

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

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RENDERED: SEPTEMBER 21, 2006

NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-000794-MR

DATE 10-12-06 *E. A. Grawitt, D.C.*  
APPELLANT

ANGELO HESTER

V.

APPEAL FROM FAYETTE CIRCUIT COURT  
HON. PAMELA R. GOODWINE, JUDGE  
04-CR-00300-005

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

**I. INTRODUCTION**

Appellant, Angelo Hester, was convicted of one count of first-degree robbery, one count of first-degree burglary, and one count of being a second-degree persistent felony offender. He now contends that the trial court erred (1) by limiting the defense's cross-examination of Arian Brown, a witness for the prosecution, about the full extent of his plea bargain; (2) by refusing to recuse; (3) by failing to enter a directed verdict on his behalf; (4) by allowing the prosecution to question their witness Wanda Hughes about her "drug connection" to him; and (5) by denying his motion in limine to bar testimony concerning the victim's pregnancy. Finding no error, we affirm Appellant's convictions.

**II. BACKGROUND**

On April 2, 2003, between 10 and 11 P.M., Chris Manley and his fiancée, Tammy Sanders, were at their home on Manhattan Drive in Lexington. Sanders was pregnant and due to give birth the next day. The couple was in bed watching television when the

doorbell rang. Manley had been dozing and was dressed only in underclothes, so he asked Sanders to answer the door. When Sanders opened the front door, she encountered a middle-aged woman who claimed to be lost and asked to use the house phone. Sanders allowed the woman to use the phone, and after an unsuccessful attempt to reach anyone, the woman thanked her and left. Sanders then returned to bed.

A short time later, the doorbell rang again. Manley looked outside and saw the woman who had rung the doorbell earlier. Again he asked his fiancée to answer the door. When Sanders opened the door, the woman asked for directions to a certain street. Sanders replied that she did not know the location of the street and called out to Manley to ask if he knew how to get there. At that point a masked man jumped from around the side of the house, pointed a gun at her, and told her to get into the house. The man yelled at her to "get down." As she tried to comply with this order, she was hit on the back and fell. To avoid landing on her stomach, she turned and fell instead on her right arm, dislocating her elbow and breaking the bone in multiple places.

Once Sanders was on the ground, more masked men with guns entered the house. Manley walked into the hallway and immediately put his hands in the air. One of the men demanded that he give them drugs and money, repeatedly asking, "Where's the good stuff?" One assailant backed Manley into the bedroom, ordered him to get down, and then shot him in the leg. The assailant continued to look for money and drugs. Another assailant threatened Manley, saying that he would be killed if he did not tell him where to find "the stuff." Manley said the only drugs he had were some prescription Clonopin in the kitchen. The men took a bag of change from the bedroom.

The men then confronted Sanders, put a gun to her head, and demanded to know where the drugs and money were. She told them she did not know what they wanted. She then directed them to the prescription drugs on the kitchen counter and told them that the only money in the house was in her purse and in Manley's wallet. She stated that she had jewelry in her bedroom. The masked men took her purse and jewelry before leaving the residence.

After the men left, Sanders made her way to Manley, who had already called 911. Sanders took the phone and followed the operator's directions to place a tourniquet on Manley's leg. Soon, Emergency Medical Services arrived and took the couple to Central Baptist Hospital.

At the hospital, Manley was admitted for observation for his gun shot wound. He remained under observation for twenty-four hours and then remained at the hospital with Sanders while she had an operation on her elbow. On April 26th, two days after the home invasion, Sanders began leaking amniotic fluid, so the doctors induced labor and she gave birth to a healthy baby.

Sanders saw at least four armed men on the night of the home invasion, and Manley saw three different men. Neither Sanders nor Manley could identify any of the men, whose faces had been concealed by masks, but they had been able to tell that the men were African-American and knew that each had been carrying a gun. Police received a tip in November 2003 that a woman named Wanda Hughes was involved in the robbery. Sanders and Manley identified Hughes in a photo line-up as the woman who came to their house on the night of the invasion. Hughes was arrested and led the police to five other individuals—Adrian Brown, Arian Brown, Teddy Hawkins, Jeremy Rice, and Appellant—whom she claimed were involved in the crime.

Appellant was charged with first-degree robbery and first-degree burglary, and with being a second-degree persistent felony offender and was tried in July 2004. He was tried with Adrian Brown and Jeremy Rice.<sup>1</sup> At trial, he testified in his own defense, claiming that he was not present during the home invasion and that he did not even know several of the alleged participants in the crime. Nevertheless, the jury convicted him on all three counts and he was sentenced to twenty years in prison. He appeals to this court as a matter of right. Ky. Const. § 110(2)(b).

### **III. ANALYSIS**

We address the issues in the order in which they are presented in Appellant's brief.

#### **A. Cross-Examination of Arian Brown**

Appellant first claims that the trial court improperly limited his cross-examination of co-indictee Arian Brown regarding his plea bargain with the Commonwealth.

The original indictment in this case charged eight individuals with various crimes in relation to two separate home invasions—one at the home on Manhattan Drive, the crime for which Appellant was tried, and one at a home on Seventh Street, which Appellant was not alleged to have been involved in. The trial court severed the two crimes for trial. Only two individuals were charged for their participation in both crimes, twin-brothers Arian and Adrian Brown. Arian made a plea bargain that encompassed charges for both the Manhattan Drive and Seventh Street home invasions. Adrian did not make a plea bargain and proceeded to trial for both crimes.

As part of his plea agreement, Arian agreed to testify for the Commonwealth at the Manhattan Drive trial in which Appellant was a defendant with Rice and Adrian

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<sup>1</sup> Teddy Hawkins was originally scheduled to be tried with Appellant also, but as discussed below, his trial was severed from his co-defendants.

Brown. Although the trials for the two home invasions had been severed, questions were raised about the scope of questioning that would be allowed during Arian's cross-examination, specifically, whether he could be questioned regarding the full extent of his plea agreement, which encompassed the Seventh Street crime.

Before trial, the Commonwealth made a motion in limine to limit the cross-examination of Arian Brown to exclude information about the portion of his plea agreement that related to the Seventh Street home invasion. The Commonwealth objected to any discussion of the Seventh Street charges because of potential prejudice that could result by introducing evidence of a second crime. Appellant's counsel objected to the motion in limine, asking that the defense have unlimited opportunity to impeach Arian fully. Appellant's co-defendant Adrian Brown, however, agreed with the Commonwealth that cross-examination regarding the Seventh Street crime should be barred. Adrian argued that the scope of cross-examination should be limited because he would be prejudiced if the jury learned of his involvement in the second crime.

After hearing arguments from both sides, the trial court granted the Commonwealth's motion in limine to exclude cross-examination regarding the Seventh Street portion of the plea agreement. The trial court based its ruling on the fact that the trials had been severed and because it was not fair to Appellant and Rice, who were not involved in the Seventh Street crime, because they would be prejudiced by the jury knowing there was a second home invasion. The trial court also noted that the opportunity for the defense to impeach Arian Brown still existed because they were free to cross-examine him concerning the portions of his plea agreement involving the Manhattan Drive home invasion. The court reasoned that Arian Brown "can testify and be cross-examined with respect to him making a plea, for impeachment purposes,

without, and I think that can be done—without going into details about any other event other than those that we are on trial here today.”

At trial, before the cross-examination of Arian Brown, counsel for one of Appellant’s co-defendants made a motion to question Arian Brown about the full extent of his plea bargain, including the Seventh Street crime. Consistent with its earlier position, the trial court overruled the motion.

Appellant objected to this limitation and expressed concern it was not fair because the details of the plea bargain could show bias. He also attempted to refute any claim that such testimony would be prejudicial by arguing that it would be made clear to the jury that Appellant was not charged in the Seventh Street incident. The trial court reiterated its earlier rulings and made a final statement that the testimony concerning the Seventh Street portion of the plea agreement would be excluded, because bringing in the testimony would be “highly prejudicial.”

Thus when Arian Brown took the stand, Appellant’s cross-examination of him was limited. Arian testified that he had been charged in the Manhattan Drive crime with first-degree robbery and first-degree burglary and that he had faced a sentence of ten to twenty years for each charge. He then testified about his plea bargain and said that he pled guilty to conspiracy to commit robbery and that the burglary count was dismissed. As a result, he was sentenced to only ten years. He also testified that he would be eligible to meet with the parole board after serving two years of his sentence, since the offense he pled to was subject to the 20% parole eligibility rule.

Appellant now claims that it was error to limit his cross-examination of Arian Brown because it prevented him from conveying to the jury just how much incentive Brown had to color his testimony. He claims that if the court had allowed him to cross-

examine Brown concerning the Seventh Street portion of the plea bargain in addition to the Manhattan Drive portion, the jury would have learned that Brown had been charged with another count of first-degree robbery and that he also pled guilty to conspiracy to commit robbery, for which he received a ten year sentence and which the Commonwealth recommended he serve concurrently with the Manhattan Drive sentence, for a total of ten years. Appellant notes that if Arian Brown had gone to trial on the charges for both the Manhattan Drive and Seventh Street crimes and had received the maximum sentence for all counts, he could have faced a sixty-year sentence. Appellant also notes that had Brown not entered his plea bargain, he would have faced the possibility that his convictions would have fallen under the 85% parole eligibility rule, KRS 439.3401. Appellant argues that the disparity between the terms of Brown's plea agreement, which ultimately provided a sentence of only ten years and application of the 20% parole eligibility rule, and the potential penalty he would have faced at trial was far greater than the limited picture presented to the jury. Appellant claims that only if the jury had heard testimony about the full extent of the charges Arian Brown faced and the plea bargain he entered into, it would have understood the powerful incentive that Arian Brown had to give favorable testimony for the Commonwealth.

As the Commonwealth concedes, the credibility of a witness may always be questioned. KRE 607 provides: "The credibility of a witness may be attacked by any party, including the party calling the witness." Proof that a witness has made a deal with the prosecution may show that the witness has a motivation to testify favorably for the Commonwealth. As Professor Lawson has explained, "[t]he plea bargaining strategies of prosecutors and other characteristics of the criminal law and its processes encourage



participants in crime to trade testimony for favored treatment.” Robert G. Lawson, The Kentucky Evidence Law Handbook § 4.10[2], at 279-80 (4th ed. 2003). Thus, such evidence can constitute a powerful attack on the credibility of a witness.

Appellant also notes correctly that limitations on the admissibility of evidence of bias have constitutional implications under the Confrontation Clause. See Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986); Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1005, 1111 (1974); Commonwealth v. Cox, 837 S.W.2d 898 (Ky. 1992). Those cases recognize that the Confrontation Clause is violated when there is a complete bar on cross-examination as to a witness’s bias. This case is distinguishable, however, because Appellant was allowed to explore Arian Brown’s bias, albeit in a limited fashion.

But the right to explore witness bias is not unlimited, even when considered in the context of the Confrontation Clause. See Robert G. Lawson, The Kentucky Evidence Law Handbook § 4.10[4], at 283-84 (4th ed. 2003) (“Needless to say, Davis and Van Arsdall do not give defendants an unfettered right to cross-examine witnesses about possible bias, interest, or corruption.”). The admissibility of such evidence is subject to the discretion of the trial judge. Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997). Thus we have noted: “Defendants cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway. So long as a reasonably complete picture of the witness's veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries.” Id. (quoting United States v. Boylan, 898 F.2d 230, 254 (1st Cir.1990)).

The trial court, in ruling that cross-examination of Brown could not include questions regarding the portion of his plea bargain related to the Seventh Street crime,

engaged in the prejudice-probativeness balancing required by KRE 403 and determined that limiting the scope of cross-examination was necessary to avoid potential prejudice. The trial court noted two reasons for disallowing this testimony: it did not want to prejudice the defendants in this proceeding who were not involved in the Seventh Street crime by linking the two crimes to one another, and it was also trying to avoid prejudice to Adrian Brown, who was involved in the Seventh Street crime.

Despite the limitations imposed by the trial court, the jury heard Arian Brown testify that he had entered into a plea agreement with the Commonwealth for his role in the Manhattan Drive crime, that the agreement provided for a significantly reduced penalty, and that he would enjoy 20% parole eligibility because the crime to which he pled guilty was not considered a violent crime. This evidence presented a reasonably complete picture of Arian Brown's possible bias and motivation to testify favorably for the Commonwealth. This is sufficient to satisfy Appellant's right of confrontation and bring the trial court's decision to limit the testimony squarely within the realm of allowed discretion. Maddox, 955 S.W.2d at 721. As such, the limitation, in light of the circumstances, was not an abuse of the trial court's discretion.

### **B. Motion to Recuse**

Appellant also claims the trial court erred by overruling his pretrial recusal motion.

Teddy Hawkins was originally scheduled to be tried with Appellant, Rice, and Adrian Brown. Prior to trial, the trial court issued a funeral pass to Hawkins so that he could attend his father's funeral in Detroit, Michigan. Hawkins did not return. The incident was publicized on television and in the Lexington Herald-Leader, the local newspaper. The trial court made the following statement on the Channel Eighteen news

during the six o'clock broadcast on July 9, 2004: "It's my policy that if both sides agree I will recuse myself from this case. But I believe that I would be much more harsh than anyone else could at this point."

Appellant subsequently moved the trial court to recuse from the case pursuant to KRS 26A.015(2)(a) and (e) and SCR 4.300, the Judicial Code of Conduct. At a hearing on the motion, Adrian Brown, one of Appellant's co-defendants, and the Commonwealth joined the motion.

The trial court overruled the motion, noting that its comments on the evening news were taken out of context. Specifically, the court stated:

This Court's comments dealt specifically with Teddy Hawkins and how this Court would deal with Teddy Hawkins' defiance of this Court's Order by way of contempt, not at his trial. Furthermore, the comments in no way related to the other four defendants in this case. They were not being discussed.

The court also noted that the case would be delayed if she were replaced, and that the other defendants would be prejudiced by evidence of Hawkins's escape:

The trial scheduled in this matter for July 26th, should go forward. All parties involved in this case need closure in the foreseeable future. Recusal in this case would only delay the trial for several months, if not a year, given the number of parties involved. It would be unduly prejudicial to Defendants Brown, Rice, Hester and Hughes to be tried along with Teddy Hawkins because evidence of Hawkins' escape would be relevant only as to Hawkins. Such evidence would be prejudicial against the other defendants.

Thus, instead of recusing, the trial court, by its own motion, ordered Hawkins's trial severed from that of his co-defendants.

Appellant now contends that the trial court's statement to the media concerning the escape of Teddy Hawkins, one of Appellant's co-defendants, shows it lacked impartiality. He also claims that statements made in the press by Manley, one of the victims, criticizing the trial court for releasing Hawkins were likely to further influence the

trial court. As a result, Appellant argues, his constitutional right to an impartial tribunal was violated.

The Supreme Court has held that the right to an impartial judge is an element of due process. See Johnson v. Mississippi, 403 U.S. 212, 215-216, 91 S.Ct. 1778, 1780 (1971). As the Supreme Court has noted:

[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. But the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 1797 (1997) (internal citations and quotation marks omitted).

Kentucky employs two methods of protecting this interest: one based on statute and one based on this Court's rules. KRS 26A.015(2) requires judges to recuse from cases in certain circumstances. The portions of the statute on which Appellant relies states:

Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

(a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;

...

(e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

KRS § 26A.015. Judicial Code of Conduct Canon 3(E)(1) similarly provides: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might

reasonably be questioned . . . .” We have previously articulated the high burden of proof for a recusal motion:

The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts of a character calculated seriously to impair the judge’s impartiality and sway his judgment. The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal.

Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001) (internal citation and quotation marks omitted); see also Webb v. Commonwealth, 904 S.W.2d 226, 229-30 (Ky. 1995) (“A party’s mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal.”).

Appellant’s argument amounts to the dual claim that recusal was required because the Commonwealth agreed that recusal was called for and because the court made comments about the case in the media. The mere fact that the Commonwealth joined the recusal motion is not enough. Such a standard would be unworkable since it would allow judges who are unpopular on both sides of the bar, prosecution and defense, to be removed without any showing of impartiality.

Instead, we must evaluate whether Appellant has shown that the trial court in this case would be biased. The trial judge’s statement to the media, while perhaps not ideal,<sup>2</sup> was not enough to require recusal. As the trial court explained in its order, the statement in question was made in reference to Hawkins’s contempt proceeding. It was not made in reference to the merits of Appellant’s proceeding and was being taken out of context. Appellant contends the impartiality evidenced by comment was not limited to

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<sup>2</sup> We do note that the Code of Judicial Conduct discourages judges from making comments to the media regarding pending proceedings. See SCR 4.30-Canon 3(B)(9). However, such comments do not automatically require recusal, which is controlled by the standards applied to KRS § 26A.015 and Canon 3(E)(1) of the Judicial Code of Conduct.

Hawkins, but “could be directed at the defendants—[the trial court] might want to ensure a conviction—or towards the Commonwealth since one of the victims made such critical statements about her.” Such a contention, however, is merely speculative and therefore is insufficient to warrant recusal. Moreover, by severing Hawkins’s trial from Appellant’s, the trial court removed the possibility of taint from any impartiality directed toward Hawkins due to his escape. We conclude that the trial court’s decision not to recuse in this matter was not error.

### **C. Directed Verdict**

Appellant’s third contention is that the trial court erred by denying his motion for a directed verdict. Appellant argues that a directed verdict in his favor was appropriate in this case because, in the absence of substantial physical evidence and the victims’ inability to identify the men that invaded their home, the testimony of Wanda Hughes, Susan Toadvine, Arian Brown, and Pierre Latham, which constituted the majority of the evidence, was insufficient to justify a conviction. He argues that this testimony lacked credibility because it came from “four felons who all hoped to receive favorable treatment in exchange for their testimony.” He also cites to inconsistencies in their testimonies, which he argues further diminished their credibility.

At trial, Wanda Hughes, who had previously pled guilty to charges related to the home invasion, testified that she had known Appellant, who she identified as “Low,” for six to eight months prior to the home invasion and identified him as a participant in the crime. On the night of the home invasion, she was at the house of Susan Toadvine’s boyfriend. Prior to trial, she was unable to identify Appellant from a photo line-up even though she successfully identified Hawkins and Brown. On direct examination, she testified that she used cocaine after the home invasion. On cross-examination, it was

pointed out that she had previously testified in a deposition that she had not used drugs on the day of the home invasion. She claimed that she had lied previously, but that she was telling the truth at trial. Susan Toadvine, another witness, testified that Hughes had used cocaine prior to and after the home invasion. Appellant also notes several other minor inconsistencies in Hughes's testimony, and argues that Hughes's testimony lacks credibility because she failed to identify Appellant at a photo line-up and she lied about cocaine use on the night of the home invasion.

Susan Toadvine testified that two men, "C" and "Low" came to her boyfriend's house prior to the home invasion looking for a ride. In a statement to the police in May 2003, she claimed that the men were "Low" and "B," who was apparently a man named Butch and was Teddy Hawkin's cousin. Appellant also notes that this testimony was contradicted by Hughes, who testified to a different chronology of events, claiming that only "C" asked for a ride and that "Low" appeared later in the evening. Appellant claims that Toadvine's testimony lacked credibility because she is a convicted felon who was facing an unresolved parole violation, she testified she had only met Appellant a few times, and her testimony contradicted her own earlier statement to the police and Hughes's testimony in regards to the events that transpired prior to the home invasion.

Arian Brown testified in detail about the events on the night of the home invasion. He admitted that he had not met Appellant until Hawkins asked him to participate in the home invasion, and that he originally knew Appellant only as "C's partner" and did not know Appellant's name till the police informed him of it. He said that Appellant had a .38 caliber gun and that Appellant was the one who took Ms. Sanders's purse. As discussed above, Appellant argues that Brown's testimony lacked credibility because of the plea bargain he entered into.

Pierre Latham testified at trial that he overheard Appellant after the home invasion say that Hawkins had shot someone. He also saw Appellant with a woman's Rolex watch and a chain with a charm on it. He claimed that he had known Appellant for approximately ten years. When he initially spoke to police, he gave them a fake name. He admitted on the stand that he had had a fight with Appellant just prior to speaking with the police. He also admitted that he was serving a prison sentence and had been promised a letter on his behalf from a police detective to the parole board in exchange for his testimony. Appellant claims that Latham's testimony lacked credibility because he initially gave a fake name to the police, he only agreed to testify after a detective agreed to write a letter to the parole board on his behalf, and he testified that prior to giving his statement to the police, he got into a fight with Appellant.

Appellant's attorney moved for a directed verdict at the end of the Commonwealth's proof and at the end of the defense's proof. The trial court denied both motions.

"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 is the defendant entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). In applying this test, we are required to consider all of the evidence in the light most favorable to the prosecution, Stopher v. Commonwealth, 57 S.W.3d 787, 802 (Ky. 2001). Moreover, all questions as to credibility are left to the jury. Benham, 816 S.W.2d at 187.

This case presents a situation similar to that of our recent case, Potts v. Commonwealth, 172 S.W.3d 345, 349 (Ky. 2005). In Potts, the appellant argued that because Commonwealth's main witness "suffered from bipolar disorder, admitted to



drug use, and had a motive to fabricate her accounts of Appellant's drug transactions, her testimony was so lacking in credibility that it rendered the evidence 'qualitatively insufficient' to support his convictions." Id. at 347. In that case we reiterated our standard of review for directed verdicts and concluded that in those few cases where we have held directed verdicts to have been erroneously denied—cases upon which Appellant now relies—"the reversals occurred not because the witnesses, themselves, lacked credibility, but because their testimony asserted the occurrence of physically impossible or inconceivable events." Id. at 349. We need not reiterate the entirety of the Potts analysis as applied to Appellant's present claims. It suffices to say that, as was the case in Potts, we are not presented with a situation where the events described in the witnesses' testimony were simply impossible or inconceivable.

Under the Benham standard, it is enough to note that the contradictions in the witnesses' testimony were brought to light at trial and presented to the jury for their consideration. Similarly, the jury heard the evidence of the witnesses' possible bias and lack of credibility—namely, testimony about their plea bargains and their felony convictions. Despite the minor contradictions in the testimonies of the four witnesses and the fact that they may have been motivated to give favorable testimony for the Commonwealth because of plea bargains or pending charges, we are unconvinced that the trial court erred by failing to direct the verdict in Appellant's favor.

#### **D. Wanda Hughes's Testimony about Her Drug Transactions**

Appellant claims that the trial court erred by allowing Wanda Hughes to testify about prior drug possession and drug transactions involving Teddy Hawkins—all in violation of KRE 404(b). Immediately before Hughes testified at trial, the Commonwealth stated to the court that it intended to question her about how she knew

Appellant and that her response would reveal that he was a drug dealer and she bought drugs from him. Appellant objected on the grounds that such information would reveal a "prior bad act," which was prohibited by KRE 404(b). The trial court overruled Appellant's motion, and said Hughes could testify that she knew Appellant and Hawkins because they were drug dealers and that there was drug use the night of the home invasion. Appellant's attorney suggested that the testimony regarding the drug use on the night of the home invasion could be separated from the testimony about prior drug possession and transactions implicating Appellant as a drug dealer. The trial court responded that the testimony about the drug use that night was relevant because Hughes's testimony would not make sense unless she could explain the prior drug connection to Appellant and Hawkins. Hughes then testified that she had known Hawkins for six to eight months before the home invasion because he had sold drugs to her boyfriend. She also testified that she knew Appellant as Hawkins's "associate," but she did not testify that he had sold drugs. Hughes also testified that she was forced to participate in the home invasion because she and her boyfriend owed Hawkins's brother money for drugs.

Appellant argues that allowing Hughes to testify that she knew Appellant as an "associate" of Hawkins, a drug dealer, was evidence of a "prior bad act," which is generally prohibited by KRE 404(b). Appellant argues that as a result of introducing facts tending to show Appellant was a drug dealer, Appellant was unduly prejudiced. Appellant states in his brief that "the evidence was used merely to establish [his] criminal propensities and bad character in hopes of obtaining robbery, burglary, and PFO convictions."

We first note that it is difficult to conceive that testimony about the prior bad acts of one person would tend to “show action in conformity therewith” by another person. For this reason, the Commonwealth’s argument that Hughes’s testimony that Appellant was an “associate” of Hawkins did not constitute disclosure of a “prior bad act” is appealing because Hughes didn’t come out and say Appellant was a drug user. Nevertheless, we will give Appellant the benefit of the doubt in this case because characterizing Appellant as an “associate” of a drug dealer could imply to the jury that he was involved in dealing drugs, and such testimony could be considered evidence of a “prior bad act,” thus bringing the testimony within the realm of KRE 404(b).

We cannot conclude, however, that Hughes’s testimony violated KRE 404(b). While one of the trial court’s stated reasons for allowing the evidence—that it was relevant because it related to the drug use on the night of the crime—was not sufficient to meet one of the KRE 404(b) exceptions, the court’s statement that the evidence was relevant to show how Hughes knew Appellant did fall under the identity exception. That aspect of the testimony corroborated Hughes’s identification of Appellant as a participant in the crime because it proved that she knew him previously. Her testimony on this point was essential because she had difficulty identifying Appellant in the pretrial photo line-up and because Appellant’s defense was that he was in no way involved in this home invasion.

Appellant also contends the trial court erred by failing to make the appropriate inquiries into “relevance, probativeness, and prejudice” under Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994). Though the trial court did not explicitly engage in a point by point analysis of these three factors, we conclude that they were satisfied. The testimony was relevant because, as noted above, it helped show the identity of

Appellant as one of the robbers. The evidence was sufficiently probative because it reaffirmed that Hughes had previously met Appellant and tended to show she correctly identified him as a co-participant in the crime. Finally, the evidence was not unduly prejudicial because the witness did not directly identify Appellant as a drug dealer, but merely an “associate” of Hawkins, and also because evidence of drug use on the night of the home invasion was already introduced. It is unlikely that evidence of Appellant’s tenuous connection to drug activity would prejudice the jury so much that it would conclude he was more likely to participate in and help carry out a conspiracy to commit a violent home invasion and robbery.

Thus we conclude that Hughes’s testimony was properly admitted under the identity exception to the general rule prohibiting admission of prior bad acts.

#### **E. Motion in Limine to Exclude Evidence of Victim’s Pregnancy**

Appellant’s final claim of error is that the trial court improperly overruled his motion in limine to exclude testimony regarding Sanders’s pregnancy at the time of the crime. Sanders was due to give birth the day after the home invasion occurred. During the course of the crime, Sanders was pushed to the ground, and, in an effort to avoid injuring the fetus, landed on her arm, breaking the bone and dislocating her elbow, which required surgery. Her pregnancy was not adversely affected, and she gave birth two days after the home invasion to a healthy baby. Appellant’s motion in limine to bar testimony about the pregnancy claimed that it was not relevant to any disputed fact and was highly prejudicial. The Commonwealth responded that pregnancy was like a disability, and contributed to the heinousness of the crime. Ultimately, the trial court overruled Appellant’s motion, holding that the assault could have affected Sanders’s pregnancy and that the defendant must accept his victim as he found her.

On appeal, Appellant reiterates his argument to the trial court. He argues that the pregnancy was irrelevant as to his charges, since his robbery and burglary charges were elevated to the first-degree by the fact that he was armed with a gun, not that he caused any physical injury. Appellant concedes one of his co-defendants, Arian Brown, was charged with assault, but argues that because the injury was to the victim's elbow, evidence of her pregnancy was not required to prove that crime. Appellant alternatively argues that even if such evidence was relevant, its prejudice outweighs its probative value, and thus should have been excluded under KRE 403.

The only case Appellant cites to in support of his contention that the pregnancy evidence was highly prejudicial is Romans v. Commonwealth, 547 S.W.2d 128 (Ky. 1977). Romans was a rape case that held:

It was prejudicial error also to allow proof that as a result of the rape upon her [the victim] had conceived and given birth to a child. No one questioned the fact that she had been raped. The question being tried was whether Romans was the guilty party. That pregnancy ensued from it was utterly irrelevant and obviously calculated to incite the jury, a plain case of reckless overkill.

Id. at 130.

The evidence in this case is distinguishable from that in Romans on multiple levels. First, the evidence here does not involve only a discussion of collateral matters related to facts that arose after the crime. Though there was some testimony that Sanders began leaking amniotic fluid several days after the home invasion, the bulk of the evidence here involved events that occurred during and were part of the sequence of criminal acts. Even though Appellant's charges did not relate directly to the injuries suffered by either victim, the evidence of Sanders's pregnancy was relevant because it showed how the injury occurred (and Appellant's trial encompassed an assault charge attributed to one of his co-defendants). In short, testimony regarding Sanders's

pregnancy filled what might otherwise have been a logical gap in the description of the home invasion and was integral to the jury fully understanding the events of that night.

Evidence of the pregnancy was minimally prejudicial, if at all. Significantly, the jury was made aware of the fact that the baby was not harmed by the incident. Thus, we do not believe Appellant was unduly prejudiced by introduction of the fact Sanders was pregnant and that her pregnancy played an important, if small, roll in how the events of that night played out.

“The outcome of a KRE 403 balancing test is within the sound discretion of the trial judge, and that decision will only be overturned if there has been an abuse of discretion, i.e., if the trial judge’s ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” Cook v. Commonwealth, 129 S.W.3d 351, 361-62 (Ky. 2004). In light of this high standard of review, we conclude that the trial court’s decision to overrule Appellant’s motion in limine was proper.

#### **IV. CONCLUSION**

For the forgoing reasons, the judgment of the Fayette Circuit Court is affirmed.

All concur.

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