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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-000510-MR DATE 10-13-05 ELIA Grant D.C.

JORGE LUIS TAMAYO-MORA APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
2000-CR-002135

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant was adjudged guilty of one count of first degree sodomy and two counts of first degree sexual abuse and given sentences of twenty years, five years and five years to run consecutively for a total sentence of thirty years. Appellant appeals to this Court as a matter of right asserting that the trial court erred in (1) not upholding his Batson challenge to the Commonwealth's peremptory strike of an African-American juror, even though the trial court found a race-neutral explanation for the strike, (2) in allowing evidence of his escape from the home incarceration program after he was compelled to give a DNA sample for comparison testing, (3) in allowing the Commonwealth to call expert witnesses since no notice of their intended use at trial was given – other than copies of their reports and (4) in failing to prohibit the Commonwealth's DNA expert from testifying as to when you would expect to find traces of skin DNA on a bath towel. For the reasons set out hereinafter, we affirm the judgment of the

trial court.

FACTS

The Appellant, Jorge Luis Tamayo-Mora immigrated to the United States from Cuba in November of 1995. By the summer of 1999, he was living in an apartment complex in Louisville, where he met Alexander and May Aquilla, along with their daughter, L.P. He then began spending a lot of time with the Aquilla family, and after awhile, Alexander suspected Appellant and his wife, May were having an affair. This ultimately led to a fight, after Alexander came home early from work and caught Appellant in his apartment taking a shower at 3:00 a.m.

Thereafter the marriage between Alexander and May deteriorated and they separated in October 1999. The Appellant then moved into May's residence.

During the separation, May maintained custody of L.P.; however, L.P. would visit often with her father. At some point, he noticed she was acting differently. Upon inquiry, she replied only that Appellant was in her room sometimes. Later, on August 12, 2000, L.P. told her mother that since the Appellant's birthday in October of 1999, he had been repeatedly coming into her room, placing his penis into her hand and ejaculating on her. When Alexander became aware of the allegations, he questioned L.P. and she further explained that not only was the Appellant putting his penis into her hand, but he had touched her vagina and buttocks and had placed his penis into her mouth.[1] He then notified the police.

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[1] She described it as his "pito," but L.P. had identified it from a drawing as his penis.

The police then took L.P. for an interview with a childcare professional to whom she explained the events, stating the Appellant rubbed her hand with his penis and placed it in her mouth and that grease would come out and she had to clean her hands by washing them or wiping them on the sheets or a towel in her room. The police then searched the residence and seized two bath towels hanging over L.P.'s bedroom door, sheets from her bed and various other items. The items were transferred to the Kentucky State Police Jefferson Regional Crime Laboratory where they were examined by Robert Thurman, a forensic biologist. In his test, Thurman found sperm cells on the maroon towel, but not on the other items.

As a result, the Appellant was arrested on August 25, 2000 and charged with one count of sodomy in the first degree and two counts of sexual abuse in the first degree. On October 3, 2000, he was indicted by the grand jury on the same offenses, and on November 8, 2000, he was transferred from jail to the home incarceration program. Then, on July 2, 2001, the trial judge ordered the Appellant to provide a saliva sample for DNA testing purposes. He submitted to the test on July 3 and the next day his monitoring device reported he was outside the range of the monitoring system. Home incarceration officers drove to his residence to locate and arrest him, to no avail.

He was located and re-arrested two years later in Las Vegas, Nevada, and returned to Louisville. In April of 2004, he was tried before a Jefferson Circuit Court jury and found guilty and convicted on all counts. He was sentenced to prison for a total of thirty years.

BATSON COMPLAINT

During jury selection, the Appellant objected to the Commonwealth's peremptory strike of African-American juror # 84141, for reasons that the Commonwealth failed to give a credible, non-discriminatory justification for the strike. Based upon the fact that both sides had struck an African-American juror, leaving one African-American on the jury, the trial judge ruled that the Appellant had made no "prima facie" showing of racial discrimination. Nevertheless, the judge asked the Commonwealth to explain its use of the peremptory strike of juror number 84141. In response, the Commonwealth stated the juror was stricken because he was young, worked as a waiter, had not been employed very long and had no children. Based upon this reason, the court ruled the strike was race-neutral and did not violate Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Batson requires a three-step analysis. **First**, the Defendant must establish a **"prima facie"** case of purposeful discrimination in selection of the jury by showing the Commonwealth exercised peremptory challenges to remove a member from the jury, such as to raise an inference the strike was used to exclude jury members on account of their race or other discriminatory basis. Batson at 96. **Secondly**, once such a showing is made, the Commonwealth must satisfy its burden of showing a race-neutral explanation for striking the juror in question. Id. at 97. **Thirdly**, if this burden is met by the Commonwealth, then the Defendant must carry the burden of persuasion of proving the allegations of purposeful discrimination. Id. at 98.

The "[t]hreshold decision concerning the existence of a **"prima facie"** case of discriminatory use of peremptory challenges involves both issues of fact and law." United States v. Alvarado, 891 F.2d 439, 443 (2d Cir. 1989), vacated on other grounds, 497 U.S. 543, 110 S.Ct. 2995, 111 L.Ed.2d 439 (1990); see also, Mahaffey v. Page, 162 F.3d 481, 484 (7th Cir. 1998). This means that, once the fact-finding has been performed, "the judge must then determine, as a matter of law, whether these underlying facts suffice to establish a prima facie case." Alvarado at 443. The fact that the Commonwealth did not use a peremptory challenge to remove all African-Americans from the jury may be used as evidence that no prima facie showing was made. Harris v. Kuhlmann, 346 F.3d 330, 346 (2d Cir. 2003).

Under the second prong of Batson, once a Defendant meets the burden of making a prima facie showing, the Commonwealth must come forth with a racially-neutral explanation for its peremptory strikes. Several jurisdictions have ruled that one's youthfulness is a racially-neutral reason for utilizing a peremptory strike. Weber v. Strippit, Inc., 186 F.3d 907, 911 (8th Cir. 1999); United States V. Maxwell, 160 F.3d 1071, 1075-76 (6th Cir. 1998); United States v. Grimmond, 137 F.3d 823, 834 (4th Cir. 1998); United States v. Jackson, 983 F.2d 757, 762 (7th Cir. 1993); Price v. State, 725 N.E.2d 82, 87 (Ind. 2000); State v. Everett, 472 N.W.2d 864, 869 (Minn. 1991); People v. McGaughy, 313 Ill. App.3d 656, 246 Ill. Dec. 447, 730 N.E.2d 127 (2000); People v. Rivera, 225 A.D.2d 392, 393, 640 N.Y.S.2d 483, 483 (N.Y. 2005); and State v. Castillo, 156 Ariz. 323, 325, 751 P.2d 983, 985 (Ariz. Ct. App. 1988).

A person's short length of employment has also been held to be a racially-neutral reason for peremptory strikes. United States v. Gillam, 167 F.3d 1273, 1278 (9th Cir. 1999); United States v. Yang, 281 F.3d 534 (6th Cir. 2002); United States v. Munoz, 15 F.3d 395, 399 (5th Cir. 1994); United States v. Hughes, 970 F.2d 227, 231 (7th Cir. 1992). Having no children is also a racially-neutral reason for using a peremptory strike. Sparks v. Texas, 68 S.W.3d 6, 11 (Tex. Crim. App.2001) (abrogated on other grounds by Guzman v. State, 85 S.W.3d 242 (Tex. Crim. App. 2002); Odom v. State, 241 Ga.App. 361, 363, 526 S.E.2d 646, 649 (1999); Balentine v. State, 730 So.2d 255, 261 (Ala. Ct. App.1999); United States v. Chandler, 36 F.3d 358, 367 (4th Cir. 1994).

Having reviewed the record, we find no violation of Batson and therefore no denials of "equal protection" as argued by the Appellant. Firstly, each side struck an African-American, while one African-American juror was left on the panel. Quite simply, this is a not a "prima facie" showing of discriminatory use. Aside from this fact, the reasons stated by the Commonwealth were race-neutral.

APPELLANT'S ESCAPE FROM THE HOME INCARCERATION PROGRAM

The Commonwealth filed a Motion in January 2004, seeking to introduce evidence of the Defendant's flight while on the home incarceration program, contending that "flight evidence" was admissible to show the Appellant's "consciousness of guilt," as well as to explain the length of time the case had been pending on the docket. The Appellant objected, arguing that this was not traditional "flight evidence" due to the later timing and circumstances of the Appellant's disappearance and further that the delay in bringing the case to trial

was not a legitimate exception to KRE 404(b). After hearing arguments, the court did not issue a ruling, but did indicate an inclination to exclude the evidence. However, on the morning of trial, the trial court changed its mind and allowed the introduction, to which Appellant objects.

Appellant was arrested and indicted on the charges on October 3, 2000. He was placed on a home incarceration program on November 8, 2000. For a short period of time, on and after December 9, 2000, the Appellant was taken off home incarceration and returned to jail due to his phone being disconnected.[2] Once Appellant found another place to live, he was released back to home incarceration. He had no further problems until the court entered an Order on July 2, 2001, requiring him to produce a saliva sample for DNA comparison testing purposes. This was done on the 3rd of July and on the 4th, the Appellant absconded. He was picked up in Las Vegas, Nevada approximately two years later and brought back to Louisville.

"It has long been held that proof of flight to elude capture or to prevent discovery is admissible because flight is always some evidence of a sense of guilt. This common law rule is based on the inference that the guilty run away, but the innocent remain, which echoes more eloquent language from the bible: 'the wicked flee where no man pursueth; but the righteous are bold as a lion.' Proverbs 28:1." Rodriguez v. Commonwealth, 107 S.W.3d 215, 219 (Ky. 2003). Evidence of flight however, must still survive analysis under KRE 403 and 404(b).

"Under KRE 404 (b)(1), evidence of other crimes, wrongs or acts is not

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[2] The phone system retains communication with the home incarceration bracelets worn by the incarcerated.

excluded by the rule if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absences of mistake or accident. This list of other purposes is illustrative rather than exhaustive." Rodriguez at 219. An act expressive of a sense of guilt falls within the authorizations of KRE 404(b)(1). Id. at 220.

Admissibility under KRE 404(b)(1) though, does not always satisfy KRE 403. To evidence this point, the Defendant calls attention to the lapse of time between the date of arrest on August 5, 2000, versus the date he absconded, July 4th 2001. This separation in time creates a balancing question for the court as it may attenuate the relevancy. Rulings under KRE 403 are reviewed for an abuse of discretion. Thompson v. Commonwealth, 147 S.W.3d 22 (Ky. 2004).

In Aiken v. Commonwealth, 68 S.W. 849 (Ky. 1902), the Defendant was arrested and charged with murder. At the examining trial he was discharged and then immediately left the state for Kansas. While in Kansas, he was indicted, but then he fled to Nebraska, where he was arrested some time later and brought back to Kentucky for trial. In regards to the introduction of these facts in the Defendant's trial for murder, this court held "[t]he proof conclusively shows that he changed his mind afterwards, and did not return to Kentucky when he knew he was indicted, but, on the other hand, fled to Nebraska. Although Appellant was discharged on the examining trial, when he afterwards knew he had been indicted, proof that he was then evading arrest was properly admitted into evidence, for flight or concealment then was as significant as if he had had no examining trial." Id. at 851.

Here, although we have a significant separation from the time of arrest to the escape, the significance of the escape becomes much more relevant than prejudicial upon consideration of the fact that he fled the day after giving the saliva DNA sample for comparison. The fact that he wasn't caught until two years later is irrelevant to the balancing consideration under KRE 403, but is instructive as to the reasons for the delay in the trial, since there were arguments as to L.P.'s lapses in memory, who at the time of the alleged events, was only 5 years of age. All evidence is intended by one party to be prejudicial to the other; it is only when the danger of undue prejudice substantially outweighs the probative value that the evidence should be excluded under KRE 403. We find no abuse of discretion by the trial court in this regard.

THE EXPERT WITNESSES AND THEIR REPORTS

In respect to these issues, Appellant argues that (1) he was not given notice that the Commonwealth would use expert witnesses in regards to its forensic biological and DNA evidence, and (2) the trial court erred in allowing such experts to give opinions outside the scope of the reports provided.

On March 5, 2001, the Commonwealth, in response to the court's pretrial order of discovery, filed a one page "report of forensic laboratory examination" from the Kentucky State Police Jefferson Regional Laboratory, signed by examiner Robert Thurman. The report stated that semen had been found on a maroon bath towel, which had been taken from L.P.'s bedroom.

On October 16, 2003, the Commonwealth filed another two page "forensic laboratory report" from Fairfax Identity Laboratories signed by two forensic

analysts, Dr. George Riley and Danielle Bernier. This report stated that DNA testing had been performed on cuttings from the maroon bath towel containing semen, as well as on saliva samples from the Appellant. The results showed that the DNA on the towel was consistent with the saliva taken from the Appellant and that the expected frequency of this DNA profile was fewer than 1 in 236 quadrillion. The report also noted that no female DNA was detected on the sample tested.

At trial, the Appellant objected to the testimony of these experts on the grounds the Commonwealth had given no notice they would appear and testify as experts. The answer is plain - the Commonwealth did not have to.

It did provide copies of their reports which plainly indicated the areas of their testimony, as well as the science involved. The reports are required under RCr 7.24(1). Witness lists are not required and may not be compelled. Lowe v. Commonwealth, 712 S.W.2d 944, 945 (Ky. 1986), see also, King v. Venters, 596 S.W.2d 721 (Ky. 1980).

Relevant to the second issue, Appellant's counsel, in his opening statement, pointed out the absence of L.P.'s DNA on the towel and further noted that the exhibit photographs of the towels in place on top of her door indicated that the towels were hung too high for L.P., who was then 5, to have reached anyway. Thus, it was the defense perspective that the DNA match could only be evidence of consensual sex between the Appellant and May.

Dr. Riley, the forensic DNA analyst and the forensic laboratory director of Fairfax Identity Laboratories testified on the second day of trial. Consistent with

his report, he testified as to the testing on the cutting from the maroon bath towel containing semen and the saliva swabs from the Appellant. However, when he began to discuss the significance of the percentages regarding DNA similarities, Appellant objected, arguing he had not been given notice of this particular testimony. This objection was rightly overruled by the trial court, finding that Dr. Riley had submitted a "standard DNA report." The report specifically noted the statistical odds of similarities as being one in 236 quadrillion. This statistical probability is at the core of DNA comparison science.

Later, the prosecutor asked Dr. Riley, if it would be common for DNA to be present on the towel if someone just wiped her hands on the towel. Defense counsel again objected and requested a mistrial on the grounds Dr. Riley was expressing an opinion outside his report. The Commonwealth countered, arguing that the Appellant had opened the door to this testimony by virtue of his opening statement that the absence of L.P.'s DNA on the towel was evidence that this towel and the sperm DNA found thereon was indicative only of consensual sex between Appellant and May. The court overruled the objection and permitted the testimony from Dr. Riley that a person's DNA ("wear DNA") would not likely be found on clothing worn for a short period of time, or a towel handled for a minimum amount of time, or for that matter, within a sample containing the Appellant's sperm, since the sperm would contain voluminous material of DNA, and would likely overshadow, or cover up, minimal amounts of "wear DNA" imprinted by hand.

At no time did Dr. Riley express an opinion on what L.P. had or had not

done with the towel. His testimony was limited to the expected parameters of the science. The scientific point was merely that DNA from skin contact requires more than minimal handling and transfers only minimal amounts of mitochondrial DNA at best as opposed to the voluminous DNA expected from a sperm sample. He did confirm that no female DNA was found on the sample that he did test. L.P. testified several witnesses after Dr. Riley and was subject to cross examination on what she did or did not do with her towel.

In times past, the Commonwealth was under no duty to give information to the accused as to what proof would be introduced, except such as was conveyed through the charge set out in the indictment. Patterson v. Commonwealth, 66 S.W.2d 513, 515 (Ky. 1933)(overruled in part by Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969), see also, Lewis v. Commonwealth, 190 Ky. 160, 227 S.W. 149, 150 (921). See, CR 76.12(4)(g). Today however, criminal discovery is controlled primarily by RCr 7.24 and 7.26, along with RCr 6.22 and RCr 5.16(3). RCr 7.24(1) provides, in relevant part:

> "Upon written request by the defense, the attorney for the Commonwealth shall...permit the defendant to inspect and copy...any relevant...(b)results or reports of... scientific tests or experiments made in connection with the particular case,..."

Only a handful of cases have considered the parameters of RCr 7.24(1) in regards to the Appellant's objection. James v. Commonwealth, 482 S.W.2d 92 (Ky. 1972) is one. In this case, the defense was not given the report of the chemist who testified regarding the drugs seized; however, it was acknowledged the report existed. Thus, our predecessor court reversed, noting: "[a] cat and

mouse game whereby the Commonwealth was permitted to withhold important information requested by the accused cannot be countenanced." Id. at 94.

Then we had Ford v. Commonwealth, 665 S.W. 2d 304 (Ky. 1984). In Ford, a serologist who found and measured skin tissue taken from a hole in the wall at a crime scene and compared it to the scratches on the Appellant's hand, was allowed to testify, over objection, that "there was little chance that the skin pieces found at the scene could have come from anyone but the Appellant ." Id. at 309. In response to the Appellant's objection, this court stated: "The contention regarding surprise is without merit. Appellant had conducted a lengthy pre-trial deposition of Alford and did not ask Alford about any comparative measurements, nor is there any evidence that Alford deliberately withheld anything. A general order requiring the Commonwealth to furnish the results of scientific tests or experiments does not avail the Appellant to relief under RCr 7.24(9), where an actual deposition was taken. This is not a 'surprise' witness but one who testified at his deposition that he had, in fact, discovered skin tissue and measured it. He was never asked if he had compared those measurements with the Appellant's wounds." Id. at 310.

Barnett v. Commonwealth, 763 S.W.2d 119 (Ky. 1989) was next in line. In Barnett, we again dealt with the testimony of a serologist, who testified that "there were faint traces of blood that could be found on the Appellant's hands and arms, and then opined that this was attributable to washing away the blood that could have been expected from the victim's wounds." Id. at 123. Further considering the objection, we noted, "this presence of a nearby puddle would support an

inference, albeit weak, that there was at least an opportunity for the Appellant to wash the blood off of his hands. This evidence was weak because the undisturbed condition of the puddle and of the Appellant and of his clothing refuted the implication that washing had occurred." Id. at 123. In reversing, this court concluded "[t]he Appellant was entitled under RCr 7.24 to be confronted with the fact that this opinion would be presented against him before the trial started so that he had a reasonable opportunity to defend against the premise." Id. citing RCr 7.24(1)(b).

We next considered the question in Milburn v. Commonwealth, 788 S.W.2d 253 (Ky. 1990). In Milburn, the ballistics expert's report, in a fatal head shot case, concluded with the finding "a light reaction to lead residue noted on exhibit #7." The expert then elaborated on the finding at trial noting "it would be consistent with his findings to assume that the weapon was in close proximity to the victim's head when it was fired." Id. at 255. This conclusion on proximity, although predominant within the science of ballistics, was not contained in the report. In reviewing the differences between this instance and Barnett, we noted, "the expert's conclusion in Barnett was based not only on the premise contained in the report, but also on an additional and necessary premise. To reach the conclusion that Barnett may have washed away the victim's blood, the serologist relied on the light blood traces he found on Barnett's hands and arms. But in order to be relevant and admissible, the expert's opinion also had to be based on the evidence that Barnett had had an opportunity to wash his hands. Yet, without prior knowledge of the expert's opinion, Barnett had no reason to develop proof

that the puddle near the murder scene was undisturbed or that Barnett's person or clothing was not damp or splashed from washing, so as to refute the expert's opinion." Id. at 256.

We next elaborated on the differences between Milburn and Barnett by noting, "in contrast, the firearms examiner's opinion in the case...was drawn directly from the premise that a light reaction to lead residue was found in hair taken from the wound to the victim's head. The report stated that one of the purposes of the examination was to determine whether lead residue was present on the victim's hair sample. This information serves the commonly recognized purpose of determining the proximity between the gun muzzle and the victim. **The expert relied on no additional premise against which Appellant claims a need to defend himself.** Under the facts presented, we held the trial court did not err under discovery rules, court orders, or Barnett, in allowing the expert to testify as to his opinion on proximity based upon the result of his examination of the evidence. Id. at 256. Milburn, noted by footnote that this connection was important to the science. Id. at 256, Fn.1.

We next considered the question in Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997). In Collins, "Dr. Bates conducted the medical exam on L.T. and documented in her report that the L.T. still had a hymen. The report extensively delineated physical findings and described in detail the characteristics of L.T.'s hymen. Dr. Bates concluded that her findings were indicative of sexual abuse. In accordance with the discovery order, the Commonwealth provided Appellant a copy of the report." Id. at 573. At trial, Dr. Bates testified "as to the contents of

her report and her conclusion that L.T. had been sexually abused despite the fact that the hymen was still present. Over defense's objection, she further stated that it was not uncommon for women who have had numerous sexual encounters to still have a hymen. In fact, Dr. Bates commented approximately 50% of the sexually active women she examined retained a hymen. She stated that her opinion was based upon her experience with pelvic examinations, as well as extensive medical research she had studied. Appellant contended on appeal that he should have been provided all the research and literature Dr. Bates relied upon in stating her expert opinions. He further argued that these omissions left him ill-prepared to counter Dr. Bates' testimony that sexual intercourse does not destroy the hymen.

In commenting, we noted "the studies referred to by Dr. Bates were not made in connection with the present case. Further, there is no requirement that an expert tender each and every article or study upon which an opinion is based...the Commonwealth was not required under either the discovery order or the criminal rules to provide Appellant with all of Dr. Bates reading material." Id. at 574.

In concluding, we noted, "we cannot accept Appellant's contention that he was unduly surprised by Dr. Bates' testimony. Her report clearly stated that L.T. had a hymen. Further Dr. Bates concluded that the physical examination in conjunction with the history L.T. provided was indicative of sexual abuse. Reading the report in it entirety, Appellant could only have concluded that Dr. Bates was of the opinion that a female could engage in sexual intercourse and

still have a visible hymen." Id. at 574.

We last touched on the subject in Vires v. Commonwealth, 989 S.W.2d 946 (Ky. 1999). In Vires, Kentucky State Police Detective Timothy Hogg was allowed to testify as an expert in the field of accident reconstruction, even though he had prepared no opinion – thus his opinion was not given to the defense prior to trial. In fact, Detective Hogg did not express any reconstruction opinions, but rather demonstrated the scene of the accident by photographic exhibits. Photographs depicting the skid marks in the scene along with the complete police investigative file of the accident had been made available to Appellant's counsel prior to trial. Even so, Appellant contended it was prejudicial error to permit the detective to testify as an expert in the field of accident reconstruction where no opinion had been provided. In addressing the question presented, we again distinguished Barnett by noting that in Barnett, "the expert's opinion which was based not only upon the premise contained in the report, but also upon an additional and necessary premise which was that Barnett may have washed away the victim's blood. This premise in turn was based upon the finding of light blood traces found on Barnett's hands and arms which included the necessary, but undisclosed fact, that Barnett had an opportunity to wash his hands. This court noted that without prior knowledge of the expert's opinion, **Barnett had no reason to develop proof that the puddle near the murder scene was undisturbed or that Barnett's hands, arms and clothing were not wet from washing so as to refute the experts opinion.**

In the present case, Detective Hogg did not rely upon any undisclosed

premise as the basis for his opinion and all facts and supporting materials relied upon by him were provided to defense counsel. There being no undisclosed premise against which the Appellant claimed a need to defend himself, the trial court did not err in allowing Detective Hogg to testify as to his opinion based upon the results of the investigation." Vires, at 948, citing Milburn, 788 S.W. 2d at 256.

Here the witness, Dr. Riley, testified in regards to the science of DNA and what he referred to as "wear DNA" deposits and explained to the jury when, how, and why you would or would not expect to find "wear DNA" on such materials as towels. Unlike Barnett, Dr. Riley did not attempt to go outside the science in his report to depend on the victim's actual use of the towel for the jury – he merely gave the jury the expected scientific parameters for when you would or would not expect to find "wear DNA" or traces thereof, from a hand use. He relied on no additional premise outside the expected science of the subject, like Collins and Milburn. Dr. Riley did not comment on what L.P. did or did not do as was found in Barnett. That was left to L.P.'s testimony.

Thus, we find no error or constitutional implications in the rulings of the court.

For the foregoing reasons we affirm the judgment of the trial court.

All concur.

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