IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0572-MR DATE 12-16-04 Ella Growitt, DC.

NORBERT WILCOX — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
2002-CR-0884

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Wilcox of one count of first-degree sodomy and four counts of first-degree sexual abuse. He was sentenced to a total of twenty years in prison.

The questions presented are whether a hearing was required to determine the competency of the child witnesses; whether Wilcox was denied his right to confront and cross-examine witnesses; whether the charges were properly tried together; whether a juror should have been struck for cause; whether the amending of the indictment was permissible; and whether the closing argument was improper.

Wilcox was indicted for eight counts of sexual misconduct against his two step-daughters, both of whom were less than twelve at the time of the offenses. Regarding the youngest step-daughter, he was charged with three counts of first-degree rape, one

count of first-degree sodomy and two counts of first-degree sexual abuse. As to the oldest step-daughter, he was charged with two counts of first-degree sexual abuse. Both victims, then ages 12 and 14, testified at trial about the sexual acts committed by Wilcox over a two-year period. They each indicated their reluctance to report the abuse because they were scared of their stepfather. When the youngest victim told her mother of the abuse, she told Wilcox and he whipped her. Wilcox testified in his own defense and completely denied the charges, attributing the allegations to family and peer pressure to lie about him. He admitted to disciplining the girls but denied ever whipping them.

The trial judge entered a directed verdict on two of the counts of first-degree rape because the youngest victim only testified to one episode. The remaining offenses were submitted to the jury, which acquitted Wilcox of the single rape charge, but convicted him of all the other crimes. He was sentenced to twenty years for the sodomy offense and two years on each count of sexual abuse, all the sentences to run concurrent for a total of twenty years in prison. This appeal followed.

I. Competency Hearing

Wilcox argues that the trial judge committed reversible error by failing to hold a hearing to determine whether the child witnesses were competent to testify. We disagree.

At a hearing on the written motion, defense counsel contended that the two victims were 9 and 12 when the alleged offenses occurred and that they may have lacked the capacity to accurately perceive events at that time. Defense counsel also alluded to the existence of mental health records that he had recently discovered concerning both victims, providing him with a basis to believe that the children had been

treated for mental illness. Those records were not submitted for review at that time. The trial judge denied the motion for a separate hearing, noting that the children were presumed to be competent and that the concerns raised by defense counsel could be addressed on cross-examination.

Defense counsel renewed his motion for a competency hearing on the morning of trial, reiterating his previous argument concerning the age of the children, but he did not make mention of the mental health records. The trial judge again denied the motion, stating that defense counsel had not shown how or why the victims should be considered incompetent.

KRE 601 provides that "Every person is competent to be a witness except as otherwise provided in these rules or by statute." When the competency of an infant to testify is properly raised, it is the duty of the trial judge to carefully examine the witness to ascertain whether she is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to speak the truth. Bart v. Commonwealth, Ky., 951 S.W.2d 576 (1997).

Here, the trial judge did not abuse his discretion when he determined that there had not been a sufficient showing of potential incompetence to justify a separate hearing. The request for the competency hearing was based on the age of the child witnesses and the existence of certain mental health records. Age, however, is no determination of competence to testify. Humphrey v. Commonwealth, Ky., 962 S.W.2d 870 (1998). Further, the mental health records that defense counsel alluded to during the initial hearing were never provided to the trial judge at the hearings on the motions. Defense counsel never made a sufficient claim that those records in any way reflected on the competency of the children to testify. Also, the claim that one victim received

assistance for mild mental retardation was raised only by Wilcox during his testimony at trial. Thus, defense counsel did not properly raise an issue regarding the competency of the children to testify.

As observed in Commonwealth v. Barroso, Ky., 122 S.W.3d 554 (2003):

> The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. If as a result of a mental condition such capacity has been substantially diminished, evidence of that condition before, at and after the occurrence and at the time of trial is ordinarily admissible for use by the trier in passing on the credibility of the witness.

Id. at 562 *quoting* State v. Esposito, 471 A.2d 949, 955 (Conn. 1984). The trial judge reached this same conclusion. Under all the circumstances, the denial by the trial judge to hold a separate competency hearing was not an abuse of discretion.

II. Confrontation and Cross-Examination

Wilcox contends that his right to confront and cross-examine the witnesses against him was violated when the forensic interviewer destroyed her handwritten notes. We disagree.

Defense counsel filed a written motion to compel discovery and specifically requested that the Commonwealth produce any handwritten notes taken during the forensic interviews of the victims at Children First. This Court takes judicial notice that Children First is part of a private not for profit organization in Jefferson County that provides crisis services for sexually abused children. The Commonwealth filed a response stating that the information was not in its possession and that the defendant could subpoena it. After hearing arguments on the motion, the trial judge granted the motion by Wilcox and ordered the Commonwealth to "provide any notes taken by any interviewer(s) of the children." Defense counsel subsequently learned that the person

who conducted the forensic interviews of the two victims at Children First had destroyed her notes.

The trial judge held a hearing on the morning of trial concerning the destruction of the notes. The forensic interviewer testified at that hearing that she takes notes during the interview and that she types a report based upon those notes. She then destroys the notes, either immediately after typing the report or within a few days. The notes in this case were destroyed before the issuance of any order of preservation or subpoena.

Defense counsel argued that the interview notes should have been preserved and turned over in discovery rather than destroyed because the forensic interviewer was acting as an agent of the Commonwealth and the notes constituted a substantially verbatim statement of a witness under RCr 7.26. Defense counsel did not request a dismissal based on the destroyed notes, but asked that any reference to the second forensic interview to which the destroyed notes pertained be excluded. The trial judge overruled the motion.

Initially, we must observe that the Commonwealth's obligation to turn over records includes those records actually in the hands of the prosecutor, its investigator, and other agencies of the state. See Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 707 (1994) *overruled on other grounds by* Commonwealth v. Barroso, Ky., 122 S.W.3d 554, 563-64 (2003). Children First is not an agent of the state and even if we accepted the argument by Wilcox that it was, RCr 7.24(2) "authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or

prosecution of the case . . ." Wilcox did receive the case summaries from the forensic examiner and conducted an extensive cross-examination of the two victims.

We do not agree with Wilcox that the failure of the forensic interviewer to retain her handwritten notes constitutes any type of violation of either the state or federal constitution. There is no evidence that the forensic interviewer destroyed the notes in a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland and its progeny. There is no credible allegation that the employee of Children First was not acting in good faith and in accordance with her normal practice. The record contains no allegation of official animus towards Wilcox or of a conscious effort to suppress exculpatory evidence. Wilcox has failed to demonstrate that the destroyed notes possessed an exculpatory value that was apparent before they were destroyed. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). See also Barroso, supra. The trial judge did not err in denying the motion to exclude the evidence.

III. Severance

Wilcox asserts that the trial judge committed reversible error by denying his motion to sever the counts of the indictment. He claims that because the two offenses involved different types of conduct against different victims, the offenses could not be consolidated.

RCr 6.18 permits the joinder of two or more offenses in the same indictment if the offenses are of the same or similar character or based on the same acts or transactions connected together or constitute parts of a common scheme or plan. Additionally, RCr 9.12 permits two or more indictments to be consolidated for trial if those offenses could have been joined in a single indictment. Joinder is inappropriate,

however, when it appears that a party or the Commonwealth will be prejudiced by the joinder of offenses in a single indictment. RCr 9.16. If a party or the Commonwealth will be prejudiced, the trial judge must order separate trials of counts or provide whatever other relief justice requires. The decision to join or sever is within the sound discretion of the trial judge and an exercise of that discretion will not be disturbed unless clear abuse and prejudice are shown. Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972) *overruled on other grounds by* Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985).

Here, the trial judge did not abuse his discretion in denying the motion to sever. The circumstances surrounding the crimes are very similar. All the offenses involved sexual acts with persons under the age of 12 by forcible compulsion. Both victims were the step-daughters of Wilcox. The acts were committed by Wilcox in the family home and were closely related in time. All the sexual abuse charges involved digital penetration, with at least one episode with each victim occurring while Wilcox gave the victim a bath. Both victims indicated their fear of Wilcox due to the whippings he would administer to them. Considering all the circumstances, including the sentence imposed, Wilcox has failed to show that he was prejudiced.

IV. Motion to Strike Juror for Cause

The trial judge did not abuse his discretion by refusing to strike juror #22161 for cause. During jury selection, defense counsel told the venire panel that evidence would be introduced showing that Wilcox had a tumultuous relationship with his wife that involved physical altercations and that he disciplined the children by spanking them and sometimes whipping them with a belt. Defense counsel then asked if anyone would be biased against Wilcox because he used that kind of discipline. Juror #22161

responded that he "probably would be" biased. He indicated that he did not believe in hitting a child with a belt. When asked by defense counsel if he might not be able to be fair, juror #22161 responded, "It's a possibility."

Later, defense counsel informed the venire panel that the wife filed for an EPO against Wilcox. At that point, Juror #22161 offered that he recognized Wilcox's name because he worked for the sheriff's office and "may have entered that EPO." He also indicated that he may have read the file and reviewed the allegations when entering the EPO. Upon completion of voir dire by defense counsel, the trial judge asked the entire panel whether anyone could not render a fair and impartial verdict. No one on the panel indicated that they could not. Juror #22161 was removed from the case by peremptory challenge after a motion to strike for cause had been denied.

Motions to strike jurors for cause are within the sound discretion of the trial judge. Bowling v. Commonwealth, Ky., 873 S.W.2d 175 (1993). No implied bias arises from mere juror exposure to information about the case; rather it must be shown that the exposure actually biased the juror. Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 739 (1996). The party alleging bias bears the burden of proving that bias and the resulting prejudice. Caldwell v. Commonwealth, Ky., 634 S.W.2d 405 (1982). Unless the trial judge's action was clearly erroneous, this Court will not reverse the trial court in matters regarding the bias and impartiality of a juror. Scruggs v. Commonwealth, Ky., 566 S.W.2d 405, 410 (1978).

Here, the response by Juror #22161 to the question posed by defense counsel concerning discipline was equivocal. When the trial judge asked the entire panel if anyone could not render a fair and impartial verdict, this juror did not indicate that he could not. Further, it was never established that the employment of the juror at the

Sheriff's office gave him any special knowledge about the case. The refusal of the trial judge to strike juror #22161 for cause did not violate the right of Wilcox to a fair and impartial jury and did not unnecessarily compromise his use of the allotted peremptory challenges. No abuse of discretion occurred.

V. Amending of Indictment

It was not an abuse of discretion to allow the Commonwealth to amend the indictment. During the testimony of the two victims, each girl related the approximate time of the assaults to which school they were attending at the time. Another witness for the Commonwealth, a public school/court liaison, later gave the chronology of the dates the two victims attended various schools. At the close of the Commonwealth's case, defense counsel moved for a directed verdict, arguing that based on the testimony of the witnesses, some of the offense dates had occurred outside the indictment period. The prosecutor agreed that the dates were different, but stated that he would move to amend the indictment. The trial judge overruled the directed verdict motion and indicated that he would give the Commonwealth the opportunity to amend the indictment because the period was relatively the same.

At the conclusion of all the proof, the Commonwealth renewed its motion to amend the indictment to reflect the evidence as follows: counts one and four, from between November 1, 2000 and February 28, 2001, to between March 8, 1999 and March 8, 2001; counts five and six, from between March 1, 1999 and February 28, 2001, to between March 8, 1999 and March 8, 2001; and counts seven and eight, from between August 5, 1999 and February 28, 2001, to between March 8, 1999 and December 28, 2000. Ultimately, the trial judge overruled the objection by defense counsel and permitted the Commonwealth to amend the indictment.

An indictment may be amended at any time to conform to the proof providing the substantial rights of the defendant are not prejudiced and no additional evidence is required to amend the offense. RCr 6.16. Here, only the dates of the occurrences of the alleged offenses were changed by the amendment. The amendment made no substantive change in the indictment; it did not state an additional or different offense within the meaning of RCr 6.16. There could be no prejudice to Wilcox because his defense was a complete denial. Cf. Gilbert v. Commonwealth, Ky., 838 S.W.2d 376 (1991). The trial judge did not abuse his discretion in permitting the Commonwealth to amend the indictment.

VI. Closing Argument

Wilcox argues that the trial judge committed reversible error by permitting the Commonwealth to make several prejudicial comments during its closing arguments. He claims that the allegations by the Commonwealth concerning his failure to call certain witnesses impermissibly shifted the burden on him to prove his innocence. Wilcox also asserts that the prosecution improperly claimed that the defense had falsely accused the Commonwealth of telling the two victims to lie.

When reviewing claims of error in closing argument, "the required analysis, by an appellate court, must focus on the overall fairness of the trial and not the culpability of the prosecutor.... A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 412 (1987). Reversal is only justified when the alleged prosecutorial misconduct is so serious as to render the trial fundamentally unfair. Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir.1979); Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

Here, the prosecutor did not go beyond the permissible boundaries of closing argument. The prosecutor is allowed to comment on the failure of the accused to introduce witnesses. Walker v. Commonwealth, Ky., 476 S.W.2d 630 (1972) *citing* Francis v. Commonwealth, 311 Ky. 318, 224 S.W.2d 163 (1949). See also Maxie v. Commonwealth, Ky., 82 S.W.3d 860 (2002), wherein we held that it was a reasonable comment on the evidence for the prosecutor to state during closing argument that "We didn't hear from the defendant's mother. He could've called her but he didn't." There was no impermissible shifting of the burden of proof, but only reasonable comments on the evidence and reasonable argument in response to matters brought up by defense counsel. Cf. Hunt v. Commonwealth, Ky., 466 S.W.2d 957 (1971).

Wilcox received a fair trial. He was not deprived of any due process right under the federal or state constitutions.

The judgment of conviction is affirmed

Lambert, C.J., Graves and Wintersheimer, JJ., concur. Keller, J., concurs in result only. Cooper, J., dissents by separate opinion and is joined by Johnstone and Stumbo, JJ.

COUNSEL FOR APPELLANT:

Elizabeth B. McMahon
Assistant District Defender
Office of Jefferson Dist. Public Defender
200 Advocacy Plaza
719 West Jefferson St.
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Dr. Suite 200
Frankfort, KY 40601-8204

RENDERED: OCTOBER 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-0572-MR

NORBERT WILCOX — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
2002-CR-0884

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE COOPER

Appellant was charged with sexually abusing his two minor stepdaughters. Anticipating that there would be evidence that Appellant was a harsh disciplinarian who sometimes whipped the children with his belt, defense counsel advised prospective jurors of that fact during voir dire and inquired: "Would anyone be biased against him because he used that kind of disciplinary punishment with his children?" Juror No. 22161 immediately responded: "I probably would be." The following colloquy then ensued between defense counsel and Juror 22161:

Counsel: Okay. Can you tell me why?

Juror: I just don't believe in it. I don't believe in whipping a child with a belt.

Counsel: Well, sir, I won't say if I agree or not, but do you think it would pose a problem for you as a juror sitting here, to hear that if he spanked his children, that he used a belt to spank or whip his children?

Juror: I don't [inaudible].

Counsel: So then you actually do think that you might not be able to be fair?

Juror: It's a possibility.

Counsel: Thank you. Thank you for your honesty.

Later, when defense counsel informed the prospective jurors that Appellant's wife had obtained an emergency protective order (EPO) against Appellant, the same juror stated that he recognized Appellant's name because he worked for the sheriff's office and "may have entered that EPO." He also indicated that he may have read the file and reviewed the allegations at the time he entered the EPO.

Juror No. 61176 also responded that he might be biased against Appellant if there was evidence that he whipped the children with a belt.

Juror: It depends on the severity of it.

Counsel: Well, he would use a belt sometimes, and he would whip them. I mean, they would cry. Now, to get into marks, I don't know, it could come out. I don't know that. But for the . . . him and his wife used to have physical confrontations where, I mean, someone would be hit. Would that pose a problem?

Juror: Probably.

Counsel: Okay. And could you tell me why that would pose a problem? Just your personal beliefs?

Juror: Yes.

Counsel: Okay. Would you be able to sit, would you place Mr. Wilcox on a fair playing field or would you be now kind of looking at him maybe [inaudible] not presumed innocent now because of these physical confrontations.

Juror: I could probably separate the two.

Counsel: Would you be biased against him? If you went back in the jury deliberation room and it was so close, would that be a

side factor to find him guilty, because of, "Well, he punished them this way, maybe we'll punish him another way," in the back of your mind?

Juror: Possibly.

Counsel: Okay. Thank you for you honesty.

Because Juror 61176 was removed by random draw, the only significance of his colloquy with defense counsel is that, during the strike conference, the trial court confused his answers with those given by Juror 22161:

Counsel: The next one would be 22161, seat number 42. He was the one that works in the sheriff's office. He said he might know Mr. Wilcox from issuing EPOs. He said he was, he had a real problem with the physical abuse, and he said, "I don't think I can be fair."

. . .

Court: I'm going to deny your motion on Juror No. 22161 because he said he could separate the charges, as I recall, and that's sufficient for me because we're not trying a physical abuse case.

Obviously, the trial court mistakenly attributed to Juror 22161 Juror 61176's statement about being able to separate the charges. As noted by the trial court, the importance of that fact is that Appellant was being tried for sexual abuse under KRS Chapter 510, not criminal abuse under KRS Chapter 508. He was entitled to be tried by jurors who would convict him only if they believed beyond a reasonable doubt that he sexually abused the victims and not because he whipped them with his belt.

> It is fundamental, and goes to the very root of the administration of justice, that parties litigant are, in jury trials, entitled to have their causes heard by unbiased and unprejudiced jurors.

Sizemore v. Commonwealth, 210 Ky. 637, 276 S.W. 524, 526 (1925). "[A] party charged with a criminal offense is entitled to be tried by a fair and impartial jury composed of members who are disinterested and free from bias and prejudice, actual or

implied or reasonably inferred." Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 864 (1993) (internal quotations omitted), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 891 (1997). As the author of today's majority opinion once wrote: "It is the possibility of bias or prejudice that is determinative in a ruling on a challenge for cause." Randolph v. Commonwealth, Ky., 716 S.W.2d 253, 255-56 (1986) (emphasis added), overruled on other grounds as recognized by Commonwealth v. Wolford, Ky., 4 S.W.3d 534, 538 (1999).

Juror 22161 should have been excused for cause. Appellant exhausted all nine of his peremptory strikes, including one that was used to strike Juror 22161. He is entitled to a new trial. Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 374 (2002); Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 260 (1993).

In my view, the majority opinion also improperly takes "judicial notice" that Children First is a private, not-for-profit organization. See McElhinney v. William Booth Mem'l Hosp., Ky., 544 S.W.2d 216, 217 (1976) (circuit court improperly used the doctrine of judicial notice to conclude that Booth was a private hospital). I am personally unaware of the status of Children First and, thus, am unwilling to join the majority's "judicial notice" that it is a private, not-for-profit entity. The issue was discussed but not resolved at a hearing held in the trial court on October 9, 2002. The prosecutor stated that "[i]t has always been our position that Children First is a separate agency apart from us." The trial court suggested that Children First should be represented by its own attorney on the discovery issue and suggested that, perhaps, the Attorney General's Office would do so. The prosecutor responded that Children First had its own attorney. Regardless, the fact of which the majority opinion takes judicial notice was not resolved. The trial court ultimately entered an order, inter alia,

requiring that "[t]he Commonwealth shall also provide any notes taken by an interviewer(s) of the children." Did that amount to judicial notice that Children First is a governmental agency?

Accordingly, I dissent.

Johnstone, and Stumbo, JJ., join this dissenting opinion.