IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0227-MR

MICHAEL D. ANDERSON — APPELLANT

V.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
01-CR-19

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael D. Anderson, Jr., was convicted by a Henderson Circuit Court jury of wanton murder and sentenced to forty-six years in prison. He appeals to this Court as a matter of right, Ky. Const. §110(2)(b), claiming that (1) the trial court erroneously refused to strike three jurors for cause; (2) the evidence at trial was insufficient to support a conviction of wanton murder; and (3) the trial court erroneously permitted the Commonwealth to introduce evidence in chief during rebuttal. We affirm.

On December 31, 2000, Appellant, then nineteen years old, was residing with his pregnant girlfriend, Ashley Gordon, age seventeen, in a hotel room at the Holiday House in Henderson, Kentucky. Living with them were Ashley's mother, Dorothy

Slaten, and Ashley's four siblings, Patricia Gordon, age thirteen, Nathan Gordon, age ten, Larry Slaten, age five, and Amber Slaten, age three weeks. Although thirteen years old, Patricia had the mental capacity of a five-year-old child. She weighed ninety-six pounds.

During her recovery from the birth of her youngest daughter, Dorothy Slaten delegated to Appellant and Ashley the responsibility for disciplining the other three children. There was evidence that Appellant physically abused both Nathan and Patricia. For example, Appellant would have them "sit on the wall," a military style of punishment that requires the person being punished to lean against the wall in a sitting position without benefit of other support for a long period of time. If the children attempted to rest from this position, Appellant would beat their knees with a beer bottle. Another form of punishment employed by Appellant was a technique referred to as the "Rock bottom move" that he learned from watching professional wrestling on television. The "Rock bottom move" is performed by grabbing another person by the neck and violently thrusting that person backwards to the floor.

Patricia Gordon was killed by blunt force trauma to the head during the night of December 31, 2000. The Commonwealth presented evidence at trial that Appellant ordered Patricia to "sit on the wall" after she knocked over his "PlayStation" video game system and ate the family's last piece of bread. When Patricia attempted to rest from the "sitting on the wall" position, Appellant used the "Rock bottom move" to repeatedly slam her head against the floor. On the first two occasions, Patricia's head struck some garbage bags filled with clothing. However, on the third occasion, her head struck the concrete floor, which caused her to lose consciousness. Ashley advised her mother

what had happened and Nathan ran to a nearby gas station to dial 911 for emergency assistance. Appellant fled the scene.

Officers from the Henderson County Sheriff's Office arrived at approximately 3:40 a.m. on January 1, 2001, and found Patricia lying unresponsive on a bed. Appellant returned to the scene shortly thereafter, spoke with the officers, and denied any involvement in Patricia's injuries. Paramedics transported Patricia to a local hospital where she died the next day. An autopsy revealed that she died from a blunt force injury to her head that caused massive hemorrhaging and swelling of the brain. The pathologist also found extensive bruising on Patricia's hips, shoulders, buttocks, arms, knees and legs. Police officers returned to Appellant's hotel room and placed him under arrest. After being informed of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Appellant confessed to slamming Patricia's head into the floor that night. His confession was read to the jury at trial.

I. MOTIONS TO STRIKE JURORS FOR CAUSE.

Appellant asserts that the trial court erred when it refused his request to strike Juror Nos. 29, 30 and 65 for cause. He alleges that this was prejudicial to him as he was therefore required to use three of his peremptory strikes to excuse those jurors. Thomas v. Commonwealth, Ky., 864 S.W.2d 151, 259 (1993).

A. JUROR NO. 29.

For an unknown reason, the jury strike sheets were not included in the record on appeal as required by CR 75.07(4). Thus, Appellant was permitted, over the Commonwealth's objection, to file a narrative statement, CR 75.13, to show that he did exercise peremptory strikes against the three jurors and that he exercised all of his

peremptory strikes as required to preserve this issue for appeal. Thomas, supra, at 259. However, the narrative statement goes further and recites that Appellant timely moved to excuse all three jurors for cause. The videotape of the proceedings (bench conference portions of which are audible though not visible) clearly reflects that while Appellant did move to strike Juror Nos. 30 and 65, he did not move to strike Juror No. 29. A narrative statement is available only when there is "no videotape, mechanical or stenographic record of the evidence or proceedings at hearing or trial." RCr 75.13(1). Obviously, a narrative statement cannot be used to create a record different from that which was properly recorded.

Defense counsel made a statement on the record after the jury was selected and sworn and after the remaining jurors had been excused that he had exercised peremptory strikes to excuse Juror Nos. 29 and 65 (but not Juror No. 30) because the trial court had overruled his motion to strike them for cause. Even if we were inclined to interpret that statement as a motion to strike Juror No. 29 for cause, it would have been untimely. Subject to certain exceptions not applicable here, a motion to strike a juror for cause must be made before the jury is sworn. Johnson v. Commonwealth, Ky., 391 S.W.2d 365, 366 (1965). Because no motion was made to strike Juror No. 29 for cause, we will not address whether she was unqualified to sit as a juror on Appellant's case. Pelfrey v. Commonwealth, Ky., 842 S.W.2d 524, 526 (1992).

B. JUROR NO. 30.

Juror No. 30 was employed by the attorney who had been appointed as the guardian ad litem for Dorothy Slaten's remaining children in proceedings to terminate Slaten's parental rights. Juror No. 30 stated that she knew nothing about Appellant's case, that she had not formed an opinion as to his guilt or innocence, and that she could

be fair and impartial if selected as a juror. Appellant moved to strike the juror for cause, claiming that her employment relationship with the guardian ad litem for the Slaten children, two of whom were scheduled to be prosecution witnesses, rendered her unfit to serve as a juror. We disagree.

A trial court's decision as to whether to excuse a juror for cause is reviewed for abuse of discretion. Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 795 (2003); Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 527 (2002). "It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause." Pennington v. Commonwealth, Ky., 316 S.W.2d 221, 224 (1958) (citations omitted). Juror No. 30 affirmed that she had not previously formed an opinion as to Appellant's guilt and that she could be impartial; thus, there is no allegation that she was actually biased against Appellant. The remaining inquiry is whether her employment in the office of the guardian ad litem for the Slaten children amounted to implied bias.

A juror will be excused for implied bias when bias can reasonably be inferred from a juror's "family or business relationship with a party, a victim or the prosecuting attorney where the relationship is not so close as to cause automatic disqualification but nevertheless transgresses the concept of a fair and impartial jury." Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 717 (1991) (citing Marsch v. Commonwealth, Ky., 743 S.W.2d 830, 834 (1988). There is no evidence that the guardian ad litem for the Slaten children was associated with the Commonwealth's Attorney or involved in any aspect of the prosecution of Appellant's case. Juror No. 30 indicated that she had not acquired any information about Appellant's case due to her employment other than that he was charged with killing one of the Slaten children. We conclude that Juror No. 30's mere employment by an attorney who had been appointed as guardian ad litem for

a trial witness is not the type of close business relationship that "transgresses the concept of a fair and impartial jury." See, e.g., Dillard v. Commonwealth, Ky., 995 S.W.2d 366, 369 (1999) (no implied bias attributed to juror who worked as a fireman at same station in which victim served as captain); Copley v. Commonwealth, Ky., 854 S.W.2d 748, 750 (1993) (no implied bias even though juror was a fellow employee of victim); Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 669 (1990) (no implied bias even though juror worked with victim's spouse); Compare Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 862-65 (1993) (bias found in sexual abuse case where juror was familiar with victim through her employment as an investigative social worker with Child Protection Services and stated that her position would affect her ability to remain impartial), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997). The trial court did not abuse its discretion in refusing to strike Juror No. 30 for cause.

C. JUROR NO. 65.

Juror No. 65 stated that he was exposed to news coverage of Patricia's murder one year prior to trial. He then engaged in the following discussion with the trial court, the prosecutor, and defense counsel:

Judge: As result of [the media coverage], did you form an opinion as to guilt or innocence or come to any sort of conclusion?

Juror: I'd be lying if I said no. You know I . . .

Judge: O.K. You feel that you have come to an opinion as to guilt or innocence?

Juror: Not yet. No. It weighs pretty heavy to one side though. I'll say that.

Judge: Well, let me ask you this, whatever you may have heard or read, that's not evidence.

Juror: That's right.

Judge: Okay. Evidence is what comes from this witness stand and any exhibits that are introduced into the trial.

Juror: I understand that.

Judge: Okay. Could you insure the [Commonwealth's Attorney] and the attorneys and [Appellant] that whatever you did read or may have heard, it's been a year ago, and I know that your retention may be better than mine, but could you assure them, all parties, that you would decide this case solely on the evidence that comes from the witness stand as well as any and all physical exhibits that they introduced? And there is no right or wrong answer, if you can't, that's fine, and if you can, that's also fine. In other words, do you feel that whatever you may have read or heard today would affect your decision?

Juror: No. I'm willing to listen to whatever.

Judge: Can you assure and look at me and tell me you can assure us that, because it's been a year ago, how good is your retention?

Juror: Well, I mean, this is a pretty spectacular you know, if I'm not mistaken this is where a boy killed a girl over a video game. It's pretty much a dysfunctional type family situation and I, you know, these kind of things stick out in my mind.

Judge: Sure, and, but, you can, can you assure that, that, in other words, it won't, whatever you heard and read won't affect your decision here today. In other words, you can assure all of us that?

Juror: Yeah, I'll do that.

Judge: Okay, Mr. Nesmith do you . . .

Def. Atty.: When you read that, do you remember what your emotional reaction was to reading those stories?

Juror: I thought it was terrible.

Def. Atty.: Did you read the paper this morning?

Juror: No, I didn't.

Def. Atty.: When you read those, did you think that something pretty horrible had happened that day?

Juror: Yeah, definitely.

Def. Atty.: Do you still think that?

Juror: Well, it's gonna be your burden to prove me otherwise.

. . .

Com. Atty.: Let me ask a question. Unfortunately, in this and other communities there are murders committed. Would you consider any murder to be terrible?

Juror: Well, sure, absolutely.

Judge: Can you assure me and both parties . . . in other words, you said that it's going to be their burden. I can tell you that is not the law.

Juror: Okay.

Judge: The law is that the Commonwealth has the burden of proof to prove their case beyond a reasonable doubt. If they do not do that, can you assure me that you could vote for an acquittal?

Juror: Yes I could.

Judge: Okay. If they don't do it here in this courtroom. But by the same token. The flip side is, that if they do prove it, see, they'll [the Commonwealth] want to hear this answer, if they do prove their case beyond a reasonable doubt, could you find [Appellant] guilty?

Juror: Yes.

Judge: Okay. And the flip side, I've already asked.

Juror: I'll base my decision on the facts here today.

Judge: So, I'll tell you that it's not their burden.

Juror: Right.

Judge: It is the Commonwealth's burden. Can you assure the court that you'll follow my instructions as to the law?

Juror: That's right, I can.

(Emphasis added.)

Appellant first points to Juror No. 65's response to the two-part question as to whether he had "formed an opinion as to guilt or innocence or come to some sort of conclusion" as a reason why he should be struck for cause. Obviously, the juror's positive response was to the second part of the question because his answer to the very next question posed to him was that he had not yet come to an opinion as to guilt or innocence. The second reason Appellant offers as to why Juror No. 65 should have been struck for cause is his statement to defense counsel that "it's going to be your burden to prove me otherwise." However, that statement referred to his previous affirmative response to defense counsel's question as to whether he thought "something pretty horrible had happened out there," not whether he thought Appellant was guilty.

Whether a prospective juror should be excused for objective bias must be determined by the totality of the circumstances. Montgomery, supra, at 718. Unlike the four jurors discussed in Montgomery, id. at 716, Juror No. 65 never claimed to have formed an opinion as to Appellant's guilt or innocence. Thus, unlike the jurors in Montgomery, id. at 718, he was not "rehabilitated" by the trial judge's "magic questions." Juror No. 65 assured court and counsel that he could be fair and impartial despite the "spectacular" media coverage, that he would decide the case solely on the evidence presented in court, and that he would follow the trial court's instructions in deciding the case.

> There is no per se rule that mere exposure to media reports about a case merits exclusion of a juror. To the contrary, in order to merit disqualification of a juror, the media reports must engender a predisposition or bias that cannot be put aside, requiring the juror to decide a case one way or the other. . . . The Constitution does not require

> ignorant or uninformed jurors; it requires impartial jurors. While it may be sound trial strategy for an attorney to exclude anyone with knowledge of the facts or the parties, such a result is not mandated by the Constitution.

Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 838 (2000) (quoting McQueen v. Scroggy, 99 F.3d 1302, 1319-20 (6th Cir. 1996) (emphasis added). We conclude from the totality of the circumstances that the trial court did not abuse its discretion in overruling the motion to excuse Juror No. 65 for cause.

II. SUFFICIENCY OF THE EVIDENCE.

Appellant asserts that the evidence against him was insufficient to support his conviction of wanton murder. The crux of Appellant's argument is that given his low IQ of sixty-six, a level classified as "borderline mentally retarded," and the fact that he killed the victim while using a "normally harmless" wrestling maneuver, no reasonable juror could believe that he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that death would result from his actions, KRS 501.020(3) (definition of "wantonly"), or that the circumstances "manifest[ed] extreme indifference to human life." KRS 507.020(1)(b) (element of wanton murder). We disagree.

A trial court should not grant a motion for a directed verdict if, drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, "the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty. . . ." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). At a pretrial competency hearing, Dr. Steven Simon, a psychologist at the Kentucky Correctional Psychiatric Center (KCPC), testified that Appellant was capable of appreciating the criminality of his conduct at the time the offense was committed. Thus, the trial court did not err in permitting the jury to decide whether Appellant was aware of

the risk of slamming the head of a ninety-six-pound female child against a concrete floor. The drafters of the Model Penal Code had this to say about the element of "extreme indifference to human life":

> There is a kind of [wanton] homicide that cannot fairly be distinguished . . . from homicides committed [intentionally]. [Wantonness] . . . presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where [wantonness] should be assimilated to [intention]. The conception that the draft employs is that of extreme indifference to the value of human life. The significance of [intention] is that, cases of provocation apart, it demonstrates precisely such indifference. Whether [wantonness] is so extreme that it demonstrates similar indifference is not a question that, in our view, can be further clarified; it must be left directly to the trier of facts.

1974 Commentary to KRS 507.020(1)(b) (quoting Model Penal Code, § 201.2, Comment 2 (Tent. Draft No. 9, 1959) (emphasis added).

In view of Dr. Simon's opinion as to Appellant's competency at the time the offense was committed, we conclude that the trial court did not err in submitting the issue of Appellant's mens rea to the jury. See Commonwealth v. Mackert, 781 A.2d 178, 187 (Pa. Super. Ct. 2001) (evidence was sufficient to support third degree (wanton) murder conviction where defendant abused child to such an extent that child subsequently died due to blunt force trauma).

III. REBUTTAL TESTIMONY.

Appellant asserts that the trial court erred by allowing the Commonwealth to present the testimony of Dr. Simon as rebuttal evidence. More specifically, Appellant claims that Dr. Simon was improperly permitted to repeat allegedly incriminating statements that Appellant made to him at KCPC. We disagree.

The pattern of events giving rise to this issue is unusual. Early in the afternoon of the second day of trial, the Commonwealth moved for an overnight recess so that it could procure the attendance of additional witnesses. The trial court sustained Appellant's objection and instructed the Commonwealth to produce additional witnesses or close its case. Having no additional witnesses available, the Commonwealth rested its case-in-chief. After the denial of his motion for a directed verdict of acquittal, Appellant then proceeded with his defense. However, at the conclusion of the testimony of his first two witnesses, Appellant also moved for an overnight recess, claiming that his final two witnesses, Dr. Simon and Dr. Dennis J. Buchholz, another KCPC psychologist, could not be present that day.[1] Not surprisingly, the prosecution objected, citing the trial court's previous refusal of its request for a recess. Appellant claimed that the testimony of both witnesses was necessary to prove his sympathy for the victim in order to negate the inference of extreme indifference to human life. After a lengthy in-chambers discussion, the trial court granted Appellant's motion, subject to the condition that the Commonwealth could reopen its case-in-chief to present testimony as to Appellant's lack of sympathy for the victim, in addition to its right to present evidence in rebuttal.

The following morning, the Commonwealth elected not to introduce any "lack of sympathy" evidence and Appellant presented the testimony of Dr. Buchholz. Contrary to Appellant's previous representations, Dr. Buchholz's testimony had little to do with Appellant's sympathy for the victim. Instead, Dr. Buchholz testified that his examinations of Appellant's motor functions, memory, and IQ had led him to conclude

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[1] Appellant did not serve Dr. Simon with a subpoena until 2:00 p.m. that day.

that Appellant had an IQ of sixty-six and other significant cognitive limitations that placed him in the category of "borderline mental retardation." Dr. Buchholz opined that, based upon Appellant's cognitive limitations and his less-than-ideal home life and upbringing, his educational development was at only a third grade level. Dr. Buchholz added that he forwarded his findings to Dr. Simon, who then used them in his subsequent report to the trial court.

At the conclusion of Dr. Buchholz's testimony, Appellant closed his case. The Commonwealth then called Dr. Simon on rebuttal. Appellant did not initially object to the Commonwealth's decision to call Dr. Simon as a rebuttal witness. Dr. Simon testified that despite Appellant's cognitive limitations, he possessed sufficient mental faculties to understand and appreciate the magnitude of his conduct. He then proceeded to repeat Appellant's account to him of the events leading up to the victim's death. Appellant objected, claiming that Dr. Simon's reiteration of Appellant's statements to him was improper rebuttal evidence. The Commonwealth explained that the statements were offered to rebut Dr. Buchholz's opinion as to Appellant's cognitive impairment by showing that Appellant could succinctly recount details of the events occurring on the night of the victim's death. The trial court overruled Appellant's objection but admonished the jury to consider Dr. Simon's testimony only to the extent that it related to Appellant's mental condition.

Dr. Simon then recounted, in part, what Appellant told him regarding the night of Patricia's death:

> [Appellant] stated that the victim in this case was Dorothy's thirteen-year-old daughter who he stated was disabled and picked on a lot by her family – by everybody. [Appellant] stated that the victim "has the mind of a five year old." He recalled that on the night in question, he had been drinking and smoking marijuana and was in bed with his girlfriend, who was

> pregnant at the time. [Appellant] recalled that "I drank a lot and smoked a lot of bud." He recalled that the victim, Patricia, who was thirteen years of age, began acting out by pulling her hair and calling herself stupid. [Appellant] recalled that "I told Patricia 'you're not stupid' and put her on the wall military style." He described this as a form of discipline where he instructed Patricia to squat against the wall "with her back end to it." [Appellant] stated that he was trying to discipline Patricia for these types of behaviors, as well as other self-abusive type behaviors such as biting herself. [Appellant] stated that Patricia's mother, Dorothy Slaten, was present "but wouldn't do nothing." [Appellant] reported that the last thing he recalled was, "I said don't get off the wall" and he fell asleep. [Appellant] stated that the next thing he remembered was his girlfriend waking him up and telling him that "Patricia is off the wall." However, he stated that when he woke up, he saw Patricia lying down and that "I say what happened?" According to Appellant, his girlfriend and the other children, "all of them said 'Mommy did it.'" He recalled that he picked Patricia up off of the floor and put her on the bed and told the ten-year-old boy present, Nathan, to call 911 "and I left." [Appellant] stated that he left because he was afraid of the ambulance and police coming. Indeed, he stated that he climbed a tree and "watched everything," including observing three police officers pulling up. [Appellant] stated that he stayed in the tree all night until the police left the next morning. He recalled that he then came down from the tree, went to a friend's house and that "I kept calling the hotel to patch me to room 145 to see if everything was okay." He finally reached his girlfriend, who informed him that her mother was at the hospital.

Appellant claims that it was reversible error to permit Dr. Simon to repeat these statements as rebuttal evidence. We disagree.

Although a trial court may "for good reason in furtherance of justice" allow the parties to reopen their case-in-chief, RCr 9.42(e), the Commonwealth chose not to do so when given the opportunity. Instead, it offered the testimony of Dr. Simon in rebuttal. Nevertheless, RCr 9.42, which governs the order of proceedings in a criminal trial, provides that "[t]he parties respectively may offer rebutting evidence, unless the court, for good reason in furtherance of justice, permits them to offer evidence-in-chief." RCr 9.42(e). KRE 611(a) also provides that:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

It is well-established that a trial court has "great discretion" in determining whether to allow the introduction of rebuttal evidence, and a decision will not be overturned on appeal absent a clear abuse of discretion. Ruppee v. Commonwealth, Ky., 821 S.W.2d 484, 487 (1991); Pilon v. Commonwealth, Ky., 544 S.W.2d 228, 231 (1976). Also, whether to admit testimony in rebuttal, which properly should be introduced in chief, is ordinarily a matter within the sound discretion of the trial court. Cf. Gilbert v. Commonwealth, Ky., 633 S.W.2d 69, 70 (1982); Robert G. Lawson, The Kentucky Evidence Law Handbook §3.20, at 156-57 (3rd ed., Michie 1993) ("The trial judge has broad discretion to control the interrogation of witnesses and production of evidence and decisions made in the exercise of that discretion will not be disturbed absent a showing of abuse and prejudice."). See also Davis v. Commonwealth, Ky., 795 S.W.2d 942, 947 (1990). Federal cases interpreting Federal Rule of Evidence (FRE) 611, which mirrors KRE 611, agree. See, e.g., United States v. Puckett, 147 F.3d 765, 770 (8th Cir. 1998) ("A trial court has discretion to exercise control over the order of interrogating witnesses to make the interrogation and presentation effective for the ascertainment of truth, Fed. R. Evid. 611, and no reversal is warranted unless an abuse of discretion affects the substantial rights of the parties.") (quotations omitted).

Of course, this discretion is not unlimited. In Gilbert, supra, we held that "[t]he Commonwealth should not be permitted to take undue advantage of the defendant and withhold important evidence until near the close of the trial, and then introduce it in the

guise of rebuttal evidence." Id. at 71 (citations omitted). Gilbert found reversible error in allowing the Commonwealth to introduce, as rebuttal evidence, the defendant's tape-recorded admission that he raped his eleven-year-old granddaughter. Id. at 70-71. Although this evidence directly contradicted the defendant's testimony at trial, we held that these statements went beyond diminishing the defendant's credibility and into providing substantive evidence of the crime. As this was presented at the end of the trial, the defendant's case was greatly prejudiced. Id. We noted that "it is improper for a trial court to permit evidence to be introduced in rebuttal that could and should have been introduced in chief, if it appears probable that its introduction after the defense has rested will have a prejudicial effect on the defendant's case." Id. at 70 (citing Archer v. Commonwealth, Ky., 473 S.W.2d 141, 143 (1971)). See also Wager v. Commonwealth, Ky., 751 S.W.2d 28, 29 (1988) (reversible error for trial court to allow jailhouse informant to testify to defendant's alleged confession as rebuttal evidence where informant had not been listed as a witness and had not testified during the Commonwealth's case-in-chief).

We find no abuse of discretion in the case sub judice. Appellant presented the testimony of Dr. Buchholz during his case-in-chief to emphasize his extremely low IQ and cognitive impairment in order to demonstrate to the jury his inability to appreciate the risk created by his conduct. The Commonwealth offered Dr. Simon's testimony to rebut this theory by showing that, despite his low IQ, Appellant had sufficient mental capacity to relate his version of the events to Dr. Simon in a succinct and logical manner. Nor are we able to perceive how the relation of Appellant's statements to Dr. Simon prejudiced his defense. Appellant did not admit to having caused Patricia's fatal injuries. In fact, his version was that the other children claimed that their mother had

injured Patricia. Since Appellant did not testify in his own defense (he could have been impeached by his prior felony offense), he was able to impart this information to the jury through Dr. Simon without being subjected to cross-examination.

Appellant received adequate notice of the Commonwealth's intent to use Dr. Simon as a rebuttal witness. Written notice of that fact and a copy of Dr. Simon's report were filed and served on defense counsel on January 9, 2002, twenty days prior to trial. Compare Wager, supra, at 29 (jailhouse informant not previously listed as a witness). Finally, the trial court's admonition to consider the evidence only for the purpose of evaluating Appellant's mental state further reduced any possible prejudice. Ruppee, supra, at 487. The trial court did not abuse its discretion in allowing Dr. Simon to relate to the jury as rebuttal evidence the statements made to him by Appellant at KCPC.

Accordingly, the judgment of conviction and the sentence imposed by the Henderson Circuit Court are affirmed.

All concur.

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