

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky **FINAL**

2004-SC-0316-MR

DATE 7-6-06 EJA Groun D.C.

JAMES E. COVINGTON

APPELLANT

V. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE CARL HURST, SPECIAL JUDGE  
2002-CR-0405

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, James E. Covington, appeals from his conviction in the Warren Circuit Court of rape in the first degree, sodomy in the first degree, incest, and of being a persistent felony offender in the second degree. He was sentenced to twenty years' imprisonment for the rape and sodomy convictions, and ten years' imprisonment for the incest conviction, to be served consecutively. The sentence was enhanced to a total of life imprisonment as a result of the persistent felony offender charge. He appeals as a matter of right.

***Background***

The charges herein arise from allegations made by Appellant's biological daughter, C.C. On May 17, 2002, C.C. claimed that Appellant had raped and sodomized her in her bedroom and in the family living room while her mother and younger sister slept in an adjacent bedroom. According to C.C.'s testimony, Appellant used threats against her mother, Candace, to force her to comply with his advances.

C.C. did not reveal the incident to her mother the following morning, but wrote a letter to her aunt later that day describing the events. C.C.'s aunt immediately informed authorities.

At trial, both Appellant and C.C. testified. Though a physician examined C.C. shortly after the police became involved, little physical evidence was recovered as she admitted to having taken two showers prior to disclosing the incident to her aunt. The examination did, however, reveal minor injuries to her vaginal area that could be consistent with sexual activity. This evidence was particularly damaging, in light of C.C.'s testimony that she had never previously engaged in sexual relations. Ultimately, a Warren Circuit Court jury found Appellant guilty of rape, sodomy, and incest, as well as being a persistent felony offender. Further facts will be developed as necessary.

#### ***Discovery of Counseling Records***

Appellant first argues that he was denied his right to confrontation when the trial court refused to allow complete discovery of the counseling records of Candace Covington and of C.C. Both Candace and C.C. had received counseling at the Hope Harbor counseling facility; C.C. received additional counseling at the Barren River Area Child Advocacy Center (BRACAC). Appellant moved to produce all pertinent records for review, claiming that the records could potentially include exculpatory evidence. It appears that defense counsel had information that C.C. had previously accused Appellant of inappropriate sexual behavior, and that Candace had dismissed these prior allegations. Appellant believed documents in the records might bolster his defense theory that C.C. and Candace had "invented" the allegations against him because he had been having an extramarital affair.

On defense motion, the trial court held a hearing, at which Appellant satisfactorily established a reasonable belief that an in camera review might provide exculpatory evidence. The trial court inspected the BRACAC records in the presence of both parties, describing the types of documents in the record. The trial court issued findings of fact and conclusions of law, ultimately ordering the release of three pages of the BRACAC file. A similar procedure was followed with respect to the Hope Harbor records.<sup>1</sup> Though the trial court did not issue any written findings of fact or conclusions of law, it ordered ten pages of Candace's records be released to defense counsel.

Appellant now argues that the trial court erred in refusing complete discovery of the counseling records of both C.C. and Candace Covington. He concedes that these counseling records are generally protected by the qualified counselor-client privilege. KRE 506. However, Appellant claims that the records fall within the exception defined at KRE 506(d)(2), which permits discovery of the records if the trial court finds that the communication is relevant to a material issue, that there is no available alternative means of obtaining similar evidence, and that the defendant's need for the records outweighs the interest protected by the privilege.

With respect to both the BRACAC records and the Hope Harbor records of both Candace and C.C., we conclude that the trial court followed the proper procedures for the determination as to whether Appellant was entitled to review the records. Before engaging in the in camera review, the trial court properly required Appellant to "present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability." Stidham v. Clark, 74 S.W.3d 719, 727 (Ky. 2002), quoting United States v. Zolin, 491 U.S. 554, 574, 109 S. Ct. 2619,

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<sup>1</sup> Special Judge Larry D. Raikes conducted this hearing.

2632, 105 L. Ed. 2d 469 (1989). The trial court then concluded that the requisite reasonable belief had been established and that an in camera review was warranted; Appellant of course does not argue that this determination was inappropriate. Though not required, the trial court then conducted an in camera review of the records in the presence of the Commonwealth, Appellant, and defense counsel. Barroso v. Commonwealth, 122 S.W.3d 554, 564 (Ky. 2003). ("We . . . depart from [our prior] holding that the review must be conducted in the presence of the prosecutor and defense counsel.") Following the two in camera hearings, the trial court determined that certain pages in the various files should be furnished to defense counsel. In sum, the procedures followed by the trial court protected Appellant's constitutional rights to discover relevant evidence without destroying C.C.'s and Candace's interest in protecting the confidentiality of those records.

In response to Appellant's request, we have reviewed the BRACAC and Hope Harbor records of both C.C. and Candace in their entirety. The trial court ordered the release of all pages containing potentially exculpatory evidence. The unreleased portions of the records contain information that is no way germane to Appellant's defense, and accordingly must remain confidential. The trial court did not abuse its discretion in refusing to release the remaining records to defense counsel.

***KRE 404(b) evidence***

Appellant next argues that the trial court admitted evidence in violation of KRE 404(b). The issue is preserved by defense counsel's contemporaneous objections, and involves two pieces of testimony that indicated Appellant had previously physically assaulted Candace.

Appellant first directs our attention to Candace Covington's testimony. During direct examination, Candace Covington testified that she and her husband had a "normal" relationship until she learned of C.C.'s allegations. In response, on cross-examination, defense counsel refreshed Candace's memory with a transcript of her prior statement to Detective Wiley, during which she stated that the relationship was poor up to a year prior to C.C.'s allegations. In fact, Candace explained that, by the time of C.C.'s allegations, she and Appellant argued "pretty much" and "hated each other." A short time later, at a bench conference, the Commonwealth's Attorney stated that he intended to question Candace about allegations of prior physical abuse by Appellant against her, explaining that defense counsel had "opened the door" to questions about the quality of the relationship. Over defense counsel's objections, the trial court authorized limited further questioning by the Commonwealth. While explaining that extensive testimony regarding allegations of physical abuse would not be permitted, the trial court did authorize the Commonwealth to ask Candace a single question: Why she and Appellant had grown to "hate each other."

On re-direct, the Commonwealth asked this question and Candace replied, "because we argued." The Commonwealth asked her why else she hated Appellant, to which she again responded, "just because we argued." Finally, the prosecutor asked Candace what happened during these arguments, and she said, "we'd push and shove each other." The Commonwealth then asked Candace if Appellant had ever struck her, but defense counsel objected prior to her response. The trial court sustained the objection and instructed the Commonwealth to ask that question "both ways." In this final question, the Commonwealth asked Candace if she had ever struck Appellant; she admitted that they had both shoved one another, but stated that Appellant had also

punched her. On re-cross examination, Candace admitted that she had previously told detectives that she and Appellant were "equally" aggressive with one another.

Appellant also finds error in C.C.'s testimony. During the direct examination, C.C. was asked what Appellant had said to her during the incident. C.C. testified that Appellant told her that he was "going to have to beat your [C.C.'s] mother again." Defense counsel's objection on the grounds of KRE 404(b) was overruled.

KRE 404(b) prohibits evidence of other crimes, wrongs or acts to prove action in conformity therewith. Such evidence is admissible, however, if "probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). The question of whether the probative value of the evidence outweighs its prejudicial effect is a decision within the sound discretion of the trial court. Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994).

We first analyze Appellant's allegations of error with respect to C.C.'s testimony. Appellant was charged with first-degree rape, which requires a finding of forcible compulsion. KRS 510.040(1)(a). "Force is not restricted to physical force but includes a threat that overcomes earnest resistance and places the victim in fear of immediate death, physical injury or kidnapping of himself or another person." 1974 Commentary to KRS 510.040. Testimony that Appellant threatened to beat Candace in order to place C.C. in fear is directly probative of the forcible compulsion element of first-degree rape. See Yarnell v. Commonwealth, 833 S.W.2d 834, 836-37 (Ky. 1992). That Appellant's threat happened to include reference to his own alleged prior bad act is insufficient to compel exclusion of this testimony. We find no abuse of discretion in the

trial court's determination that the testimony's probative value, and the Commonwealth's compelling need for this evidence, greatly outweighed any prejudice to Appellant.

With respect to Candace's testimony, we likewise find no abuse of discretion. It is important to note that Appellant's defense theory was that C.C. and Candace concocted the allegations against Appellant in retaliation for his extramarital affair. Thus, it was necessary for the defense to demonstrate that the marriage was tumultuous prior to C.C.'s allegations. Accordingly, on cross-examination, defense counsel questioned Candace about the marriage, and even impeached her with a prior statement when she attempted to testify that the relationship was "normal." Once defense counsel had inquired about the quality of the marriage prior to C.C.'s allegations with the specific goal of revealing the tumultuous nature of the relationship, the Commonwealth was free to further question Candace about this topic. See Muncy v. Commonwealth, 132 S.W.3d 845, 848 (Ky. 2004). The trial court did not abuse its discretion in authorizing limited inquiry regarding the nature of the relationship, while specifically prohibiting extended testimony of alleged physical abuse.

We must acknowledge, however, that the Commonwealth's Attorney improperly exceeded the scope of the permitted testimony. Though the trial court had limited re-direct examination to a single question, the Commonwealth's Attorney nonetheless asked Candace whether Appellant had ever struck or punched her. In light of the trial court's express prohibition of this line of questioning mere minutes before, we find it unacceptable that the Commonwealth would nonetheless blatantly defy this instruction in an attempt to inform the jury of Appellant's prior bad acts. This Court is not



unmindful of the effect that such a question might have on a jury, even when an objection is sustained prior to the witness's response.

However, the trial court properly cured any error. After the Commonwealth asked if Appellant had ever struck Candace, the trial court required the Commonwealth to ask Candace whether she had ever been physically aggressive towards Appellant, which she answered in the affirmative. Defense counsel highlighted this answer on re-cross examination when Candace admitted that she previously told investigators that she and Appellant were equally physically aggressive with one another. Furthermore, by virtue of Appellant's threats to C.C. that were properly admitted, the jury was already aware that Appellant had previously physically assaulted Candace. In fact, C.C. testified that Appellant repeated this threat throughout the assault. Accordingly, we conclude that any resulting prejudice was harmless.

***Exclusion of Letter***

Appellant's final allegation of error is that the trial court improperly excluded a letter that C.C. had written her boyfriend prior to May 17, 2002. In the letter, C.C. referred to "phone sex" with her boyfriend. The defense sought to question C.C. about what transpired during "phone sex," and potentially identify an alternative source for her slight vaginal injuries. The trial court ruled that the contents of the letter were too ambiguous, and prohibited its introduction. Citing Anderson v. Commonwealth, 63 S.W.3d 135 (Ky. 2001), Appellant now argues that the letter and C.C.'s testimony were admissible.

We cannot reach the merits of this issue because it is not properly preserved for review. Although a bench conference was held concerning admission of the letter during which defense counsel objected to its exclusion, defense counsel did not request

that the excluded letter be entered into the record by offer and it has not been included in the record on appeal. KRE 103. Furthermore, defense counsel did not request to cross-examine C.C. regarding the letter by way of avowal testimony. Without submission of the letter for review, and absent avowal testimony indicating what C.C. would have said regarding the letter, this Court has no meaningful and reliable basis upon which to determine whether Appellant was unduly prejudiced by the letter's exclusion. See Commonwealth v. Ferrell, 17 S.W.3d 520, 525 (Ky. 2000). ("An appellate court simply cannot address admissibility and prejudice issues in a vacuum . . . .") See also Hart v. Commonwealth, 116 S.W.3d 481, 483 (Ky. 2003). ("[A] description of proposed testimony by defense counsel [is] insufficient to preserve an alleged error in the exclusion of evidence for review.") Accordingly, we affirm as this issue is not preserved for appellate review.

***Conclusion***

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

All concur.

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