

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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

2005-SC-0231-MR

VIRGIL HALL III

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD  
02-CR-1493 AND 04-CR-2206

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Virgil Hall III, entered a conditional guilty plea to murder and being a persistent felony offender in the second degree. He was sentenced to thirty-five years imprisonment. Appellant reserved his right to appeal the issues discussed below.

The facts surrounding this appeal involve the tragic death of Appellant's infant son, Virgil Hall IV. Appellant's girlfriend, Sherry Ballard, left the infant and her two-year-old son in Appellant's care. When she returned thirty-five minutes later, she discovered the baby badly injured. Appellant told her that he slipped and fell while holding the baby, and that he had already called 911. The paramedics arrived to find the infant severely bruised, having suffered multiple blunt force traumas. The infant was taken to Kosair Hospital, where he died.

Police apprehended Appellant hiding in a closet at his mother's home. The police Mirandized and questioned him. In his first statement, Appellant said that he had

been drinking and became angry for having to take care of the baby. Appellant stated that he slammed the baby into a window and into a stove range hood. Physical evidence at the scene confirmed Appellant's story. He later retracted his statements and said that he fabricated his first version of the events.

Appellant's assignments of error on appeal concern the trial court's ruling on DNA evidence found on the garment that the infant was wearing at the time of his death. The presence of acid phosphatase (a constituent of semen) was found on the garment. When it was analyzed, the DNA did not match Appellant, but was found to have matched DNA found at the scene of three unsolved cases in Missouri, Texas, and Wisconsin dated 2002, 1981, and 1997 respectively. The case in Texas involved a 55-year-old man who had been sodomized and stabbed. The case in Wisconsin involved a 45-year-old female prostitute who also was stabbed to death. The final case involved the rape of a 40-year-old woman.

The Commonwealth filed *motions in limine* to exclude evidence of these other crimes, and to exclude the DNA evidence. The Commonwealth argued that the evidence was irrelevant because the infant in this case was not sexually assaulted and because his assault and subsequent death had no rational connection whatsoever to the unsolved cases or their perpetrator. In addition, the garment was given to the infant's mother as a used item of clothing, and it was uncertain how long the acid phosphatase had been on the shirt.<sup>1</sup> Thus, even if relevant, the Commonwealth argued that any relevancy would be substantially outweighed by confusion of issues and/or its tendency to mislead the jury. KRE 403. After a hearing, the trial court granted the

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<sup>1</sup> The infant's mother testified that she did not remember washing the garment before placing it on her child.

Commonwealth's motions, finding that the evidence was likely to cause undue confusion, and had no probative connection to the infant's death.

A relevancy determination by the trial court is reviewed for abuse of discretion. Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996). "Weighing the relevancy against the prejudice is peculiarly within the province of the trial court." Foley v. Commonwealth, 942 S.W.2d 876, 888 (Ky. 1996). "[A]n appellate court should only reverse a ruling under KRE 403 where there has been clear abuse of discretion." Page v. Commonwealth, 149 S.W.3d 416, 420 (Ky. 2004). Appellant argues that the existence of these unsolved crimes and the presence of DNA found at the scene of those crimes on his child's clothing was relevant to prove that he was not the person who caused the child's death. In Harris v. Commonwealth, 134 S.W.3d 603 (Ky. 2004), we held that "a direct connection must exist between the [alternate perpetrator] and the offense charged in order for the evidence [regarding the alternate perpetrator] to be admissible." Id. at 608. Appellant's proposed theory is that during the approximately thirty-five minutes while he was alone with the child, he blacked out (due to alcohol intoxication) and that during this time, a yet to be apprehended serial killer randomly broke into his house, deposited semen on his 16-day-old child and then caused multiple bruises and contusions on the child's head, face, back, and extremities.

When viewed in light of the entire record, we believe that the connection between the alternate perpetrator and the offense charged is simply "too remote to show a reasonable possibility that a third person committed the crime." Id. at 609. First, it is impossible to know when the acid phosphatase was actually deposited on the child's shirt. Second, Appellant points to no physical evidence whatsoever to show or even suggest that Appellant's house was entered or broken into by a stranger that night.

Finally, the crime in this case is not remotely similar to the unsolved crimes cited above. On balance, we find no abuse of discretion in the trial court's rulings. Cf. Rogers v. Commonwealth, 992 S.W.2d 183, 186-87 (Ky. 1999) (state of defendant's fingernails one year after alleged attack was not probative to prove whether or not he was likely to have caused scratches on the victim; and even if it was probative, "the danger of confusing the issues and/or misleading the jury is so great in this case as to outweigh whatever value this evidence has to offer").

The judgment and sentence of the Jefferson Circuit Court are affirmed.

All concur.

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