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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 15, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0348-MR
AND
2004-SC-0482-MR

ELIJAH BURNS — APPELLANT

V.

APPEALS FROM PULASKI CIRCUIT COURT
HONORABLE ROBERT E. GILLUM, JUDGE
2003-CR-0084-001 AND 2002-CR-204

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Elijah Burns, was convicted in the Pulaski Circuit Court of first-degree rape, criminal attempt to commit first-degree rape, four counts of first-degree sodomy, and nine counts of first-degree sexual abuse. He was sentenced to a total of seventy years' imprisonment and appeals to this Court as a matter of right.

Appellant's convictions stem from acts committed against three minor children under the age of twelve during the time period of October 2000 to January 2001. B.P., who was eleven years old at the time of trial, testified that she lived in an apartment with her mother and Appellant, who was her mother's boyfriend. B.P. recounted several incidents wherein Appellant put his hands and mouth on her private parts, and had her do the same to him. B.P. also claimed that on one occasion when they were in bed together, Appellant rubbed his private on her private and put it inside her "just an itty bit." B.P. further testified that she observed Appellant touch A.D. in a similar manner.

B.P. stated that on one evening when her mother was away, she, A.D., and Appellant all slept together in the same bed.

A.D., who was ten years old at the time of trial, testified that she often stayed at B.P.'s apartment. A.D. stated that Appellant licked her vaginal area and that she also saw him to do the same thing to B.P. A.D. claimed that Appellant would give her and B.P. candy afterward. A.D. further testified that Appellant would make her and B.P. rub his penis until he ejaculated. A.D. also said that Appellant rubbed his penis on her private area, but that it was over her clothes.

The third victim, D.C., was thirteen years old at the time of trial. D.C. lived in the same apartment building as B.P. D.C. testified that Appellant asked her questions about whether she had developed breasts or pubic hair, and would touch her "down there" over her clothing.

Appellant was tried by a Pulaski County jury in January 2004, and convicted of the instant offenses. Although the jury recommended a total concurrent sentence of fifty years' imprisonment, the trial court ordered the fifty year sentences for first-degree rape and first-degree sodomy to run consecutive to the five year concurrent sentences for the nine counts of first-degree sexual abuse and to the fifteen year sentence for the first-degree criminal attempt to commit rape. Accordingly, judgment was entered sentencing Appellant to seventy years' imprisonment and these appeals ensued. Additional facts are set forth as necessary.

I.

Appellant's first claim of error concerns the trial court's refusal to remove three jurors for cause. Appellant alleges that this was prejudicial to him under Thomas v.

Commonwealth, 864 S.W.2d 252 (Ky. 1992), as he was required to use peremptory strikes to remove the jurors.

During voir dire, Juror S stated that she had training in social work and sexual abuse, and that she worked for an organization that counseled people who had been physically or sexually abused. Juror S disclosed that a couple of her family members under the age of twelve had been victimized, although not sexually. Juror S stated, however, that there was nothing in her training or background that would prevent her from deciding the case based solely on the evidence presented. Next, Juror G stated that she had been inappropriately touched by an uncle when she was four or five years old. However, Juror G noted that the incident had never gone to court and that it would not affect her ability to be impartial. Finally, Juror F, a third grade teacher, advised the court that three years earlier she had a student from another county placed in her class who was so distraught she had to be removed. Juror F acknowledged that if that student turned out to be one of the three complainants, she would be unable to decide the case based on the evidence.

The trial court denied Appellant's request to remove the three prospective jurors for cause, and he thereafter exercised three peremptory strikes. Thus, none of the three prospective jurors sat on the case.

The decision whether to excuse a juror for cause is within the sound discretion of the trial court. Adkins v. Commonwealth, 96 S.W.3d 779 (Ky. 2003); Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002). "It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause." Pennington v. Commonwealth, 316 S.W.2d 221, 224 (Ky. 1958). Recently, however, in Morgan v. Commonwealth, ___ S.W.3d ____ (Ky. 2006), this Court changed the law with respect to peremptory

challenges and challenges for cause. Overruling both Thomas and its long-standing principle that reversal is required when a defendant has been forced to exhaust his peremptory challenges on jurors who should have been removed for cause, the Majority in Morgan held:

> A defendant's right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision. Rigsby v. Commonwealth, 495 S.W.2d 795 (Ky. 1973); Randolph v. Commonwealth, 716 S.W.2d 253 (Ky. 1986); Sanbom v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). As long as the jury that actually hears and decides the case is impartial, there is no constitutional violation. Even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury. Cf. Turpin v. Commonwealth, 780 S.W.2d 619 (Ky. 1989); Cf. Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).

Since none of the three jurors in question took part in Appellant's trial, we are compelled to conclude that he was not prejudiced by the trial court's refusal to strike them for cause.

II.

Appellant next argues that he was prejudiced by the admission of improper expert testimony by Dr. Dana Lister and Dr. Syed Umar. Appellant claims that neither doctor's testimony falls within the hearsay exception set forth in KRE 803(4), because B.P.'s statements were not made for the purpose of medical treatment.

Dr. Lister, an osteopathic physician, testified that she examined B.P. in January 2002, over a year after the abuse had ended. B.P. was brought to her office for the purpose of examining B.P. for sexual abuse. In fact, B.P. told Dr. Lister that she knew she was there to get her "privates checked," but that she had no current medical complaints or problems. Dr. Lister testified that although B.P.'s physical exam was normal, such was not necessarily inconsistent with a history of sexual abuse. Dr. Lister

then recounted a detailed interview she conducted with B.P., wherein B.P. repeatedly identified Appellant in describing exactly where and how he had touched her. Dr. Lister not only related to the jury B.P.'s statements concerning the frequency of the abuse, but also B.P.'s description of Appellant's penis.

Dr. Umar, a psychiatrist, testified that he only conducted an initial evaluation of B.P. in March 2001. Dr. Umar explained that with children who had allegedly been sexually abused, he did an initial evaluation to determine the focus of clinical intervention, and if there was a sexual, physical, or neglect issue, he referred the child for further evaluation. When asked what B.P. told him regarding the alleged abuse, Dr. Umar referred to his notes, stating, "Well, according to the notes, if you see I have clearly mentioned that the patient stated that she had been inappropriately touched by her [mother's boyfriend]."

KRE 803(4) provides an exception to the hearsay rule for "[s]tatements made for the purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis." At the outset, we note that it is questionable whether Dr. Lister's interview with B.P. should even qualify under KRE 803(4) on its face. B.P. was taken to Dr. Lister over a year after the sexual abuse had ceased solely for the purpose of looking for physical evidence of sexual abuse. She found none. Nor did B.P.'s statements relate to "past or present symptoms, pain, or sensations," as she plainly told Dr. Lister she had none. Thus, it would appear quite a stretch of the hearsay exception to consider many of B.P.'s statements in the interview as "medical history," or reasonably

pertinent to medical treatment or diagnosis. See Robert G. Lawson, The Kentucky Evidence Law Handbook, § 8.55[6] at 661 (4th ed. 2003).

Nevertheless, it is not necessary to engage in a line-by-line analysis of B.P.'s statements, because Dr. Lister was erroneously permitted to relate the interview in an "unsanitized" form, not only repeating B.P.'s statements alleging abuse, but also identifying Appellant throughout as the perpetrator. KRE 803(4) requires, as a prerequisite for admission, that a statement be "reasonably pertinent to treatment or diagnosis." However, it is well settled that, even in child abuse cases, "statements of identity are 'seldom if ever' pertinent to diagnosis or treatment." Garrett v. Commonwealth, 48 S.W.3d 6, 12 (Ky. 2001) (quoting United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir.1980), cert. denied, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981)). See also Souder v. Commonwealth, 719 S.W.2d 730, 735 (Ky. 1986). (Information important to an effective diagnosis and treatment "does not include information provided as part of a criminal investigation, nor does it usually include information identifying the name of the wrongdoer because normally the name of the wrongdoer is not essential to treatment.") While Garrett noted that a narrow exception exists whereby the identity of the perpetrator may be reasonably pertinent to diagnosis and treatment in a child sexual abuse case where the doctor was providing psychological treatment and the abuser was a household member, under the theory that the identity was important to treatment because the abuse would continue if the child were left in the home, such circumstances did not exist in this case. Garrett, 48 S.W.3d at 11-12. See also Edwards v. Commonwealth, 833 S.W.2d 842, 844 (Ky. 1992).

We conclude that B.P.'s identification of Appellant falls squarely under the general rule that statements of identity are not pertinent to diagnosis or treatment, and are inadmissible under KRE 803(4). See Garrett. Accordingly, the trial court erred in allowing Dr. Lister to testify as to her interview with B.P.

While Dr. Umar's testimony was not as egregious as that of Dr. Lister, he too identified Appellant as the perpetrator. And the narrow exception likewise does not apply to his testimony because B.P. no longer had any contact with Appellant at the time of her interview with Dr. Umar, thus negating a need to identify the perpetrator to protect B.P. from further harm.

III.

Appellant next contends that he was denied his constitutional right to present a defense and confront witnesses by the trial court's refusal to permit evidence that B.P. had made sexual abuse allegations against one of her mother's previous boyfriends as well as her ex-husband. During a pretrial hearing, Appellant introduced a page from a social worker's report dated April 1997, wherein B.P. claimed that her mother's boyfriend had inappropriately touched her. In addition, B.P.'s mother testified that B.P. accused her former husband of sexual abuse. B.P.'s mother stated that the allegations against the husband occurred when B.P. was three years old and against the boyfriend when B.P. was four years old. Defense counsel argued that evidence of prior false allegations was admissible as an exception to KRE 412, to show B.P.'s source of knowledge about sexual matters and under the Confrontation Clause, to impeach B.P.'s credibility. At the conclusion of the hearing, the trial court ruled the evidence was inadmissible. At trial, B.P.'s mother testified by avowal as to the prior allegations.

This Court has never previously considered how a trial court should respond when a defendant on trial for a sexual offense seeks to admit evidence purportedly demonstrating that the complainant has made other allegedly false statements to the effect that he or she has been the victim of a separate, unrelated sexual offense. However, courts that have addressed the issue "have uniformly held that evidence of false statements of unrelated sexual assaults are not excluded by the rape shield statute because they are not evidence of sexual conduct." State v. West, 24 P.3d 648, 653-54 (Haw. 2001) (emphasis in original); State v. Smith, 743 So.2d 199 (La. 1999); Smith v. State, 377 S.E.2d 158 (Ga. 1989), cert. denied, 493 U.S. 825, 110 S. Ct. 88, 107 L. Ed. 2d 53 (1989); Miller v. State, 779 P.2d 87 (Nev. 1989).

Kentucky's rape shield rule, KRE 412, provides in pertinent part:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> > (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> >
> > (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions:
>
> > (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
> >
> > > (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> > >
> > > (B) evidence of specific instances of sexual behavior by the alleged victim with

respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

The rationale behind KRE 412 is "to protect alleged victims of sex crimes against unfair and unwarranted assaults on character." Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.30[3] (4th ed. 2003). As this Court has stated, "'[t]he purpose of the Rape Shield Statute . . . is to insure that [the victim] does not become the party on trial through the admission of evidence that is neither material nor relevant to the charge made.'" Anderson v. Commonwealth, 63 S.W.3d 135, 140 (Ky. 2001) (quoting Barnett v. Commonwealth, 828 S.W.2d 361, 363 (Ky.1992)).

To be admissible, evidence of an alleged victim's behavior must be: (1) evidence of past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, i.e., the source of semen or injury; (2) evidence of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which an offense is alleged; or (3) any other evidence directly pertaining to the offense charged. KRE 412(b); Barnett, 828 S.W.2d at 363.

We conclude that the evidence in question does not fall within the purview of KRE 412. The evidence Appellant sought to introduce was not other instances of B.P.'s past sexual behavior, nor did it directly pertain to the charged offenses. Rather, it related to B.P.'s alleged propensity to make false claims of sexual abuse. Quite simply,

defense counsel wanted to show that if B.P. lied about the prior sexual abuse, then she must also have lied about the alleged sexual abuse by Appellant.

In ruling that the proposed evidence in this case was inadmissible, the trial court cited to Berry v. Commonwealth, 84 S.W.3d 82 (Ky. App. 2001), wherein the Court of Appeals upheld the exclusion of evidence of a victim's prior allegations of sexual abuse in the absence of any showing of falsity. "[T]he only way such allegations are admissible is if they are demonstrably false, and if the probative value of the evidence outweighs its prejudicial effect." Id. at 91. The Court of Appeals in Berry relied on its earlier decision in Hall v. Commonwealth, 956 S.W.2d 224, 227 (Ky. App. 1997), in which it held:

> It appears the general rule which has emerged in cases involving sexual offenses, is that the admissibility of evidence of similar accusations made by the victim depends on whether they have been proven to be demonstrably false. To comport with the defense theory of a fabrication scheme, there must be proof of the falsity of the unrelated allegations. See e.g., Hughes v. Raines, 641 F.2d 790 (9th Cir.1981); United States v. Bartlett, 856 F.2d 1071 (8th Cir.1988); United States v. Cardinal, 782 F.2d 34 (6th Cir.), cert. denied, 476 U.S. 1161, 106 S. Ct. 2282, 90 L. Ed. 2d 724 (1986); United States v. Provost, 875 F.2d 172 (8th Cir.), cert. denied, 493 U.S. 859, 110 S. Ct. 170, 107 L. Ed. 2d 127 (1989); Roundtree v. United States, 581 A.2d 315 (D.C. App. 1990); United States v. Torres, 937 F.2d 1469 (9th Cir. 1991). The importance of proof concerning the falsity of the other allegations has been enunciated in numerous state court decisions as well. See e.g., State v. Kringstad, 353 N.W.2d 302 (N.D. 1984); State v. Anderson, 211 Mont. 272, 686 P.2d 193 (1984); Little v. State, 413 N.E.2d 639 (Ind. App. 1980); State v. Blalack, 434 N.W.2d 55 (S.D. 1988); State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209 (App. 1984); State v. Barber, 13 Kan. App. 2d 224, 766 P.2d 1288 (1989).
>
> . . . .
>
> Other jurisdictions have fashioned a resolution we consider prudent. If the unrelated accusations are true, or reasonably true, then evidence of such is clearly inadmissible primarily because of

> its irrelevance to the instant proceeding. Additionally, unrelated allegations which have neither been proven nor admitted to be false are properly excluded. If demonstrably false, the evidence still must survive a balancing test, i.e., the probative value must outweigh the prejudicial effect. This approach eliminates the risk of circumventing evidentiary rules designed to protect the legitimate interests of the victim as well as the risk of obfuscating the real issues; it preserves the integrity of the trial process. Ky. R. Evid. (KRE) 403, 404, 412, and 608.

In fact, nearly every jurisdiction addressing this question has required a threshold determination of falsity prior to the admission of allegedly false statements of unrelated sexual abuse. Peeples v. State, 681 So. 2d 236, 238 (Ala. 1995). We note, however, that courts have varied widely with respect to the standard of proof required. See generally Nancy M. King, Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469 (1989).

We need not determine whether Appellant met his burden to show that the allegations were false. During the pretrial hearing, defense counsel conceded that there was no evidence to indicate whether B.P.'s prior allegations were true or false. Further, although B.P.'s mother testified that she did file a police report with respect to her ex-husband, she did not know whether any further investigation took place. And, she was unaware as to even the exact nature of the allegations against the prior boyfriend. Although Appellant points to the fact that neither man was ever charged or prosecuted, "[t]hat charges were never filed . . . does not mean [they were] false, for there are many reasons . . . charges might not be filed, including, e.g., that the prosecutor declined to pursue the charges." State v. Raines, 118 S.W.3d 205, 214 (Mo. Ct. App. 2003).

Appellant's reliance on Anderson v. Commonwealth, 63 S.W.3d 135 (Ky. 2001) is misplaced. In Anderson, the examining physician testified at trial that the victim had a "loose vaginal opening," and concluded that she had previously been penetrated, leaving the jury to believe that it must have been the defendant who penetrated her. Defense counsel attempted to cross-examine the victim regarding a report in which she told a nurse that she had previously had sex with another boy to establish another source of the victim's injury. The trial judge sustained the Commonwealth's objection on the grounds that a loose vaginal opening was not an injury under KRE 412(b)(1). Reversing the trial court, this Court held:

> The victim was a child, and unlikely to have any sexual partners. The only partner identified to the jury was Appellant. Therefore, testimony from a doctor that C.S.B. had a "loose vaginal opening" would lead the jury to believe that Appellant must have been the one who penetrated C.S.B. and caused her vaginal opening to be loose. Therefore, under [Barnett v. Commonwealth, 828 S.W.2d 361 (Ky. 1992)], it appears that the evidence of the victim's past sexual encounter is relevant to provide an explanation for why she had a loose vaginal opening, and rebut the inference of guilt. This is directly "pertaining to the offense charged," as required by KRE 412(b)(3). As a result, we find that the trial court erred in refusing to let defense counsel question C.S.B. about her prior sexual experience.

Id. at 140. In this case, however, Appellant seeks merely to introduce evidence of prior alleged false allegations. Contrary to his assertion, the evidence does not rebut Dr. Lister's testimony that a normal physical examination is consistent with a history of sexual abuse. Dr. Lister conceded on cross-examination that the findings were just as consistent with no occurrence of sexual abuse.

Nor are we persuaded by Appellant's argument that he was denied his Sixth Amendment right to confront witnesses and present a defense. Notably, we are not presented with a situation where Appellant sought to cross-examine B.P. about the

falsity of the allegations, and we specifically decline to address the constitutional ramifications of such. Here, Appellant sought to introduce extrinsic evidence to impeach B.P.'s credibility. Yet, the United States Supreme Court has "never held – or even suggested – that the long-standing rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems." Hogan v. Hanks, 97 F.3d 189, 191 (7th Cir. 1996), cert. denied, 520 U.S. 1171, 117 S. Ct. 1439, 137 L. Ed. 2d 546 (1997). See also White v. Coplan, 399 F.3d 18, 25 (1st Cir. 2005), cert. denied, ___U.S. ___, 126 S. Ct. 478, 163 L. Ed. 2d 384 (2005); State v. Raines, 118 S.W.3d 205 (Mo. Ct. App. 2003).

The admissibility of evidence is within the sound discretion of the trial court. Simpson v. Commonwealth, 889 S.W.2d 781 (Ky. 1994); Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999). We conclude that the trial court herein properly exercised that discretion in determining that, absent a showing that B.P.'s prior allegations were false, the evidence was inadmissible.

IV.

Finally, Appellant challenges the trial court's denial of his motion for a directed verdict on the first-degree rape charge pertaining to B.P. B.P.'s testimony was as follows:

B.P.	And there was once he got me in bed with him, but he never put it anywhere near the inside of my private.
Comm.	Okay. Did he ever take his private and rub your private with it?
B.P.	Yes.
Comm.	Okay. Did he put it in maybe an itty bit?
B.P.	Just an itty bit.

Comm. Okay. He put his private in your private just an itty bit?

B.P. Just an itty bit, but never inside.

Comm. Never all the way inside?

B.P. Yes.

In addition, Dr. Lister testified that B.P. told her that Appellant "touched his private to my private," but that it was "not in the hole." However, Dr. Lister then provided a detailed anatomical description of the female genitalia and testified that penetration occurred if Appellant placed his penis within the outer labia regardless of whether it went into the vaginal canal or "hole" as B.P. referred to it.

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, reserving to the jury all questions of credibility and weight of the evidence. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991); Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Benham, 816 S.W.2d at 187.

A conviction for first-degree rape, as it relates to this case, required the jury to find that Appellant engaged in sexual intercourse with B.P., who was incapable of consent because she was less than twelve years old at the time. KRS 510.035(1)(b)(2). Sexual intercourse occurs "upon any penetration, however slight[.]" KRS 510.010(8). Admittedly, B.P.'s testimony is somewhat equivocal as to whether penetration occurred. However, her testimony, given her age and knowledge of such topics, when considered in conjunction with Dr. Lister's testimony, was sufficient to

establish penetration, however slight, and to withstand a directed verdict. We therefore conclude that it was not clearly unreasonable for the jury to find Appellant guilty of first-degree rape and the trial court did not err in failing to grant a directed verdict.

For the foregoing reasons, the judgment of the Pulaski Circuit Court is reversed and the matter is remanded for further proceedings consistent with this opinion.

Johnstone and Scott, JJ., concur. Cooper and Roach, JJ., concur in result only. Wintersheimer, J., dissents by separate opinion, with Graves, J., joining that dissent. Lambert, C.J., not sitting.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because the medical testimony was not improper hearsay and was properly admitted into evidence.

The majority reverses on the sole issue of improper hearsay testimony. Two doctors testified, and both repeated the statements of the child victim regarding the sexual abuse and the identification by the child of the defendant. KRE 803(4) requires that hearsay testimony be reasonably pertinent to treatment or diagnosis. Statements of identity are seldom, if ever, pertinent. See Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001). I fully recognize that such testimony could be error, but that is not the situation in this case.

The child in question also testified and repeatedly identified the defendant as the person responsible for the sexual contact. A careful examination of the testimony from the medical witnesses as well as the child victim is required in order to fully evaluate

this case. The medical testimony mirrored the prior testimony of the child in every respect. Consequently, it is merely cumulative error and therefore harmless. See Bratcher v. Commonwealth, 151 S.W.3d 332 (Ky. 2004). The statements by the examining physician and the psychiatrist were not violations of KRE 803(4) and should have been allowed to go to the jury. Here, Burns has not demonstrated that the trial judge committed any error or abused his discretion in so holding.

Therefore, I would affirm the conviction in all respects.

Graves, J., joins.