Appellant had offered

[1] Ky. Const. § 110(2)(b).

her 13-year-old son, E.J.C., money in exchange for sex. Appellant was Ms. Clark's friend whom she had met earlier that fall at a "Web TV" gathering. During follow-up interviews with E.J.C., officers learned of a continuing course of sexual activity between Appellant and E.J.C. Appellant was arrested.

Police searched Appellant's home and found sexually explicit photographs and movies, a large stack of used condoms returned to their original packages and dated, and small plastic baggies labeled with names and containing pubic hairs. In Appellant's vehicle were found cameras, used and unused film, video tapes, a jar of Vaseline, a tube of K-Y jelly, and Appellant's journal describing his sexual exploits. This journal revealed Appellant's past involvement with another minor, J.E.

Appellant's roommate, Michael Branch, was also involved in Appellant's sexual exploits. Branch pled guilty to charges of criminal facilitation to promote a sexual performance by a minor and to second degree sodomy based upon activities with J.E. in 1994-1995.

More facts will be presented as necessary for analysis of the claims of error.

I. OTHER SEXUAL ACTIVITY & KRE 404(b)

Appellant's first claim of error is that the trial court improperly admitted evidence of sexual activity unrelated to the charges. Appellant contends that the admission of six evidentiary items violates KRE 404(b), which states that other crimes, wrongs, or acts are not admissible to prove the character of a person to show action in conformity therewith.[2]

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[2] Bell v. Commonwealth, Ky., 875 S.W.2d 882 (1994).

The first alleged violation occurred when E.J.C. testified regarding his initial sexual encounter with Appellant. Defense counsel objected and moved for a mistrial, pointing out that Appellant had not been charged with this offense because it allegedly occurred in another county. The trial court overruled the motion, yet limited the questioning to events that had occurred in Greenup County.

Specifically, during E.J.C.'s testimony, the prosecutor asked about the onset of the sexual relationship between E.J.C. and Appellant. The prosecutor referred specifically to sexual activity in Greenup County, yet E.J.C. answered that "it was at Mike Strickland's house." Defense counsel objected, and no further details of this event were revealed. As this reference to 'Mike Strickland's house' was brief and without further detail, and was immediately abandoned by the prosecution, the refusal to grant a mistrial was within the trial court's discretion.[3]

The second alleged evidentiary infraction occurred when Officer Ison testified about a tube of K-Y jelly and a jar of Vaseline petroleum jelly found in Appellant's car trunk. The prosecutor asked Officer Ison, "From your experience and training as a police officer, what are K-Y jelly and Vaseline used for?" Officer Ison responded, "Sexual intercourse." There was no objection, and this claim of error is unpreserved, yet will be reviewed pursuant to RCR 10.26.

Appellant contends that the items were irrelevant, as he used them for a medical rather than an illicit sexual purpose. He testified that the lubricants were for the use of his catheter. Nevertheless, a jury could believe that the items were used sexually in connection with many of the charged offenses. Accordingly, there was no error.

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[3] *See, e.g.,* Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002).

Appellant's next complaint arose when Detective Tom Lynch testified regarding a large stack of used condoms found in Appellant's apartment. Each used condom had been put back in what appeared to be its original package, which was marked with the ostensible date of use. Detective Lynch also testified about small plastic bags filled with pubic hairs and labeled with persons' names that had been found at Appellant's apartment. Appellant contends that these items were improperly admitted as there was no proof that the items involved the two victims, and in fact the names on the labels were not those of the victims. This claim is also unpreserved, yet will be reviewed pursuant to RCr 10.26.

We do not believe that this collection of intimate mementos, however distasteful, was sufficient to have rendered the guilty verdicts the result of prejudice rather than proof. Strong evidence including incriminating photographs, victims' testimony, and Appellant's personal written accounts of his illicit sexual encounters was introduced. As there is no substantial possibility that the result would have been different,[4] reversal upon this claim is not required.

The fourth instance involved entries from Appellant's journal about sexual encounters with J.E. that were not the basis of charged offenses. Appellant was charged with four counts of use of a minor in a sexual performance based upon the description of these events in his journal. Although there were other sexual encounters described in the journal, Appellant was not charged with these offenses apparently because J.E. had no recollection of them. Officer Ison nonetheless read from the journal the crude and explicit descriptions of seven sexual encounters with J.E., only three of which were charged offenses. During the reading of the eighth entry, defense

[4] Jackson v. Commonwealth, Ky.App., 717 S.W.2d 511 (1986).

counsel objected upon grounds of redundancy, and the court sustained the objection, stating, "I think the jury has got the idea here." The part of the journal from which Officer Ison read, complete with the uncharged offenses, went to the jury room.

At the outset, we observe that Appellant did not object until the journal entries from seven occasions had been read. When his objection was finally made, it was on grounds of redundancy, possibly presupposing proper admission of the seven previous readings. In any event, there was no timely objection, and when the objection was made, it was sustained and no further relief was requested. As such, there was no reversible error.[5]

The fifth instance concerns a charge of distributing obscene material, on which the trial court granted Appellant's motion for a directed verdict. During the testimony of Harry Bertram, the adult to whom Appellant allegedly distributed obscene material, Bertram described a time when he saw Appellant and another man, both naked, through an open window at Michelle Clark's apartment. Appellant points out that this testimony did not go to any of the charged offenses. Although this alleged error is unpreserved, it will be reviewed pursuant to RCR 10.26.

At the time of this testimony, the prosecutor was attempting to elicit information about a November 10, 1999 incident in which Appellant showed Bertram pornographic images on the Web TV. Bertram stated that on that date, he went over to Michelle Clark's home, and although she was not there, there were two naked people visible through the window -- Appellant and another guy. The prosecutor immediately redirected the testimony to the pornographic images on the Web TV. As being naked in a private room with another naked person is not a crime, and as the reference to this

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[5] *See, e.g.*, Brown v. Commonwealth, Ky., 449 S.W.2d 738 (1969).

episode was fleeting, we do not believe the result would have been different absent this testimony. Accordingly, reversal is not required.[6]

This sixth and final alleged KRE 404(b) violation occurred when Jennifer Potter testified that Appellant had told her that he had had sex with J.E.'s brother. Appellant points out that he was not charged with any offenses arising from this conduct with J.E.'s brother. As there was no objection, the claim will be reviewed under RCr 10.26.

This information was elicited when the prosecutor asked Potter about Appellant's relationship with J.E., stating specifically, "What did [Appellant] tell you about having sex with [J.E.]?" Potter answered, "He just told me that he had sex with [J.E.] and his brother..." The prosecutor then asked further details about the relationship with J.E., and nothing more was said about the brother. As this non-responsive reference was fleeting rather than belabored, and as the involvement with the brother was not necessarily criminal, there was no error.

II. DISMISSED CHARGE

Appellant's second claim of error is that evidence regarding a charge dismissed prior to trial was improperly introduced at trial. Contained in the indictment was a charge of criminal attempt to commit an unlawful transaction with a minor arising from an October 13, 1999 incident. This charge was dismissed several months prior to trial because it was part of an ongoing federal prosecution. However, at trial the prosecution mistakenly read this count of the indictment to the jury, discussed it in opening argument, and elicited testimony regarding the charge. Specifically, E.J.C testified that Appellant offered him thirty dollars to perform oral sex on the relevant date.

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[6] Schambon v. Commonwealth, Ky., 821 S.W.2d 804 (1991).

A short time later, E.J.C. repeated this information, adding the specific details that he and Appellant were driving to Portsmouth, Ohio, and that Appellant made the proposition a couple of times. This testimony came during E.J.C.'s testimony regarding numerous similar requests for sex in exchange for money on other dates. Defense counsel did not object.

Soon afterwards, at a bench conference, the prosecution informed the trial court of the mistake and noted that the jury instructions should not include that count of the indictment. The trial court agreed not to instruct the jury on the dismissed count. Defense counsel then stated:

> "The only problem I have is the testimony tainting the evidence against my client. You start off with a twenty-some [count] indictment, and you heap so much stuff on him and it creates the impression that where there's so much smoke, there's got to be a big fire. And, I think that it is prejudicial to my client."

In response, the prosecutor stated that because the jury was required to return separate verdicts on each count of the indictment, "[Y]ou can't have some type of snowballing effect, you can't say where there's smoke there's fire." Defense counsel then moved for a mistrial, and the trial court summarily overruled the motion. Defense counsel requested no further relief.

To obtain a mistrial, there must appear in the record a manifest, urgent, or real necessity for such an action.[7] If a party claims entitlement to a mistrial, the party must timely ask the court to grant such relief.[8] Whether a mistrial should be granted is

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[7] Skaggs v. Com., Ky., 694 S.W.2d 672, 678 (1985); Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002); Neal v. Commonwealth, Ky., 95 S.W.3d 843, 851-852 (2003).

[8] West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989).

within the trial court's discretion, and such decision will not be disturbed absent an abuse of discretion.[9]

Here, there was no contemporaneous objection when the dismissed charge was briefly discussed or in earlier references to the charge. The motion for a mistrial was not made until the prosecution later brought the mistake to the trial court's attention by requesting that the charge be omitted from the jury instructions. Generally, courts have "defined a timely objection as one that is made as soon as the basis for objection becomes apparent."[10] Although neither the prosecution, defense counsel, nor the court noticed, the basis for the objection became apparent early in the trial, long before the prosecutor requested that the charge be dropped from the instructions. Thus, the motion for mistrial was not timely, yet the claim will be considered pursuant to RCr 10.26.

The Commonwealth contends that the minimal amount of testimony regarding this single count compared with the vast array of evidence supporting the many other counts makes the prejudicial impact minimal. We agree. Of the twenty-two charges, eight were for criminal attempt to commit an unlawful transaction with a minor based upon the same set of circumstances as the dismissed count: Appellant offering E.J.C. money in exchange for sex. The references to the dismissed count were few, and were neither detailed nor distinct from the other eight charges. Thus, there is not a substantial possibility that the result would have been different absent the evidence of the dismissed count, and reversal is not required.

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[9] Bray at 383; Neal at 852; Maxie v. Commonwealth, Ky., 82 S.W.2d 860, 863 (2002).
[10] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 1.10 (3d ed. 1993); *see* Bowers v. Commonwealth, Ky., 555 S.W.2d 241, 243 (1977)("An objection, to be timely, must be promptly interposed").

III. SODOMY DIRECTED VERDICT

Appellant contends that the trial court erred by denying his directed verdict motions on two counts of second degree sodomy arising from acts committed against E.J.C. Appellant maintains that directed verdicts should have been granted because the only evidence of the crimes was E.J.C.'s testimony. Appellant recognizes that a victim's uncorroborated testimony may be sufficient to sustain a rape or sodomy conviction,[11] yet argues that E.J.C.'s testimony was too unreliable to sustain the convictions. In support of this argument, Appellant maintains that the evidence of sodomy committed against the other minor victim, J.E., was stronger than the evidence of acts committed against E.J.C. Appellant points out that he acknowledged involvement with J.E. and that there were corroborating photographs, yet there were no such photographs or acknowledgment of the E.J.C. crimes.

Under KRS 510.080, "A person is guilty of sodomy in the second degree when, being eighteen (18) years old or more, he engages in deviate sexual intercourse with another person less than fourteen (14) years old." E.J.C. testified in detail regarding two particular instances of oral sex between him and Appellant. The first encounter occurred in a car at the Greenup Lock and Dam around the second week of October 1999. Appellant had a gun with him and told E.J.C. that he would kill him or his family if E.J.C. did indulge Appellant's desires. Subsequently, during the critical act, someone came up to the car, got inside, and took pictures. E.J.C. testified that the second instance of sodomy occurred in the living room of his apartment at night. Appellant was performing oral sex on him when someone walked in, and they moved to

[11] Commonwealth v. Cox, Ky., 837 S.W.2d 898, 900 (1992).

the bedroom. E.J.C. recalled that he was clothed, but that his pants were down around his ankles, and he did not know who had walked in on them.

This Court has stated that

> ...to survive a motion for a directed verdict, it is not necessary that every fact related by the victim be reasonable and probable. It is sufficient if the victim's testimony taken as a whole could induce a reasonable belief by the jury that a crime occurred.[12]

Given E.J.C.'s firsthand testimony, it was not clearly unreasonable for the jury to find guilt, and Appellant was not entitled to a directed verdict of acquittal.[13]

IV. DIRECTED VERDICTS: CRIMINAL ATTEMPT TO COMMIT AN UNLAWFUL TRANSACTION WITH A MINOR

Appellant's next claim of error is that the trial court improperly failed to grant directed verdicts on the eight counts of criminal attempt to commit an unlawful transaction with a minor under KRS 530.064 and KRS 506.010. These counts were based upon Appellant offering E.J.C. varying sums of money to engage in oral sex. Appellant contends that he was "overcharged" for the offenses, i.e., that he was at most guilty of the lesser offense of attempt to commit second degree sodomy.[14] Appellant's argument is that there was a specific sexual act at issue, oral sex, and thus that he should be charged under KRS Chapter 510 and not 530.064, which does not require a specifically identified act. Appellant acknowledges that Young v. Commonwealth[15] contradicts his argument, but urges this Court to re-consider its holding therein.

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[12] Cox v. Commonwealth, Ky., 837 S.W.2d 898, 900 (1992).
[13] Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).
[14] Appellant maintains that he was prejudiced because attempt to commit second degree sodomy is a Class A misdemeanor carrying a maximum 12 months sentence, whereas attempt to commit an unlawful transaction with a minor is a Class C felony carrying a penalty of 5-10 years.
[15] Ky., 968 S.W.2d 670 (1998).

In Young, this Court considered whether KRS 530.064 applied only to circumstances in which the defendant induced, assisted, or caused a minor to engage in illegal sexual activity with another person other than the defendant himself. In answering this question in the negative, the Court considered potential overlap between KRS 530.064 and KRS Chapter 510 offenses. The Court noted that if a specifically identified sexual act were at issue, KRS Chapter 510 as well as KRS 530.064 could apply, as the latter does not identify the specific sexual behavior while the former refers to specific acts. The Court noted, however, that the inverse was not true, i.e., that nonspecific sexual conduct could be prosecuted under KRS 530.064 but not KRS Chapter 510. The Court concluded that "any possible overlap of [KRS 530.064] with the offenses described in KRS Chapter 510 is but another circumstance where the same act may constitute either of two offenses, permitting the grand jury to elect to indict under either offense."[16]

Appellant urges this Court to reconsider this holding in light of KRS 500.030, the "Rule of Lenity," which provides that "all provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to affect the objects of law." In this spirit, "[d]oubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results."[17]

Although we decline to re-visit the Young holding, it would have been the better practice to include instructions on the lesser offense. Unfortunately, although defense counsel moved for directed verdicts for the KRS 530.064 charges, he made no

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[16] Id. at 673.

[17] Boulder v. Commonwealth, Ky., 610 S.W.2d 615, 618 (1980), *overruled on other grounds*, Dale v. Commonwealth, Ky., 715 S.W.2d 227, 228 (1986).

request for instructions on attempted sodomy. Moreover, defense counsel presented a contrary argument, arguing that because E.J.C. did *not* testify to a specific sexual act, Appellant could only be charged with promoting prostitution in the first degree,[18] which is an exemption to KRS 530.064. Thus, the choice presented at trial was between KRS 530.064 and promoting prostitution, not between KRS 530.064 and attempted sodomy. Appellant may not be heard with claims on appeal that differ from the grounds asserted at trial.[19] Accordingly, reversal is not required.

V. DIRECTED VERDICTS-USE OF A MINOR IN A SEXUAL PERFORMANCE

Appellant's fifth claim is that the trial court erred by denying his motions for directed verdicts on the four counts of use of a minor in a sexual performance arising from sexual activity with J.E. Appellant argues that because the sexual conduct involved actual physical participation, the crime does not come within the ambit of KRS 531.310. This statute is part of KRS Chapter 531, entitled, "Pornography." Appellant maintains that he should have been prosecuted instead for third degree sodomy, a Class D felony, and third degree sexual abuse, a Class B misdemeanor, instead of under KRS 531.310 for which he received three Class B and one Class C felony convictions.

KRS 531.310(1) states that "a person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance." KRS 531.300(6) defines "sexual performance" as

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[18] KRS 529.030.
[19] Neal v. Commonwealth, Ky., 95 S.W.3d 843, 849 (2003).

"any performance or part thereof which includes sexual conduct by a minor." KRS 531.300(5) defines "performance" as "any play, motion picture, photograph or dance ... [and] any other visual representation exhibited before an audience." For "the purposes of KRS 531.300(5) an audience may consist of one person."[20] KRS 531.310 does not "apply to instances where one actively participates in sexual conduct with the minor."[21]

Although the 1994-1995 incident with J.E. supported the conviction of promoting a sexual performance by a minor because photographs were involved, the 1997 incidents did not support the use of a minor in a sexual performance charge as there was only evidence of physical engagement between Appellant and J.E. without any "performance" as required by KRS 531.300(5). Accordingly, we reverse.

VI. CHANGE OF VENUE

Appellant's sixth claim is that the trial court erred by overruling his motion for a continuance and change of venue. On November 18, 2000, an article was published in *The Daily Independent* newspaper stating that Appellant was going to enter a guilty plea to the charges in this case. The information was also broadcast over local commercial radio stations. Based upon the article and the broadcasts, prior to voir dire, defense counsel moved for a change of venue. Defense counsel also requested individual voir dire on the issue of pre-trial publicity, and the trial court granted the request. Each potential juror was asked whether he had read, seen, or heard anything about the case. Any juror who answered affirmatively was asked follow-up questions regarding whether he had formed an opinion or was biased about the case. One out of every four jurors had read about the possible guilty plea.

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[20] Alcorn v. Commonwealth, Ky.App., 910 S.W.2d 716, 717 (1995).
[21] Allen v. Commonwealth, Ky.App., 997 S.W.2d 483, 487 (1999).

KRS 452.210 requires a change of venue if the defendant cannot receive a fair trial in the county where the prosecution is pending. The decision to grant a change of venue is within the sole province of the trial court, and the trial court's decision will not be reversed absent an abuse of discretion.[22] This Court has held that a juror's exposure to newspaper accounts of the case, even while the trial is in progress, is not necessarily prejudicial.[23] Moreover, where "publicity prior to and during a trial is neither inherently prejudicial nor unusually extensive, the accused must assume the additional burden and show actual jury prejudice."[24]

Appellant contends that reversal is required based upon Miracle v. Commonwealth,[25] which was reversed because many jurors on the panel from which the jury was selected were present on a previous occasion when the defendant entered a guilty plea that was later withdrawn, and some of those jurors had served on a jury that tried the defendant. Appellant's case is a far cry from Maricle, however. As Appellant fails to allege and prove any actual jury prejudice, the denial of the motion for change of venue was within the trial court's discretion.

VII. JUROR STEVENS

Appellant's next claim is that the trial court erred by failing to excuse juror Larry Stevens for cause. Appellant contends that Stevens' responses to questions regarding the media reports of Appellant's possible guilty plea show that the juror could not be impartial. During voir dire, the prosecutor asked Stevens if he would be

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[22] Smith v. Commonwealth, Ky., 366 S.W.2d 902 (1962); Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997).
[23] Byrd v. Commonwealth, Ky., 825 S.W.2d 272, 274 (1992).
[24] Id. at 274-275.
[25] Ky., 646 S.W.2d 720, 720-721 (1983).

influenced by the media report that Appellant was going to plead guilty but then changed his mind. Stevens stated,

> Yes, I would honestly say it would a little bit. You know, you try to read that with an open mind, but you do read that and it does stick with you.

Defense counsel later asked Stevens if the fact that Appellant might have pled guilty indicated that there was some amount of guilt present. Stevens stated,

> Truthfully you assume that when you read something like that. You try to set that aside. Without hearing any of the evidence, I can't make a judgment on that. But, you do get swayed by what you read. It's just human nature.

Finally, the trial court asked Stevens if he could set "these influences and experiences aside and still render a fair and impartial verdict, based upon the evidence and the law?" Stevens answered affirmatively.

RCr 9.36 states that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." As stated in Mabe v. Commonwealth, the test is whether "the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict."[26] Generally, a juror who acknowledges that he has formed an opinion before trial yet claims that he can disregard the previously formed opinion and render a fair and impartial verdict is qualified to serve on the jury.[27] For exposure to media reports about a case to warrant disqualification of a juror, the media reports must engender a predisposition or bias that cannot be put aside, requiring the

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[26] Ky., 884 S.W.2d 668, 671 (1994).
[27] Levi v. Commonwealth, Ky., 405 S.W.2d 559, 562 (1965); Coates v. Commonwealth, Ky., 72 S.W.2d 714, 255 Ky. 18 (1934); Turpin v. Kassulke, 26 F.3d 1392 (6th Cir. 1994).

juror to decide a case one way or the other.[28] The question of whether a juror should be excused for cause is within the trial court's discretion.[29]

In this case, although Stevens indicated that it was hard not to be influenced by media reports, he also stated that he could be fair and impartial regardless of knowledge acquired before trial. Accordingly, the failure to excuse the juror for cause was within the trial court's discretion, and there was no error.

VIII. EXCLUDED BROWN STENO NOTEBOOK

Appellant's eighth claim is that the trial court erred by denying his motion for a mistrial due to the prosecution's failure to provide him all available material during the discovery process. At trial, during the testimony of Detective Roy Ison, it came to light that the prosecution had failed to turn over a brown steno notebook, which was one of two notebooks found in Appellant's car. The trial court prohibited the prosecution from introducing the notebook, yet refused to grant a mistrial.

The specific facts giving rise to this claim are as follows. As a means of discovery, defense counsel gave the Raceland Police Department paper to photocopy materials in their possession, and the police department made the copies and gave them to defense counsel. Chief Don Sammons, however, inadvertently failed to make a copy of the notebook, although all other material was provided to defense counsel.

At trial when this mistake was discovered, the prosecution immediately offered to make a copy of the notebook and to afford defense counsel an opportunity to

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[28] Furnish v. Commonwealth, Ky., 95 S.W.3d 34 (2002).
[29] Thompson v. Commonwealth, Ky., 862 S.W.2d 871, 874 (1993).

review it, and offered not to introduce the notebook until the following morning. The trial court, however, out of a stated "abundance of precaution," excluded the notebook. Defense counsel made no objection to the notebook's exclusion at this time. The next day, however, defense counsel requested a mistrial upon the basis that the excluded notebook might contain exculpatory material.

RCr 7.24, the rule governing discovery and inspection, states in relevant part,

> (1) Upon written request by the defense, the attorney for the Commonwealth shall ... permit the defendant to inspect and copy or photograph any relevant [] written or recorded statements or confessions made by the defendant, or copies thereof...
>
> (2) Upon motion of a defendant, the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy books, papers, documents or tangible objects ... that are in the possession, custody or control of the Commonwealth...
>
> (9) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule ..., the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

Accordingly, a defendant has the right to have access to all documentary evidence in the prosecution's possession, and the trial court has the discretion to take such measures as necessary to remedy any defects in the discovery process.

Although we question whether defense counsel's belated motion for a mistrial adequately preserved this claim for appellate review,[30] we decline to consider

[30] *See* Issue II, *supra.*

preservation because the trial court's exclusion of the notebook was a proper remedy under RCr 7.24(9) for the discovery defect.[31] Accordingly, there was no error.

IX. REFRESHING J.E.'S MEMORY

Appellant's next claim is that Appellant's journal and leading questions were improperly used during J.E.'s testimony to refresh his memory. KRE 612, entitled "Writing used to refresh memory," provides that a writing may be used to refresh a witness's memory, but if such a writing is used, the adverse party has an opportunity to inspect it and to have extraneous matters redacted. KRE 611(c) prohibits the use of leading questions "except as necessary to develop the witness's testimony." Regarding the topic, Professor Lawson writes that Kentucky case law "authorizes the use of leading questions to awaken a weakened memory (although leading questions would ordinarily be improper under the circumstances) and it authorizes the use of written instruments to accomplish the same objective."[32] Moreover, a writing used to refresh memory does not need to have been written by the witness, and the writing may be very old.[33]

In this case, J.E. admitted that he did not remember the specific dates of the charged crimes yet did remember some of the places where the crimes occurred. J.E. was asked to remember specific dates from an ongoing involvement that lasted several years. He was also a minor when the numerous crimes were committed.

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[31] *See* Anderson v. Commonwealth, Ky., 864 S.W.2d 909, 914 (1993)("the mandates of RCr 7.24 required the exclusion of this evidence when it had not been provided on discovery").
[32] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 3.20 (3rd ed. 1993).
[33] Id.

Accordingly, the use of leading questions and Appellant's journal to refresh J.E.'s memory as to the dates of the crimes was proper.

X. CO-INDICTEE'S GUILTY PLEA

Appellant's next claim of error is that the jury was improperly informed of his co-indictee's guilty pleas as to charges arising from the same events. As stated above in the presentation of facts, Branch pled guilty to criminal facilitation to promote a sexual performance of a minor and second degree sodomy with regard to incidents involving J.E. This claim of error was not preserved for appellate review, but will be considered pursuant to RCr 10.26 to prevent manifest injustice.

At trial, Lieutenant Tom Haynes of the Flatwoods police department testified that during an investigation of sex crimes in the Flatwoods and Raceland area, Michael Branch had confessed to an involvement with J.E. and Appellant. Lt. Haynes also testified that Branch had pled guilty to those charges. Branch later took the stand as a witness for the prosecution. Branch testified that he currently resided at the Greenup County Detention Center, and that he had been convicted of two crimes arising from sexual activity with minors and Appellant. Branch also stated that he had pled guilty to what he had done, and was awaiting sentencing under a plea bargain in which he had agreed to a five and a seven year sentence. Lt. Haynes was later recalled to the stand and testified that Branch had admitted taking two sexually explicit photographs of J.E. and Appellant, and that Branch had pled guilty to facilitation for the offenses.

It is well-established in this Commonwealth that it is improper to show that a co-indictee has been convicted under the indictment.[34] This Court has stated that to "make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does or does not testify, and whether or not his testimony implicates the defendant on trial."[35] Such evidence may be allowed, however, to impeach the co-indictee witness' credibility if his credibility is at issue.[36] Another exception to this general rule occurs when the defendant permits the introduction of such evidence without objection as a matter of trial strategy.[37]

In this case, there is no indication that the evidence was used either to impeach Branch's credibility or for trial strategy. The admission of the guilty pleas was thus improper. The Commonwealth argues, however, that the evidence of Appellant's guilt was so overwhelming that the RCr 10.26 palpable error standard required for reversal is not met. The other evidence included J.E.'s testimony, Branch's testimony, incriminating photographs and videos of J.E. and Appellant, Appellant's sex journal describing the activity with J.E., and Appellant' acknowledgement of sexual involvement with J.E. in a statement made to police. We agree with the Commonwealth, and thus reversal is not required.

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[34] Tipton v. Commonwealth, Ky., 640 S.W.2d 818, 820 (1982); Parido v. Commonwealth, Ky., 547 S.W.2d 125, 127 (1977); Martin v. Commonwealth, Ky., 477 S.W.2d 506, 508 (1972); West v. Commonwealth, Ky., 117 S.W.2d 998, 999, 273 Ky. 779 (1938).

[35] Tipton at 818.

[36] Parido at 127.

[37] Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 32-33 (1998)(Appellant's theory of the case was that co-indictee committed murders and blamed Appellant; thus, co-indictee's guilty plea supported Appellant's alibi, and court attributed Appellant's failure to object to co-indictee's guilty plea to trial strategy).

XI. AMENDED INDICTMENT

Appellant's final claim is that the trial court erred by allowing amendment of the indictment. At the close of the prosecution's case in chief, it became evident that the testimony indicated a slightly different date for one of the sodomy charges than was previously thought. Thus, the prosecution asked the court to amend the date of one of the sodomy charges from "on or about November 15, 1999" to "on or about October, 1999." Defense counsel objected, arguing that had he known of the October date, he would have studied the October phone records of Appellant's only witness, his mother, which could have provided an alibi.

The ruling governing amendment of indictments is RCr 6.16, which states

> The court may permit an indictment, information, complaint or citation to be amended at any time before verdict of finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

This Court has held it permissible to amend an indictment charging child molestation to change the date the offense was allegedly committed since the amendment did not state an additional or different offense.[38]

It is significant that Appellant did not request a continuance, as permitted by RCr 6.16, to investigate whether the phone records could have supported an alibi defense. As Appellant did not request the relief afforded by the rule, and has not adequately demonstrated that he was prejudiced by the amended indictment, there was no error.[39]

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[38] Stephens v. Commonwealth, Ky., 397 S.W.2d 157 (1965).
[39] *See* Stephens at 158.

As set forth herein, the judgment of the Greenup Circuit Court is reversed as to the four use of a minor in a sexual performance convictions. In all other respects, the judgment is affirmed and this cause remanded for re-sentencing in conformity herewith.

All concur.

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