

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2006-SC-000399-MR

DATE 12-13-07 E.L.A. Grew, H.P.C.

BUDDY LEE WORKMAN

APPELLANT

V. ON APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
NO. 04-CR-000409

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant, Buddy Lee Workman, was convicted by a Henderson Circuit Court jury in May 2006 of first-degree sodomy and for being a second-degree persistent felony offender. For these crimes, Appellant was sentenced to life imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. §110(2)(b). He asserts two¹ main arguments in his appeal: (1) that the admission of hearsay statements made by a non-testifying victim was error and (2) that the introduction of evidence showing Appellant had a sexual relationship with, and subsequently married, his stepdaughter was unduly prejudicial. For the reasons set forth herein, we reverse Appellant's convictions and remand for a new trial.

¹ Appellant's brief argued that the trial court erred in failing to hold a hearing regarding his potential ineffective assistance of counsel claims. Since Appellant is entitled to a new trial it is unnecessary to determine the merits of that argument.

Sometime in the early 1990s, Appellant met and married a woman who had a daughter named Tammy Frailex. Frailex was approximately thirteen or fourteen years old when she first met Appellant. When Frailex turned seventeen, she consented to a sexual relationship with Appellant, while he was still married to her mother. Frailex married Appellant after he divorced Frailex's mother. Appellant and Frailex had three children together – including S.W., the alleged victim in this case.

Frailex told the police in September 2004, that sometime around February or March 2003, she entered her bedroom and found Appellant standing naked over S.W. Appellant's penis was erect at this time and semen was present on S.W.'s face. S.W. told Frailex that Appellant had put his "pee pee" in her mouth. Subsequently, S.W. vomited in a trash can. Based on this report, the police launched an investigation which led to the charges against Appellant. However, Frailex testified at trial that her previous statements to the police were false.

I. The trial court committed error in admitting hearsay statements into evidence because there is no hearsay exception covering the statements

At trial, the prosecutor sought to introduce several statements that S.W. allegedly made to Karen Mains, Appellant's stepdaughter. When S.W. was three, she reportedly told Mains who was giving her a bath at the time: "Sissy Karen, you not hurt my monk. You not hurt my monk like my daddy do... My daddy knows how to do this [said as S.W. wiggled her fingers]. My daddy has a real big dick. My daddy kissed my monk." S.W. used the word "monk" to refer to her private area. Mains stated that as S.W. made these statements she seemed fine, but was slightly shaky.

Prior to trial, the trial judge found that S.W. did not satisfy KRE 601(b)(1) and found her incompetent to testify. Due to S.W.'s incompetence to testify, the prosecutor sought to introduce the statements made while she was taking a bath through the hearsay testimony of Mains. Despite Appellant's objection, the trial court admitted the statements under KRE 803(3), the state of mind exception, because they described what S.W. was thinking and feeling at that particular moment in time – specifically that she was experiencing apprehension at having her genitals exposed or washed.

KRE 803(3) allows hearsay statements to be admitted into evidence about the “then existing mental, emotional, or physical condition” of the declarant. Such statements can include the declarant’s “then existing state of mind, emotion, sensation, or physical condition ... but not includ[e] a statement of memory or belief to prove the fact remembered or believed.” *Id.* The “memory or belief” clause of KRE 803(3) prevents the admission of hearsay evidence if the statement or belief is used to prove the act, event, or occurrence that generated the memory. Moseley v. Commonwealth, 960 S.W.2d 460, 462 (Ky. 1998); see also Robert G. Lawson, Kentucky Evidence Law Handbook § 8.50 at 649 (4th ed. Michie 2003). The “memory or belief” clause codifies the landmark decision of, Shepard v. United States, 290 U.S. 96, 106, 54 S.Ct. 22, 26, 78 L.Ed. 196, (1933), which held that the statement “Dr. Shepard has poisoned me” did not fall within the state of mind exception because it “faced backward . . . to a past act.”

The standard of review on appeal for the admissibility of evidence is whether or not the trial court abused its discretion. English v. Commonwealth, 993 S.W.2d 941, 945 (Ky. 1999). “The test for abuse of discretion is whether the

trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” Id.

Under this standard, we conclude that the trial court erred in admitting the hearsay statements. The hearsay statements fall under the “memory or belief” exception to the state of mind rule because they were being used to prove that a certain event occurred – in this case that Appellant molested S.W. Since the victim's out-of-court statements do not fall within any other applicable exception to the hearsay rule, the admission of S.W.’s statements was thus error.

This error demands a reversal and a new trial because there is a substantial possibility that the outcome of the case would have been different if the error had not occurred. See generally Brewer v. Commonwealth, 206 S.W.3d 313, 324 (Ky. 2006) (holding that error is harmless if there is no substantial possibility that the result of the case would be any different had the error not occurred). Moreover, the prejudicial nature of these hearsay statements likely played a substantial role in securing Appellant’s conviction. The statements certainly portray Appellant in a poor light and imply that he molested S.W. – potentially multiple times. The improperly admitted hearsay evidence is perhaps the best connection between Appellant and the alleged crime – especially in light of Frailex recanting her prior statements to the police regarding Appellant molesting S.W.

However, it is important to note that despite the terrible nature of the crime alleged, it is a hallmark of our justice system that no person be unfairly convicted. “[I]t is far worse to convict an innocent man than to let a guilty man go free.” In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 1077, 25 L.Ed.2d 368 (1970) (Harlan,

J., concurring). Because there is a substantial possibility that the improperly admitted evidence unfairly swayed the jury's decision, it is therefore our duty to reverse and remand for a new trial.

Because the conviction must be reversed, we will address Appellant's other relevant claim of error to assist the trial court in the retrial.

II. Evidence showing Appellant had a sexual relationship with, and married, his stepdaughter was relevant but evidence of Appellant's subsequent marriage to a nineteen-year-old was overly prejudicial

During trial, the prosecution introduced evidence pertaining to Appellant's family life. Such evidence included the fact that Appellant had a sexual relationship with Frailex when she was seventeen, that he ultimately married Frailex, and that after divorcing Frailex, Appellant married a nineteen-year-old. Appellant argues that the introduction of this evidence was unduly prejudicial because it merely shows his "lustful inclination" and a general criminal disposition and does not prove whether he committed sodomy on his daughter.

The admissibility of this evidence is governed by KRE 404(b), which states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible: "1) [i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or 2) if so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." *Id.* In determining the admissibility of other acts evidence, it is useful to analyze the

evidence using a three-tier inquiry involving its: (1) relevance, (2) probativeness, and (3) prejudice. Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005). Moreover, a trial court's decision to admit evidence will not be disturbed absent abuse of discretion. Id.

Using the three-tier analysis, the evidence regarding Appellant's family life, including his relationship with his stepdaughter, was admissible under KRE 404(b)(2). "KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation." Adkins v. Commonwealth, 96 S.W.3d 779, 793 (Ky. 2003), citing Robert G. Lawson, Kentucky Evidence Law Handbook § 2.25 at 96 (3d ed. Michie 1993); see also Major v. Commonwealth, 177 S.W.3d 700, 708 (Ky. 2005) (holding that the defendant's incarceration at the time of his confession was admissible evidence to show the setting and context of the events surrounding the confession and explain any delays in his return to Kentucky). When presenting "a complete, unfragmented picture of the crime and investigation," it is customary and necessary to explain how the crime was discovered and reported to authorities. Id. Thus, the setting and context of the events surrounding Frailex's delay in reporting the alleged sodomy to the police are relevant and had potential impeachment value.

Additionally, the evidence regarding the strange relationship Frailex had with Appellant can help explain why she acted the way she did upon discovering the abuse, why she did not immediately contact authorities after discovering the abuse, and perhaps why Frailex recanted the story she told to the police. The strange relationship between Appellant and Frailex is too inextricably intertwined with Frailex's actions regarding the abuse to allow separation of the testimony

without serious adverse effect on the Commonwealth's case. Accordingly, the trial judge did not abuse his discretion in admitting that evidence pursuant to KRE 404(b)(2).

However, while the evidence regarding Appellant's relationship with Frailex is admissible, any evidence regarding Appellant's subsequent marriage to a nineteen-year-old is inadmissible at retrial. The evidence of Appellant's subsequent marriage, which was not illegal, is overly prejudicial and provides little to no probative value regarding the alleged crimes. The primary effect of the admission of the subsequent marriage evidence would be to inflame the jury, not to shed light on Appellant's guilt or innocence.

For the reasons set forth herein, the judgment and sentence of the Henderson Circuit Court is vacated and the matter remanded for a new trial.

All sitting. Lambert, C.J.; Cunningham, Minton and Scott, JJ., concur. Abramson, J., concurs in result only. Schroder, J., concurs in result only stating, although the outcome would be the same, the hearsay issue should have been analyzed under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and Davis v. Washington, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Noble, J., concurs in part and dissents in part by separate opinion.

COUNSEL FOR APPELLANT:

Donna L. Boyce
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601

Supreme Court of Kentucky

2006-SC-000399-MR

BUDDY LEE WORKMAN

APPELLANT

V.

ON APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
NO. 04-CR-000409

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION BY JUSTICE NOBLE

CONCURRING IN PART AND DISSENTING IN PART

The majority Opinion as to Section I is correct as discussed. However, as to Section II, it is error to admit evidence regarding Frailex's past personal history with the Appellant. This evidence should be excluded on retrial.

The testimony that Appellant had a sexual history with Frailex when she was seventeen and he was still married to her mother, that he married Frailex after divorcing her mother, and that after divorcing Frailex he married a nineteen year old clearly was not offered for any other acceptable purpose under KRE 404(b)(1). It does not prove motive, intent, identity, or anything else relevant or probative to the first-degree sodomy charge. Rather, the evidence only shows "lustful inclination."

More importantly, given the majority's reliance on KRE 404(b)(2), this evidence was not so "inextricably intertwined" with the direct proof that Appellant committed the sodomy against his (and Frailex's) daughter as to require its admission in order to

prevent serious adverse effect to the Commonwealth's case. To prove first-degree sodomy, the Commonwealth needed only to show that Appellant engaged in deviate sexual intercourse with a person below the age of twelve (who is therefore incapable of consent). KRS 510.070. The alleged victim was three years old at the time Frailex, the Appellant's former wife, claims to have caught him almost in the act of placing his penis in the child's mouth. Frailex subsequently recanted and claimed the event never happened, thereby impeaching her own accusation. After the child was declared incompetent to testify, there was no other admissible evidence of the event. Frailex's past history with the Appellant does not make it more or less likely that the incident actually occurred, nor was it necessary to present evidence of that history in order to present the recanted story of the sexual contact. Sexual activity with a seventeen and nineteen year old female does not compare to sexual activity with a three year old, and proves no element of sodomy at any rate.

These acts are not proper KRE 404(b)(2) evidence because inextricability requires a gap in logic that would make it difficult for the Commonwealth to present a coherent case against a defendant. Dysfunctional as this family history may be, it adds only prejudice and is certainly capable of redaction without causing the Commonwealth undue difficulty in proving its case. The real difficulty to the Commonwealth here is the scarcity of evidence and a primary witness who has recanted her original accusations. Nonetheless, a jury could believe those accusations and give them more weight than her subsequent denial.

The Commonwealth cannot rehabilitate Frailex by showing she had possible reasons to lie about the Appellant in the first instance. This family history might be of interest to the defense to prove she had a motive to lie and thereby further impeach her

original accusation, but it certainly helps the Commonwealth only by injecting irrelevant and prejudicial information. It is simply not admissible for the Commonwealth.

Finally, if the evidence were proper as the majority asserts, then it should not be addressed at all since the judgment is being reversed for other reasons. As it stands the majority's decision to proclaim the evidence admissible becomes the law of the case and will not be appealable should the Appellant be retried and reconvicted. However, since the evidence was erroneously admitted, this Court should instruct the trial court in accordance.