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NOT TO BE PUBLISHED OPINION

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AS MODIFIED: DECEMBER 18, 2003
RENDERED: SEPTEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 12-18-03 Elia Grant, D.C.

2001-SC-1067-MR

JAMES EDWARD GEORGE, JR. — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VAN METER, JUDGE
2001-CR-0532

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Appellant, James Edward George, Jr., was convicted of two counts of terroristic threatening, one count of kidnapping, six counts of first-degree sodomy, five counts of first-degree rape, and one count each of second-degree assault and second-degree persistent felony offender. He was fined $1,000.00 and sentenced to a total of twenty-five years' imprisonment. He appeals to this Court as a matter of right. On appeal, he raises a number of alleged errors by the trial court including exclusion of evidence of letters written by the victim to George, failing to disclose expert testimony, failing to include instructions on lesser-included offenses, and failure to enter a directed verdict of acquittal on certain charges. For the reasons set forth below, we affirm in part, reverse in part, and remand for a new trial on the indictment for second-degree assault.

I. Facts

The crimes for which George was tried and convicted relate to a five-day period in which George held the victim, D.C., captive in their apartment. For about two years prior to these events, George and D.C. had been involved in an on-and-off relationship. In addition to being intermittent, the relationship was somewhat stormy as well.

Winds of suspicion began to buffet George while he spent two weeks in jail for failing to pay traffic fines. D.C. picked George up from jail upon his release. When they returned to their apartment, George unleashed his anger and accused D.C. of cheating on him. When she denied being unfaithful, George punctuated his accusations with physical blows, first from his fists and then from a broom stick and a mop handle. Eventually, D.C. changed her story to conform to what she thought George wanted to hear in order to make him stop.

During this time, George often tied D.C. up with duct tape or cord. On one occasion he threatened to kill her. She had to get his permission to go to the bathroom or to move about the apartment. George forced her to sit on the floor and would not allow her to sit on any of the furniture. This was either because she was bleeding (and he did not want her staining the upholstery) or because she was not worthy in his eyes. She was not permitted to go to sleep until George fell asleep first. If she did, George would wake her by beating her. On one occasion, he tied her hands together and plunged her face into bath water. She never felt free to leave the apartment.

While they left the apartment a number of times during this period to get food, he carried a knife with him and threatened her with it if she attempted to flee. At one point, he put the knife to her throat.

On the fifth day, the din died and they left the apartment together to go to George's job interview. He was hired and started work the next day. D.C. was left alone in the apartment while George was away at work. Free, at least for the moment, D.C. went to the apartment manager's office to call her mother and to ask her if she, D.C., could come and stay with her. Responding to her daughter's call for help, D.C.'s mother immediately called the police and went to Lexington to rescue and to comfort her child.

When police officers arrived at the apartment, they found D.C. battered and bruised, as well as blood on the floor, a broom stick, and a mop handle. D.C. appeared to be in shock. Because of her condition, she was taken to the U.K. Medical Center Emergency Room, where physical evidence of rape was discovered including vaginal lacerations, cervical bruising, and swelling of the perineum.

II. Discussion

A. Post-Crime Letters

George's defense to the rape and sodomy charges was that the sex between him and the victim was consensual. To show this, defense counsel questioned D.C. on cross-examination about the nature of their relationship before the five-day period at issue at trial. She admitted that they had a very active sex life and engaged in consensual vaginal, oral, and anal sex prior to the five-day period. Also, D.C. testified that she was still in love with George, visited him in jail twice a week, and had tried to get the prosecutor to drop the charges against George in order to secure his release. To this end, she spoke with George's lawyer in connection with the case.

Immediately prior to D.C.'s testimony, the Commonwealth moved to exclude evidence of a number of letters that D.C. sent to George while he was in jail awaiting

trial on the charges in the instance case. In these letters, D.C. proclaimed her love for George, and she also explicitly described the types of sex acts she wanted to perform with him, on him, and have him do to her. Suffice it to say, these acts encompassed the types of acts he was ultimately convicted of forcing D.C. to submit to during the five-day period in question. The trial court excluded the letters on grounds that they were not relevant to the crimes charged. That is, the trial court ruled that whether she wanted to have sex with him after the fact had no bearing on the question of whether she wanted to have sex with him during the critical five-day period. On appeal, George argues that the trial court erred in excluding the evidence because of its great relevance to the question of consent. We disagree.

We begin by noting that the letters in question were pure hearsay, and should have been excluded on that ground. See Miller v. Commonwealth, Ky., 77 S.W.3d 566, 570 (2002). But the hearsay argument was not made to either the trial court, or to this Court on appeal. In an abundance of caution, we address the merits of the issue as argued.

George argues that D.C.'s subsequent desire to have sex with him as expressed in the letters is relevant to the question of whether she consented to have sex with him during the prior five-day period at issue. This argument is somewhat complimentary to the rule of evidence that past sexual behavior between the alleged victim and the defendant is relevant and is generally admissible on the issue of consent. See KRE 412(b)(2).[1]

[1] KRE 412 was not mentioned in the motion to exclude the letters, nor did the trial court refer to the rule when granting the Commonwealth's motion. Thus, we have no call to address the questions of whether the letters fall within the scope of KRE 412 or whether they are admissible under subsection (b)(3) as "evidence directly pertaining to the offense charged."

We agree with George that the letters were relevant to the issue of whether D.C. consented to have sex with him. That is, evidence of consensual sex or the desire to have consensual sex after an allegation of rape would tend to prove that consent may have in fact been given and that no rape occurred. See State v. Babbs, 971 S.W.2d 774, 776 (Ark. 1998); People v. Adair, 550 N.W.2d 505, 512 (Mich. 1996). Of course, such evidence is not conclusive on the issue of consent and is only a circumstance for the trier of fact to consider. State v. Soke, 584 N.E.2d 1273, 1277 (Ohio Ct. App. 1989). Being relevant, the evidence was admissible under KRE 402 unless it was otherwise excluded by law.

A trial court's ruling on the relevancy of evidence implicitly embraces a determination of the admissibility of the evidence under KRE 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

In this case, the trial court did not abuse its discretion by excluding the evidence under KRE 403.

Defense counsel was able to introduce evidence (1) of the prior consensual sexual relationship between George and D.C.; (2) that D.C. visited George frequently in jail, and was taken there by George's mother; and (3) that D.C. was still in love with George and wanted to get back together with him. Further, while it appears the question was not asked, the trial court's ruling did not preclude D.C. from testifying that she was presently willing and wanted to have consensual sex with George. Thus, the trial court's ruling did not preclude evidence of consensual sexual desires subsequent

to the events that resulted in the rape charges. Rather, it simply precluded evidence of explicit details of the actual sexual acts D.C. wanted to engage in with George.

Given the quantity of evidence that George was able to introduce on the issue of consent on the one hand, and the highly sensational and provocative nature of the contents of the letters on the other, we hold that the trial court did not abuse its discretion in granting the Commonwealth's motion to exclude the letters.

B. Sufficiency of the Evidence

George argues that there was not sufficient evidence to support any of his rape or sodomy convictions. We disagree.

George begins with an argument that the charges in the indictment against him were deficient. He was indicted on six counts of forcible sodomy and five counts of forcible rape. Each of the sodomy counts is worded identically with the others:

> Between the 21st day of March 2001, through the 25th day of March 2001 . . . the . . . Defendant committed the offense of Sodomy First Degree by engaging in deviate sexual intercourse with D.C., through forcible compulsion.

Likewise, each of the rape counts is worded identically with the others:

> Between the 21st day of March 2001, through the 25th day of March 2001 . . . the . . . Defendant committed the offense of Rape First Degree by engaging in sexual intercourse with D.C., through forcible compulsion.

George argues that these charges impermissibly failed to make any distinction between each count of sodomy and each count of rape. According to George, this flaw was further compounded at trial by the failure of the Commonwealth to present sufficient proof to distinguish the various charges and by the failure of the trial court to distinguish between the charges in its instructions on the various counts of sodomy and rape.

The trial court instructed the jury separately on each count of sodomy and rape. Each instruction was identically worded. Each sodomy instruction provided in pertinent part:

> You will find the defendant guilty of First-Degree Sodomy under this Instruction if, and only if, you believe from the evidence alone beyond a reasonable doubt all of the following: (a) That in this county between the 21st day of March, 2001, through the 25th day of March, 2001, James George engaged in deviate sexual intercourse with [D.C.]; AND (b) That he did so by forcible compulsion.

Likewise, each of the rape counts provided in pertinent part:

> You will find the defendant guilty of First-Degree Rape under this Instruction if, and only if, you believe from the evidence alone beyond a reasonable doubt all of the following: (a) That in this county between the 21st day of March, 2001, through the 25th day of March, 2001, James George engaged in sexual intercourse with [D.C.]; AND (b) That he did so by forcible compulsion.

George argues that these instructions were based on a mathematical extrapolation of D.C.'s testimony and, therefore, should have been excluded under Miller v. Commonwealth, Ky., 77 S.W.3d 566 (2002). We disagree.

D.C. testified that—between March 21, 2001 and March 25, 2001—she performed oral sex on George four or five times, that they had anal sex three to five times, and that they had vaginal sex four or five times. When asked whether she felt forced to perform or submit to these acts or to have sex with George on each of these occasions, she equivocated. When asked to explain, she stated that she submitted to the sex acts because she was afraid that he would beat her if she did not comply. This testimony was sufficient to support each of the instructions on sodomy and rape.

C. Lesser-Included Offenses

George argues that the trial court erred in failing to instruct on sexual abuse as a lesser-included offense to the sodomy and rape charges. We disagree.

George attacks the meaning of D.C.'s testimony that she and George had "oral sex," "anal sex," and "vaginal sex." He takes the position that D.C.'s use of the terms "oral sex" and "anal sex" did not necessarily mean that there was either oral-genital or anal-genital contact between D.C. and George, and that D.C.'s use of the term "vaginal sex" did not necessarily mean that there was physical penetration of her vagina. While arguably D.C. could have meant something else by her testimony, there is no evidence in the record to support this assertion. Compare the state of the record in this case with Johnson v. Commonwealth, Ky., 864 S.W.2d 266, 277 (1993) (holding that the trial court erred in failing to instruct on a lesser-included offense to a rape charge where "there was considerable evidence that [the appellant] had attempted intercourse, but had failed, being unable to attain erection." (Emphasis in original)).

"Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser-included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no evidentiary foundation." Houston v. Commonwealth, Ky., 975 S.W.2d 925, 929 (1998) (internal citation omitted). D.C. was an adult female of at least average intelligence. Nothing in the record indicates that she did not understand these terms. Because there was no evidence that she was not using the ordinary meaning of these terms and there was absolutely no other evidence to support the desired instruction, we hold that the trial court did not err in declining to instruct on sexual abuse as a lesser-included offense to the rape and sodomy charges.

D. Mistrial

During the guilt phase of the trial and while still on call as a witness, D.C. was excluded from the courtroom under RCr 9.48. At some point, the prosecutor

approached the bench and informed the trial court that D.C. had made some sort of comment in the hallway outside of the courtroom that may have been overheard by members of the jury. The trial court then promptly asked the jury panel if they had heard any witnesses making any comments in the hallway. Juror 481 responded affirmatively.

At the bench, Juror 481 informed the court that he saw D.C. whisper, "I love you," to George through a door. Some unidentified person then told D.C. not to do that because it might cause a mistrial. D.C. responded to this comment by stating that she did not care because she did not want George prosecuted in the first place. Juror 481 was asked whether these comments would affect his ability to try the case on the facts adduced at trial. Juror 481 said that it would not. At the request of the prosecutor, the trial court admonished the juror to disregard anything he heard D.C. say in the hallway. Defense counsel then moved for a mistrial and, later, moved to have Juror 481 excluded from the trial.

On appeal, George argues that the trial court erred in not declaring a mistrial and, in the alternative, argues that the trial court erred by not excluding Juror 481. "A mistrial is justified only when a 'manifest necessity for such an action or an urgent or real necessity' appears in the record. It is within the trial judge's discretion whether a mistrial should be granted, and his decision should not be disturbed, absent an abuse of discretion." Neal v. Commonwealth, Ky., 95 S.W.3d 843, 851-52 (2003) (internal citations omitted). On appeal, George argues that the prejudice from Juror 481's exposure to D.C.'s comments was so great that a mistrial was required under this standard. We disagree.

The comments were consistent with D.C.'s testimony at trial. While juror exposure to extrajudicial evidence is clearly improper and should be avoided at all times, the prejudice to George under these circumstances is hard to discern. George argues that the comments reinforced the Commonwealth's theory of the case that George had complete control over D.C. On the other hand, the comments were consistent with George's defense that all of the sexual contact between them was consensual. In any event, we cannot say that the trial court abused its discretion in denying George's motion for a mistrial. Nor can we say the trial court abused its discretion in denying George's motion to exclude Juror 481.

E. Expert Testimony

Prior to calling Dr. Greg Davis as a witness, the prosecutor approached the bench. The prosecutor informed the trial court that Dr. Davis was a forensic pathologist and that she had spoken with Dr. Davis in September regarding D.C.'s bruises and had shown him pictures of those bruises. The purpose of this discussion was to learn more about the nature and extent of the physical injury that might be associated with the bruises displayed in the pictures. Dr. Davis reviewed the pictures for the prosecutor and gave her an oral report on his conclusions. No written report was filed and no notice was given to the defense regarding Dr. Davis's oral report or even that he would be testifying as a witness.

Defense counsel objected to Dr. Davis taking the stand on grounds that the Commonwealth violated the trial court's reciprocal discovery order by failing to give notice that Dr. Davis would be called as an expert and failing to disclose the substance of his testimony. The trial court overruled the objection on grounds that, because no

written report was filed, no notice or disclosure was required. On appeal, George argues that this was error. We agree.

RCr 7.24(1) provides:

> Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

The trial court's ruling was undoubtedly based on the conclusion that the phrase "inspect and copy or photograph" limited "results or reports" to actual physical documents and tangible things. While this construction of the rule is correct, see United States v. Johnson, 713 F.2d 654, 659 (11th Cir. 1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984) (construing a similarly worded federal criminal rule); see also Vires v. Commonwealth, Ky., 989 S.W.2d 946, 949 (1999), this did not end the trial court's inquiry into the admissibility of Dr. Davis's testimony.

In James v. Commonwealth, Ky., 482 S.W.2d 92 (1972), we condemned the deliberate violation of the criminal discovery rules: "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." Id. at 94. We expressed the same sentiments in response to an inadvertent discovery violation in Barnett v. Commonwealth, Ky., 763 S.W.2d 119 (1989): "In a case where the murder is shrouded in mystery and the

question of guilt hung in the balance, it will not do to permit the possibility that victory was obtained by ambush and surprise, even if we accept that the mistake was not 'malicious.'" Id. at 123. Here, while the Commonwealth did not violate the letter of RCr 7.24, it surely violated the spirit and the purpose of the rule.

As we stated half a century ago the

> interest of the Commonwealth in a criminal prosecution is not that it shall win a case but that justice shall be done. The decisions of this court afford abundant support of this principle. We have many times declared that there rests upon prosecuting attorneys the obligation to deal fairly with the accused and to recognize his legal rights as well as the rights of the Commonwealth, and that these public officials should see that the truth is disclosed and that justice shall prevail.

Arthur v. Commonwealth, Ky., 307 S.W.2d 182, 185 (1957). The failure to disclose the substance of Dr. Davis's expert testimony precluded even the possibility of adversarial testing of the subject matter of his opinions.

In cases where expert testimony is likely to be determinative of an important issue or of the case itself, the failure to disclose the substance of the testimony of experts expected to be called at trial

> produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand.

Fed. R. Civ. P. 26 advisory committee's notes.

That the above comments relate to civil rules of discovery do not make them inapplicable here. On the contrary, these concerns are amplified in a criminal trial by a constitutional sounding board. That is, pre-trial disclosure of the substance of expert testimony in a criminal trial is a matter of fundamental fairness that goes to the very

heart of the adversarial process. Put another way, admission of expert testimony without pre-trial disclosure in a criminal case risks turning a prosecution into a persecution.

The trial court has broad discretion whether to admit expert testimony under KRE 702. Mitchell v. Commonwealth, Ky., 908 S.W.2d 100, 102 (1995), overruled in part on other grounds, Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999). An important component of the proper exercise of this discretion is the balancing test required by KRE 403. Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997), cert. denied, 523 U.S. 1052, 118 S. Ct. 1374, 140 L. Ed. 2d 522 (1998). The Commonwealth's failure to disclose the substance of Dr. Davis's report was so unduly prejudicial that Dr. Davis's testimony should have been excluded under KRE 403.

Dr. Davis's testimony concerned the medical conclusions he deduced from examining photographs of the bruises on D.C.'s body. The testimony covered a number of topics, including the type of instrument used to inflict the bruises (round and cylindrical like a broom stick or mop handle), the time period in which the bruises occurred, and the seriousness of the underlying injuries. This last testimony was the most damning.

Dr. Davis testified that the injury pattern and the extent of the bruising exhibited in the photographs could result in fat being absorbed into the bloodstream, which, in turn, could cause a pulmonary embolism. He explained that a pulmonary embolism makes it impossible for a person to breath. Further, he testified that the likelihood of this dangerous occurrence increases with the number and force of blows a person receives. Finally, he testified that, in his practice (forensic pathology), pulmonary fat embolisms "actually happen quite a lot."

While the trial judge ruled that, as a matter of law, D.C.'s injuries were not "serious physical injuries" as defined by statute, Dr. Davis's testimony was the only evidence concerning the potential severity of D.C.'s injuries. His testimony was the only direct evidence on the question of whether the broom stick and mop handle George used to beat D.C. were "dangerous instruments" as that term was defined by the instructions and is defined by statute.

A "dangerous instrument" is "any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury." KRS 500.080(3). And "serious physical injury" is "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(15). Thus, Dr. Davis's testimony that the beatings D.C. received could have been fatal, bore directly on the question of whether the broom stick and mop handle were "dangerous instruments." The failure of the Commonwealth to disclose the substance of Dr. Davis's testimony prevented defense counsel from gathering evidence to counter the testimony or from being able to effectively cross-examine Dr. Davis at trial.

The jury could have inferred—without Dr. Davis's testimony—that the broom stick and mop handle were "dangerous instruments" based on the other evidence adduced at trial. See Barth v. Commonwealth, Ky., 80 S.W.3d 390, 399 (2002), cert. denied, ___ U.S. ___, 123 S. Ct. 1586, 155 L. Ed. 2d 324 (2003). This evidence consisted primarily of the many pictures of the extensive and deep bruises covering

most of D.C.'s body and the actual broom stick and mop handle that were introduced at trial. But Dr. Davis's testimony added greatly to the evidence upon which the jury could have found that the Commonwealth had proven the elements of second-degree assault beyond a reasonable doubt.

The elements of the second-degree assault instruction required the jury to find (1) that George intentionally caused D.C. physical injury by beating her with the broom stick and mop handle, and (2) that the broom stick and mop handle were "dangerous instruments." Therefore, we cannot say, upon consideration of the whole case, that there is a substantial possibility that George still would have been convicted of second-degree assault had Dr. Davis not been allowed to testify. The error was not harmless. See Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969), overruled in part on other grounds, Blake v. Commonwealth, Ky., 646 S.W.2d 718 (1983). But in this case, this does not mean that all of the convictions against George must be reversed.

Dr. Davis's testimony was limited to the elements of second-degree assault. The testimony had no bearing on the other charges against George, e.g., kidnapping, rape, sodomy, attempted murder, and persistent felony offender. Further, the photographs of D.C.'s bruises were properly admitted through Lorie Gambill—who worked in the Evidence Collection Unit of the Division of Police—and published to the jury. Thus, there was no additional harm to George in connection with Dr. Davis's testimony relating to the extent of D.C.'s bruises. Rather, the harm (in the form of testimony that could not be effectively met at trial due to lack of notice) to George was limited to Dr. Davis's testimony as to the potential physical injury that could have been caused by the blows George inflicted upon D.C. In other words, the undue prejudice from Dr. Davis's

testimony was confined to one of the elements of the second-degree assault charge against George. Therefore, reversal on only that one conviction is required here.

In closing our discussion on this issue, we note that the Commonwealth's disclosure obligations (other than those imposed by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)) are triggered only when the defense requests reciprocal discovery under RCr 7.24. This action establishes mutual disclosure obligations on both the Commonwealth and the defense. Accordingly, except when the Constitution mandates otherwise, we hold that neither party in a criminal proceeding may skirt the spirit and purpose of RCr 7.24 by limiting an expert's report to "oral reports," thereby setting an ambush at trial for the opposing party. When such a situation arises, the trial court must first carefully weigh the unfair prejudice to the opposing side—which comes from the inability to prepare and plan to meet the evidence at trial—as part of the KRE 403 balancing test that it must perform when deciding whether to admit the evidence.

F. Other Issues

Additionally, George argues that the trial court erred in denying his motion for a directed verdict on the second-degree assault charge. The issue has no merit. Further, he argues that the trial court erred in allowing the Commonwealth to amend the indictment in the middle of trial. This amendment relates to the second-degree assault charge. Because we are reversing George's conviction on this charge, the issue is moot. Finally, George argues that the trial court erroneously included misdemeanor sentencing information in the guilt phase instructions in violation of Commonwealth v. Philpot, Ky., 75 S.W.3d 209, 214 (2002). While the instructions do violate Philpot, the error was not preserved. Therefore, we will not review it here. RCr 9.54 (2).

III. Conclusion

For the reasons set forth above we affirm the judgment of the Fayette Circuit Court, except for George's conviction for second-degree assault, which we reverse, and we remand this case for proceedings consistent with this opinion.

Lambert, C.J.; Cooper, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Graves and Keller, JJ., concur in part and dissent in part and would affirm Appellant's Second-Degree Assault conviction because RCr 7.24 did not require the Commonwealth to give pretrial notice of the substance of Dr. Davis's expert testimony.

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Supreme Court of Kentucky

2001-SC-1067-MR

JAMES EDWARD GEORGE, JR. — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VAN METER, JUDGE
01-CR-532

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

The petition for rehearing of this Court's opinion rendered on September 18, 2003, filed by the Commonwealth of Kentucky, is hereby denied.

On the Court's own motion, page one of said opinion is hereby modified by substituting a new page one, attached hereto, in lieu of page one of the opinion as originally rendered. Said modification is made to clarify the Court's position and does not affect the holding of the opinion as originally rendered.

All concur.

ENTERED: December 18, 2003.

CHIEF JUSTICE