# ***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## ***NOT TO BE PUBLISHED OPINION***

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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 21, 2006
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL
DATE 10-12-06 [illegible] D.C.

2005-SC-0014-MR

STEVEN JAY WILSON — APPELLANT

V.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
03-CR-00341

COMMONWEALTH OF KENTUCKY — APPELLEE

## MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A Barren Circuit Court jury convicted Steven Jay Wilson of one count of first-degree sodomy of his stepdaughter, H.L., and two counts of first-degree sodomy and three counts of first-degree sexual abuse of his stepson, D.J.L. In accordance with the jury's recommendation, the trial court sentenced Wilson to a total of 25 years in prison, plus three years conditional discharge as required by KRS 532.043. Thus, he appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

### I. The Five Issues on Appeal

Wilson raises five issues in this appeal. The five issues pertain to: (1) certain testimony of Julie Griffey, a marriage and family therapist who provided treatment to the victims; (2) the sufficiency of the Commonwealth's proof as to D.J.L.; (3) improper bolstering of the victims' testimony by the lead detective assigned to the case; (4) improper rebuttal testimony by a witness who the Commonwealth allowed to remain in

the courtroom during the entirety of the proceedings even though the rule of separation of witnesses had been invoked; and (5) the trial court's denial of Wilson's motion for relief under CR 60.02 based on newly discovered evidence and juror mendacity. Because we conclude that Julie Griffey's testimony regarding her experience as to the profile of sexual abuse perpetrators, the habits of sexual abuse victims, her diagnoses of the children, and statements made to her by the children was inadmissible, we must reverse and remand for a new trial. And because we believe these errors are dispositive of the case, we address in this opinion only Wilson's arguments concerning Griffey's testimony.

## II. Facts Underlying Wilson's Conviction of Three Counts of First-Degree Sodomy and Three Counts of First-Degree Sexual Abuse

H.L. is Wilson's stepdaughter. When H.L. was seven years old, she told her mother (who was married to Wilson at the time) that Wilson touched her "down there with his tongue" while tucking her into bed. Her mother confronted Wilson but did not involve law enforcement at that time. H.L. later recanted the allegation in 2000 because Wilson and her mother had separated but were trying to reconcile, and she wanted her family to stay to together. When H.L. learned in 2003 what Wilson had allegedly done to her brother, D.J.L., however, she informed law enforcement of what Wilson had allegedly done to her. H.L. testified at trial and admitted that she had told certain individuals in 2000 that the act had not occurred.

D.J.L. is H.L.'s younger brother and Wilson's stepson. Around the time when his mother and Wilson finally decided to divorce, which was sometime in 2003, he told a social worker of Wilson's alleged abuse of him that had been occurring since D.J.L. was nine years old. D.J.L alleged that Wilson made him watch pornography videos with

him, made him look at pornography pictures, made him touch his penis, made him put his mouth on his penis, and touched D.J.L.'s penis in a sexual manner. When D.J.L. was eleven or twelve years old, he told Wilson to stop. Wilson told D.J.L. in response that D.J.L. would go to jail if he told anyone. Wilson also took away D.J.L.'s privileges.

At trial, D.J.L., then seventeen years old, testified about several occasions when Wilson allegedly sexually abused him. His testimony included accounts of the types of abuse, the locations where the abuse happened, and conversations with Wilson about the abuse.

Wilson testified on his own behalf at trial and claimed that the children's mother put them up to fabricating the allegations. The jury chose to believe the children.

Of the eleven felony offenses related to his alleged acts for which Wilson was indicted, a Barren Circuit Court jury found him guilty of the counts relating to sodomizing and sexually abusing his stepchildren when the children were under the age of twelve years. So a jury convicted him of one count of first-degree sodomy of his stepdaughter, H.L., and two counts of first-degree sodomy and three counts of first-degree sexual abuse of his stepson, D.J.L. The jury acquitted him, however, on all charges that included the element of "forcible compulsion."

### III. Testimony of Marriage and Family Therapist, Julie Griffey, and Four Issues Related to her Trial Testimony

In its case-in-chief, the Commonwealth called Julie Griffey, a licensed marriage and family therapist with 27 years of experience in providing marriage and family therapy. When questioned about her education and training, Griffey stated that she had a master's degree in marriage and family therapy, held a Kentucky license in marriage and family therapy, and was a member of the American Association of

Marriage and Family Therapists.

At the community mental health agency where Griffey works, she is the designated specialist for counseling children who have been sexually abused. To maintain this designation, her agency requires her to attend annual training in the area of child sexual abuse.

Griffey testified that in her 27-year career, she has counseled hundreds of children and approximately one-third of those children had been sexually abused. Following up on that number, the Commonwealth asked Griffey to approximate how many of that one-third had a great relationship with the alleged perpetrator. Defense counsel objected, and the trial court overruled the objection. The Commonwealth asked the question again, the second time rephrasing slightly by asking of the one-third treated for sexual abuse, approximately how many of those children have been abused by someone with whom they had a relationship. Griffey responded: "Most of them because the myth out there is the stranger in the raincoat with a van at the playground, but my practice has revealed that . . . most . . ." She could not complete her answer, however, because defense counsel objected on the grounds of relevancy, bolstering and lack of foundation.

Over defense counsel's objection, the trial court allowed Griffey to continue her answer. She stated that her experience was that children were most often sexually abused by people that are in special trust situations, such as babysitters, relatives, people who live in the home or people who have some type of power or custodial care of the children.

As to H.L. and D.J.L., Griffey testified that she had taken histories from and provided treatment to both. Griffey saw H.L. one time in 2000. At that time, H.L.

denied that Wilson had abused her sexually. Griffey saw H.L. again in 2003. At that time, H.L. told Griffey that Wilson had abused her sexually. Griffey saw H.L. a total of three times in 2003, but H.L. dropped out of treatment. Griffey began seeing D.J.L. in 2003, and had counseled him a total of three times as of trial on July 21, 2004.

Over defense counsel's objection, Griffey read her office notes verbatim to the jury. Those notes included the facts that both H.L. and D.J.L. named Wilson as the perpetrator. Based on H.L.'s history, Griffey testified over defense counsel's objection that she diagnosed H.L. as being a child sexual abuse victim and having a depressive disorder not otherwise specified. Based on D.J.L.'s history, Griffey testified over defense counsel's objection that she diagnosed D.J.L. as being a child sexual abuse victim and having an anxiety disorder not otherwise specified. The specific objection as to the diagnoses was that she had no foundation for her diagnoses other than the history that she took.

The Commonwealth noted that the history given by H.L. and D.J.L. was that they were young children when the abuse occurred yet they did not disclose the abuse until they were teenagers or young adults. The Commonwealth asked Griffey if that gave her some concern about her diagnosis. Griffey answered "No," to this question and went on to explain that her experience was that children disclose when they feel like they can, when they are ready to or when they feel like it is safe to. Defense counsel promptly objected on the grounds that Griffey could not testify as to the truthfulness of another witness. The trial court ruled that that was not what she was doing and overruled the objection. The trial court then prompted Griffey to continue by stating, "The question had to do with delayed disclosure. You may answer that." Griffey continued to elaborate and stated that children disclose when they finally feel brave

enough or empowered enough, and she based this answer on her experience of 27 years and the literature. Defense counsel objected and moved to strike as to the literature, which objection the trial court overruled.

On cross-examination, Griffey admitted that H.L. had changed her story from no abuse in 2000 to abuse in 2003 despite the fact that she was in a safe reporting environment in Griffey's office. Although Griffey admitted that H.L. had changed her story, she disagreed that H.L. was in a safe environment and went on to explain that in 2000, H.L.'s mother was already reconciling with Wilson, and H.L. could see that it was inevitable that her family would move back in with Wilson. Defense counsel did not let Griffey finish her answer, however, and argued to the trial court that she was being unresponsive. Defense counsel concluded its cross-examination, but the Commonwealth picked up at that point on re-direct and asked Griffey to finish her explanation. Griffey explained that the family was in substandard housing compared to where they lived with Wilson. Defense counsel interrupted her again and argued in a bench conference that they would need to have a hearing under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The Commonwealth responded that it was satisfied with Griffey's answer, and would move on.

Wilson raises four issues related to Griffey's testimony: (1) Griffey's diagnoses that both H.L. and D.J.L. were victims of child sexual abuse were inadmissible because this testimony invaded the province of the jury. (2) The trial court erred in allowing Griffey to testify as to why a child sexual abuse victim would delay in disclosing the abuse or recant an earlier statement. (3) The trial court erred in permitting Griffey to provide profile testimony describing likely perpetrators of child sexual abuse. (4) The

trial court abused its discretion in allowing Griffey to read her treatment notes verbatim to the jury as the notes either contained hearsay that did not fall under the KRE 803(4) exception or, as stated in KRE 403, the probative value was substantially outweighed by the danger of undue prejudice.

The Commonwealth argues in response that the errors provided above are either not preserved or harmless because Griffey's testimony was cumulative in that both H.L. and D.J.L. testified at trial and gave their accounts of the alleged abuse. The Commonwealth does note, however, this Court's opinion in Kurtz v. Commonwealth, 172 S.W.3d 409 (Ky. 2005), which it believes may or may not have an adverse effect on our decision in this case. We believe that this case does turn on Kurtz as well as other decisions of this Court that address prohibited testimony, expert or otherwise, in child sexual abuse cases of which much of Griffey's testimony ran afoul.

**a. Profile testimony describing likely perpetrators of child sexual abuse**

In discussing the applicable case law and rules of evidence, we will take Wilson's arguments out of order. We begin with Wilson's argument pertaining to profile testimony describing likely perpetrators of child sexual abuse. Having reviewed the record, we conclude that this error is preserved.

Testimony regarding general characteristics of the typical child sex abuse perpetrator is expressly prohibited and constitutes reversible error. Kurtz v. Commonwealth, 172 S.W.3d at 413 (following Dyer v. Commonwealth, 816 S.W.2d 647, 652 (Ky. 1991), which held that evidence in a child sex abuse case which tended to show that the defendant possessed profile characteristics of a pedophile is inadmissible in criminal cases to prove either guilt or innocence). As in this case, Griffey's testimony as it pertained to common characteristics of perpetrators of sex

crimes was at issue in Kurtz. In Kurtz, Griffey testified that she found that perpetrators possessed certain common characteristics: they tended to be members of the victim's family or have some kind of special access to the victim, they tended to be in some role of power, such as parental or supervisory, and they tended to be older than the victim. See id. She went on to describe certain habits of sex crime perpetrators, such as grooming the potential victim, which we acknowledge that she did not do in this case.

Despite the lack of habit evidence of a sex crime perpetrator, we conclude that Griffey's testimony in this case relating to profile characteristics was not relevant or permissible for the jury to consider. See Kurtz, 172 S.W.3d at 414. She should not have been permitted to testify that the myth was the stranger in the raincoat with a van at the playground, when in reality her experience was that children were most often sexually abused by people that are in special trust situations, such as babysitters, relatives, people who live in the home or people who have some type of power or custodial care of the children -- a category in which Wilson neatly fell.

**b. Testimony as to why a child sexual abuse victim would delay in disclosing the abuse or recant an earlier statement**

The opposite of impermissible profile evidence of a perpetrator is impermissible habit evidence of victims of child sexual abuse to prove that the person was a member of that class of victims because he or she acted the same way under similar circumstances. See Miller v. Commonwealth, 77 S.W.3d 566, 571-72 (Ky. 2002). Here, we are referring to the trial court's admission of Griffey's testimony about delayed disclosure, which error we conclude is preserved. As to H.L.'s and D.J.L.'s delay in reporting the sexual abuse until they were teenagers, Griffey stated this did not concern her in reaching a diagnosis because her experience was that children disclose when

they feel like they can, when they are ready to, when they feel like it is safe to, when they finally feel brave enough or when they feel empowered enough. Although she made reference to "the literature," she based her conclusion on her extensive experience in working with child sexual abuse victims.

But either way -- whether based on the literature or on her experience -- the admission of such testimony is impermissible because "a party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class because he/she acted the same way under similar circumstances." Id. at 572. Griffey's testimony as to her observation of the habits of sexually abused children, as a class, should have been excluded as irrelevant. See id.

Wilson argues that Griffey's comments regarding H.L.'s recantation (or retraction) should have similarly been excluded as it was one of the symptoms of child sexual abuse accommodation syndrome (CSAAS) (the other elements being secrecy, helplessness, accommodation and delay in reporting). After reviewing Griffey's testimony on H.L.'s retraction, however, we conclude that while Griffey was likely relying on CSAAS for her explanation of H.L.'s behavior, it was her explanation of another's behavior that was impermissible.

**c. Griffey's diagnoses that both H.L. and D.J.L. were victims of child sexual abuse**

We conclude that this issue is preserved.

KRE 702 governs the admissibility of expert opinion testimony. See McIntire v. Commonwealth, 192 S.W.3d 690, 696 (Ky. 2006). To introduce expert opinion testimony, a four-part test must be satisfied. See Stringer v. Commonwealth, 956

S.W.2d 883, 891 (Ky. 1997). First, the witness must be qualified to render an opinion on the subject matter. Second, the subject matter must satisfy the requirements of Daubert. Third, the subject matter must satisfy the test of relevancy set forth in KRE 401, subject to the prejudicial versus probative balancing test required by KRE 403. Finally, the opinion testimony must assist the trier of fact.

The decisions concerning the admissibility and qualifications of an expert witness rest within the sound discretion of the trial court. Ford v. Commonwealth, 665 S.W.2d 304, 309 (Ky. 1983), cert. denied, 469 U.S. 984, 105 S. Ct. 392, 83 L. Ed. 2d 325 (1984). A trial judge abuses his or her discretion when a decision is "arbitrary, unreasonable, unfair or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000).

In this case, Griffey's diagnoses that H.L. and D.J.L. were child sexual abuse victims were her expert opinions. However, the Commonwealth made no motion to have Griffey qualified as an expert to render an opinion on whether a child had been sexually abused. And the trial court did not make an express finding that Griffey was an expert who was qualified to render an opinion. While it may be implied that the Commonwealth was offering Griffey's testimony as an expert opinion and the trial court found that she was qualified to render an opinion, we conclude that the trial court's admission of Griffey's opinion under the circumstances of this case constituted an abuse of discretion.

**d. Griffey's reading of her treatment notes verbatim to the jury**

We conclude that this issue is preserved.

KRE 803(4) provides an exception to the hearsay rules for the admission of statements made for purposes of medical treatment or diagnosis insofar as those

statements are reasonably pertinent to treatment or diagnosis. Statements made by a child sexual abuse victim to a clinical psychologist for the purpose of psychological therapy fall within the parameters of KRE 803(4). See Stringer, 956 S.W.2d at 888 (citing Edwards v. Commonwealth, 833 S.W.2d 842 (Ky. 1992)). Statements of the identity of the alleged perpetrator are generally admissible if offered by one treating the child's psychological injuries, and the abuser is either a household member or one that has continued access to the child. See Stringer, 956 S.W.2d at 888. Otherwise, statements of identity are seldom pertinent to treatment or diagnosis. See Garrett v. Commonwealth, 48 S.W.3d 6, 11-12 (Ky. 2001).

In this case, Griffey is a licensed marriage and family therapist and did provide treatment for H.L.'s and D.J.L.'s psychological injuries related to the sexual abuse. However, at the time of her interviews in the summer of 2003, Wilson was neither a household member nor in a position of special trust as he no longer lived with them and he and their mother were in the process of divorcing. Thus, the trial court erred in allowing Griffey to read her treatment notes verbatim, which included Wilson's identity, to the jury. Griffey's testimony as to the history provided by H.L. and D.J.L. should have been "sanitized," a practice upheld in Garrett, by taking out the identification of the alleged perpetrator and eliminating the details of the sexual acts. See id. at 10. In other words, Griffey should have only been permitted to repeat those statements that were reasonably pertinent to her treatment or diagnosis.

Our review of the evidence discussed in the preceding sections, when viewed in light of the entire record, compels us to conclude that the trial court's admission of this evidence was prejudicial. Wilson is entitled to a new trial according to settled law. Due to our holding, we elect not to address Wilson's additional arguments because the

alleged errors are either (1) unlikely to recur on retrial, or (2) rendered moot by this opinion.

The judgment of the Barren Circuit Court is reversed; and the case is remanded for a new trial consistent with this opinion.

Lambert, C.J.; and Minton, J., concur. Roach, J., concurs in result only. Scott, J., files a separate opinion concurring in part and dissenting in part in which Graves, and Wintersheimer, JJ., join.

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**CONCURRING IN PART AND DISSENTING IN PART**
**OPINION BY JUSTICE SCOTT**

While, I concur with the majority of the opinions expressed herein, I must dissent as to Section III(B). I do so because I realize that children often recant truthful statements under the family pressures placed upon them at the time. Thus, it should be permissible for the jury to be aware of this – given the appropriate expert. Moreover, the point that some children may completely fabricate an event can be brought out on cross examination by the defense. Thus, leaving the issue where it should be – open for the jury to determine, which was the case here. Such proof, limited as it is, is not proof of the Child Sexual Accommodation Syndrome, but rather, furthers the search for the truth.

Graves, and Wintersheimer, JJ., join this opinion.