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RENDERED: JUNE 19, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000310-MR

DATE 7-10-08 [illegible]

RUSSELL GENE SULLIVAN — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
NO. 05-CR-000101

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REMANDING IN PART

This is a matter of right appeal from a judgment in which Appellant was convicted of the murder and first-degree criminal abuse of his girlfriend's three-year-old son. Appellant claims as error: the admission of the mother's guilty plea to Complicity to Criminal Abuse; that the three children who were witnesses for the Commonwealth were not competent to testify; the admission of prior bad acts of Appellant; the improper foundation laid for prior inconsistent statement testimony; and the Appellant's sentence of years was improperly ordered to run consecutively with his life sentence. We agree that Appellant's ten-year sentence was improperly ordered to run consecutively with his life sentence, and thus we remand the judgment for correction of the sentences to run concurrently. In all other respects, the judgment is affirmed.

On the Sunday morning of August 1, 2004, three-year-old Ryan Arnold had been playing outside of his mother's trailer in the countryside of Hardin County with several

other children. Later that day, Ryan came inside and complained to his mother, Andrea Arnold, that his head was hurting. Andrea gave him some Motrin, put him to bed, and asked Russell Sullivan, her boyfriend, to watch Ryan while she drove into town to get some food. According to Sullivan, whose nickname was "Rusty", approximately twenty minutes after Andrea left, he checked in on Ryan in his bedroom and saw that he had turned blue, was not breathing, and was unresponsive. Sullivan called 911 and told authorities that he would meet them at the local middle school because the area where Andrea lived could be difficult to find. Sullivan then drove Ryan and his four siblings to the Hardin Middle School where they met the EMS first responders. Paramedics attempted to revive Ryan and transported him to Hardin Memorial Hospital. From there, Ryan was transferred to Kosair Children's Hospital in Louisville, where he died the following day.

At the time of Ryan's death, Sullivan had been staying with Andrea and her five children at Andrea's trailer in the country. There was conflicting evidence as to whether he lived there or just stayed there on the weekends. Andrea testified that Sullivan had been living with them for about three weeks, while Sullivan testified that he was living at his mother's house at the time. However, it was undisputed that Sullivan had stayed at the trailer from Friday, July 30 to Sunday, August 1, 2004, and that Sullivan was at the trailer with Ryan when he first lost consciousness.

Kentucky State Trooper Jeff Gregory testified at trial that he talked to Sullivan in the waiting room at Hardin Memorial Hospital and asked him what had happened. Sullivan replied that he was babysitting the children when he checked on Ryan and found him turning blue. At that point, Trooper Gregory went to check on Ryan's status and observed extensive bruising on the child. When he returned to the waiting room, he

asked Sullivan a second time what happened with the child. This time, Sullivan stated that Ryan had been playing with some other children the night before and they were fighting with sticks. Sullivan said the sticks were still in the yard and they were not very big. When Andrea arrived at the hospital, Trooper Gregory observed her talking with Sullivan. Trooper Gregory then approached Sullivan and asked a third time about the source of Ryan's injuries, stating that the boy's massive head injuries were not consistent with stick fighting. Sullivan stated that he had just remembered that Ryan had fallen off the steps of the porch that morning.

Photos of Ryan from the hospital were admitted into evidence. These photos showed extensive bruising all over the child's body, including his forehead, chin, back, both ears, chest, shins, knees, thigh, arm, shoulder, genitals, and the tops and soles of his feet. The photos also showed abrasions to Ryan's nose and mouth.

Dr. Betty Spivack, a forensic pediatrician who had written many articles on abusive head trauma in children, was present during the autopsy of Ryan. Dr. Spivack opined that while some of the injuries could be attributed to normal childhood play or accident (the bruising to the shins and knees and abrasions on the nose and mouth), the character of the remainder of the bruises would be unusual for accidental injuries and was much more typical of inflicted injuries. In particular, the bruising on the forehead, which was in a cluster pattern, as well as the widespread hemorrhaging in the brain, was consistent with multiple inflicted blows by a flat surface at a high velocity and was not consistent with Ryan's recent medical history of a fall off of a bike or a porch, stick fighting or roughhousing with other children. Similarly, the clustered pattern of bruising on the sides of the chest, the arm, and the chin would indicate inflicted injury. Dr. Spivack specifically noted that the bruising on the genitals, the tops and soles of his

feet and in one of Ryan's ears was extremely unusual and would not have been caused by normal play or accident.

Dr. Tina Slusher, a pediatric intensivist who specialized in pediatric critical care, treated Ryan when he was transported to Kosair Children's Hospital. Dr. Slusher testified that when Ryan arrived at Kosair, he was brain dead. His CT scan showed a subdural hematoma. Dr. Slusher's assessment of the cause of Ryan's injuries corroborated Dr. Spivack's opinion that many of the injuries were inflicted and could not have been caused by a fall off of a bike or a porch or by playing with sticks. Dr. Slusher specifically noted the bruise on Ryan's thigh. Dr. Slusher testified that it was in such a pattern that it was likely caused by a belt or an adult human bite. Dr. Slusher agreed with Dr. Spivack that the bruising to the genitals, the bottom of the toes, and the one in his ear were extremely unusual.

Dr. Tracy Corey, Kentucky's Chief Medical Examiner since 1997, who is board-certified in anatomical pathology and forensic pathology, performed the autopsy on Ryan. Based on her findings during the autopsy, Dr. Corey concluded that Ryan died as a result of an inflicted, closed head injury with the manner of death being homicide. The autopsy revealed a subdural hematoma (bleeding under the membrane just underneath the skull – the dura) and a subarachnoid hematoma (bleeding in the thin layer underneath the dura). Dr. Corey testified that she observed multiple areas of trauma to the head and an area of abdominal trauma indicating that Ryan had also suffered some type of major blow to the abdomen. In Dr. Corey's opinion, falling down steps two feet high, falling off of a bicycle with training wheels, or stick fighting would not have caused Ryan's massive head injury. She stated that Ryan would have shown symptoms of the head trauma immediately or almost immediately. Dr. Corey testified

that she also found multiple, external contusions and abrasions on Ryan's body. While some of the bruises in some areas might have been caused by normal childhood play or accidents, Dr. Corey stated that the sheer number of bruises, the location of them (in recessed or protected areas), and the pattern injury on the thigh indicated that they were inflicted injuries.

The prosecution also presented the testimony of Toby Gillespie, a neighbor of the Arnolds who came by the trailer for a ride on Saturday, July 31, 2004. Gillespie testified that while he was waiting outside the trailer for Andrea to finish the dishes, he saw Sullivan "hitting on" the Arnold children. According to Gillespie, when Ryan came on the porch and said he was hurting, Sullivan told Ryan he was going to "toughen him up" and started smacking Ryan in the face and right eye area. Sullivan then picked Ryan up and started repeatedly swinging his head into the metal door of the trailer. Finally, Gillespie observed Sullivan throw Ryan down the steps, knocking the other children off of the steps. Gillespie testified that he asked Sullivan how he would like it if someone did that to him, to which Sullivan responded by calling Gillespie a "pussy." Gillespie claimed that an altercation between he and Sullivan then ensued when they started swinging and grabbing at each other, until eventually Sullivan pulled out his penis and declared he was "king of the porch."

Three of the Arnold children were called as witnesses for the Commonwealth: A.A., C.A., and H.A., who were nine, eight, and six years old, respectively, at the time of trial. While A.A. was not able to remember much about what happened when Rusty lived with them at the trailer, he testified that he remembered telling someone that Rusty whipped Ryan and fought the children with sticks. C.A. testified that he saw Rusty do bad things to Ryan, but at trial could not remember what they were. Madeline

Dunaway, a supervisor for the Cabinet for Families and Children who interviewed the Arnold children on August 1, 2004, testified that C.A. told her that Rusty sometimes whipped Ryan, would push Ryan off his bicycle, would put Ryan on the wall and hang him by his feet and swing him, and that he bit Ryan. H.A. testified that she remembered Rusty hurting Ryan and punching him in the face, but she did not remember Rusty hitting Ryan on a wall. Social worker Cynthia Little testified that H.A. told her that Rusty hit Ryan against the wall and beat him, making him bleed and cry.

The Commonwealth called Andrea Arnold as a rebuttal witness. Arnold testified that Ryan had gotten sick and vomited after dinner on the evening of July 31, 2004. She stated that the next morning, however, he was up playing and seemed fine. She testified that Ryan fell off the porch on Sunday and bloodied his nose. Later in the day, Ryan came in complaining that his head hurt and she gave him Motrin and put him to bed before she left to go get food. Andrea testified that she had never seen Sullivan get angry with any of her children or hurt them in any way.

In his testimony at trial, Sullivan denied causing Ryan's injuries or ever hurting Ryan. Sullivan stated that he could not explain what caused Ryan's injuries. According to Sullivan, he went to his mother's house on Sunday morning and when he got back to the trailer in the early afternoon, Andrea said Ryan had fallen down the stairs of the porch. Sullivan stated that Ryan had cuts on his nose and face after the fall. Sullivan testified that Ryan was constantly falling off of his bike. Sullivan also testified that when Gillespie and his friend Gage Jobe came over on Sunday, he observed them throwing rocks and bullying the children.

On February 28, 2005, Sullivan was indicted for Murder and First-Degree Criminal Abuse. After a seven-day jury trial commencing February 8, 2006, Sullivan

was found guilty on both counts. Following the jury's recommendation, the trial court sentenced Sullivan to life imprisonment for Murder and ten years imprisonment for First-Degree Criminal Abuse, to run consecutively. This appeal followed.

COMPETENCY OF CHILD WITNESSES

Sullivan maintains that all three Arnold children were incompetent to testify in this case. Competency hearings were held for all three children. KRE 601 sets forth the following standard for determining the competency of a witness:

> (a) **General.** Every person is competent to be a witness except as otherwise provided in these rules or by statute.
>
> (b) **Minimal qualifications.** A person is disqualified to testify as a witness if the trial court determines that he:
>
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
>
> (2) Lacks the capacity to recollect facts;
>
> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
>
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

KRE 601 establishes a presumption of competency, and the burden of proof is on the party challenging the witness' competency. Price v. Commonwealth, 31 S.W.3d 885, 891 (Ky. 2000). The determination of whether a witness is competent to testify is within the sound discretion of the trial court, and unless there is a clear abuse of that discretion, a trial court's ruling on competency will not be overturned on appeal. Jarvis v. Commonwealth, 960 S.W.2d 466, 468 (Ky. 1998) (citing Wombles v. Commonwealth, 831 S.W.2d 172, 174 (Ky. 1992) and Pendleton v. Commonwealth, 685 S.W.2d 549, 551 (Ky. 1985)). When the competency of a child witness is at issue, "it is then the duty of the trial court to carefully examine the witness to ascertain whether she (or he) is

sufficiently intelligent to observe, recollect, and narrate the facts and has a moral sense of obligation to speak the truth." Pendleton v. Commonwealth, 83 S.W.3d 522, 525-26 (Ky. 2002) (quoting Capps v. Commonwealth, 560 S.W.2d 559, 560 (Ky. 1977)).

At the competency hearing for A.A., who was age nine at the time of trial, A.A. could not remember his current or previous address, the name of town in which he lived, or who lived with him besides his father. However, A.A. knew his school, teacher, grade, birthday, and who brought him to court that day. A.A. correctly answered all of the questions posed by the court for the purpose of establishing that he knew the difference between the truth and a lie. A.A. testified that it was a bad thing to tell a lie and expressed awareness of the consequences of lying, such as getting into trouble and going to jail. Later in his testimony, A.A. recalled living with Rusty and his siblings in the trailer two years ago and that Rusty was "mean." In our view, A.A. met the minimum qualifications for competency in KRE 601. Hence, there was no abuse of discretion in the court's adjudication of his competency.

As for the competency of C.A., who was eight years old at trial, he likewise could not state his address or the town in which he lived. He stated that he lived in an apartment and before that, he lived at Rusty's. C.A. was able to name his three siblings that he currently lived with in his father's apartment. C.A. testified to the name of his school, his grade and how he got to school. He could not remember his teacher's name or his birthday, but was able to recall that he had a Wildcat cake for his last birthday. As for the court's questions intended to elicit whether he knew the difference between the truth and a lie, C.A. answered two correctly and one incorrectly. He correctly answered the Commonwealth's simpler questions on whether it would be a lie to say his shirt was red or that it was dark in the courtroom. When the court asked C.A. what happens

when someone tells a lie, C.A. responded, "I don't have any clue." However, C.A. did testify that it was a "bad thing to tell a lie," and that you get in trouble in school for telling a lie by having your name written on the board. He testified that before living in the apartment, he lived in a trailer with Rusty and that he did not like living with Rusty because he was mean.

Sullivan argues that C.A. was incompetent to testify at trial because of his difficulty in distinguishing truth from a lie and because of his difficulty recalling facts and events. From our review of C.A.'s testimony, although his responses were not all correct and he had difficulty recalling some facts, he nevertheless demonstrated sufficient competency to meet the minimum qualifications of KRE 601. C.A. was responsive to the questions posed to him, was able to express himself, showed the ability to recollect facts, and demonstrated that he could accurately recall the time period in question, when Rusty lived with the family. As for his capacity to understand the obligation to tell the truth, C.A.'s correct responses to basic truth/lie questions and his acknowledgement that it was a bad thing to tell a lie convince this Court that he had a sufficient understanding of this obligation. Accordingly, the lower court did not abuse its discretion in finding C.A. competent to testify.

Six-year-old H.A. competency was challenged by Sullivan also because she was unable to recall certain events and because she did not demonstrate that she understood the difference between the truth and a lie. When questioned by the Commonwealth, H.A. knew her grade, teacher, and school. H.A. recalled living in a trailer with Rusty, her mom, and her brothers when she was five. She also testified that she remembered going to the hospital when Ryan got sick.

In attempting to ascertain H.A.'s capacity to differentiate the truth from a lie, the court employed visual aids for the child in the form of a piece of paper with two children drawn on it and an object in the middle. Above one of the child's head was a circle containing the middle object, and above the other child's head was a circle containing a different object. The court explained that the object above each child represented what the child claimed the object in the middle was. The court then asked H.A. which child was lying or telling the truth, the one on the right or the one on the left. Although H.A. demonstrated to the court that she knew her right from her left and correctly identified all of the middle objects, she answered two of the truth/lie questions incorrectly and stated that she did not know the answer to another. She answered only one of the truth/lie questions correctly. The court then gave H.A. two papers with a picture of a judge in the middle and two children on either side of the judge. After telling H.A. which one of the children told a lie (the right or left child), the court asked H.A. which child would get in trouble for lying. H.A. correctly responded to both of these scenarios. When asked if it would be a lie to say that the judge brought her to court that day, the child responded, "I don't know." And when asked if she knew the difference between the truth and a lie, the child replied, "no." However, when the court asked H.A. if it would be the truth or a lie to say that the (pink) shirt she was wearing was green, H.A. correctly indicated it would be a lie. As for her knowledge of the consequences of lying, H.A. testified that it was a bad thing to tell a lie and that you might be punished for telling a lie.

Sullivan points to H.A.'s incorrect answers on the truth/lie questions as evidence of her incompetency. In viewing the visual aids used by the court, which were included in the record before us, and the method of questioning by the court, we question whether they were an accurate measure of this young child's capacity to understand the

obligation to tell the truth. Although H.A. indicated she knew her right hand from her left, she had to stop and think about it before answering. Also, the pictures of the objects in the circles above the children's heads (speech bubbles) could have been too abstract of a concept for this young child. Certainly adding these other levels of analysis to the questioning made this type of inquiry more complex and difficult for a six-year-old child. Although H.A. testified she did not know the difference between truth and a lie, when the court asked the truth/lie questions in a more simplistic way, H.A. answered correctly. Further, H.A. recognized that it was a bad thing to tell a lie and that one can be punished for telling a lie. Unlike the four-year-old child in B.B. v. Commonwealth, 226 S.W.3d 47 (Ky. 2007), H.A. demonstrated some understanding of the obligation to tell the truth and the consequences of lying. H.A. also demonstrated her capacity to perceive and recollect facts and to express herself so as to be understood. Accordingly, from our review of H.A.'s testimony as a whole, we cannot say that the trial court abused its discretion in finding her competent to testify at trial.

PRIOR BAD ACTS

Sullivan argues that the trial court erred in allowing in evidence of prior bad acts through the testimony of the child witnesses (A.A., C.A., and H.A.) and social workers Madeline Dunaway and Cynthia Little, in violation of KRE 404(b). Sullivan contends that the various testimony about his mistreatment of Ryan was prior bad act evidence because there was no time frame mentioned as to when many of these acts were committed. Hence, there was no evidence that these alleged acts related to the injuries Sullivan was charged with inflicting in this case. In particular, Sullivan objects to: H.A.'s testimony that he would hit Ryan in the face; A.A.'s testimony that he would whip Ryan and fight the children with sticks; C.A.'s testimony that he did bad things to Ryan;

Cynthia Little's testimony that H.A. told her that Rusty would beat Ryan, hit Ryan against the wall, make him cry and make him bleed; and Madeline Dunaway's testimony that C.A. told her that Rusty would whip Ryan, push him off his bike, put him on the wall, hang him by his feet and swing him, and that Rusty bit Ryan. The trial court overruled objections to this evidence. The trial court reasoned that because Sullivan was charged with First-Degree Criminal Abuse, as well as Murder, if there was any possibility that the prior acts caused the injuries that were the subject of the charges, the testimony was not evidence of "other crimes, wrongs, or acts" within the meaning of KRE 404(b) (emphasis added).

We agree with the trial court's ruling. KRE 404(b) applies to evidence of criminal conduct other than that being tried. See Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). In the Criminal Abuse indictment, Sullivan was charged with intentionally abusing or permitting the abuse of Ryan "on or about the 31st day of July, 2004." The injuries Sullivan was charged with inflicting on Ryan pursuant to the First-Degree Criminal Abuse charge were evidenced by the profuse bruising on Ryan's body. The expert medical testimony regarding the age of these bruises was that the exact age could not be conclusively determined. The bruises could have been hours old or days old at the time of Ryan's death. There was also evidence that Sullivan had only been living with Andrea and the Arnold children for about three weeks. Thus, it was possible that all of the physically abusive acts testified to could have been the source of the injuries at issue in this case. Accordingly, they were not "other" crimes, wrongs, or acts.

IMPROPER FOUNDATION

Sullivan argues that the trial court erred in allowing the Commonwealth to re-call Cabinet supervisor Madeline Dunaway to testify to C.A.'s prior statements to her about

Sullivan's abuse of Ryan. Sullivan contends that the Commonwealth failed to lay a proper foundation for such impeachment testimony pursuant to KRE 613(a). KRE 613(a) provides in pertinent part:

> Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them . . . .

On direct examination, C.A. testified that he remembered Rusty doing bad things to Ryan, but when the Commonwealth asked C.A. what those things were, C.A. responded that he forgot. The Commonwealth then asked C.A. if he remembered a lady named Ms. Dunaway coming to his house or his Dad's house and talking to him on the night Ryan got sick. C.A. responded, "no." After C.A. was released as a witness, the Commonwealth announced its intention to re-call Madeline Dunaway as a witness to testify to a prior statement made to her by C.A. about the things he saw Rusty do to Ryan. A bench conference then ensued on the issue of whether a proper foundation had been laid for re-calling Ms. Dunaway. The defense argued that C.A. was neither asked about the specific prior statement he allegedly made to Ms. Dunaway, nor the time and place of the statement as required by KRE 613(a). The trial court agreed that merely examining the child about whether he had talked to Ms. Dunaway, without examining him about the specific statement he made to Ms. Dunaway, did not meet the foundation requirements of KRE 613(a). The trial court suggested that the Commonwealth re-call C.A. to the stand to ask him the requisite foundational questions. The prosecution questioned whether an inquiry into the specific statement made by the child was necessary in light of the fact that he testified he did not remember even talking to Ms. Dunaway. Nevertheless, the Commonwealth agreed to re-call the child to ask

about the specific statement he made to Ms. Dunaway. Defense counsel then objected to re-calling C.A. because he had been released as a witness. Without formally addressing the objection to re-calling C.A., the trial court proceeded to allow the Commonwealth to re-call Ms. Dunaway to testify to the prior statement of C.A. (that Rusty sometimes whipped Ryan, would push Ryan off his bicycle, would put Ryan on the wall, hang him by his feet and swing him, and that he bit Ryan) without the additional foundational testimony of C.A..

In Noel v. Commonwealth, 76 S.W.3d 923, 929-930 (Ky. 2002) (quoting Cole v. State, 65 Tenn. 239, 241 (1873)), this Court made clear that strict compliance with KRE 613(a) is required, which includes asking "whether he said or declared that which it is proposed to prove by the impeaching witness," as well as "the time, place and person to whom the declaration was made." From our review of the Commonwealth's examination of C.A., the "time, place, and person" foundational elements were met by asking whether C.A. remembered talking to Ms. Dunaway at his or his Dad's house on the night Ryan got sick. However, simply asking C.A. whether he remembered talking with Ms. Dunaway, without stating the substance of the specific statement he purportedly made to her, was not sufficient.

The Commonwealth argues on appeal that Sullivan waived the error by his objection to re-calling C.A.. The Commonwealth maintains that any deficiency in laying a foundation for the impeachment testimony would have been cured by re-calling C.A., and thus it was Sullivan that invited the error by preventing the error from being remedied. Although C.A. had been released as a witness, no subsequent witness had been called to testify, and the trial court had the discretion to re-call the witness. See Metcalf v. Commonwealth, 158 S.W.3d 740, 748-49 (Ky. 2005); McQueen v.

Commonwealth, 28 Ky.L.Rptr. 20, 88 S.W. 1047 (1905). Indeed, the Commonwealth had already agreed to and was ready to re-call C.A.. "[C]ounsel for the aggrieved party must exhaust all reasonably available means to have the error rectified" before he can demand relief from the claimed error. Romans v. Commonwealth, 547 S.W.2d 128, 131 (Ky. 1977). Because Sullivan stood in the way of the error being remedied in this case, we deem said error to have been waived.

EVIDENCE OF ANDREA ARNOLD'S GUILTY PLEA

The Commonwealth called Andrea Arnold as a rebuttal witness at trial to ostensibly rebut evidence offered by the defense that Sullivan was living at his mother's house at the time of Ryan's death, not with Andrea and the children. After the Commonwealth asked Andrea several questions about her relationship with Sullivan and their living arrangements at the time, the following exchange occurred:

> Commonwealth: You have pled guilty to Criminal Abuse, have you not?
>
> Arnold: Yes.
>
> Commonwealth: And you pled guilty to not properly protecting Ryan. Who did you not properly protect him from?
>
> Arnold: Rusty.
>
> Commonwealth: As part of that plea agreement, you're going to serve ten years in jail, correct?
>
> Arnold: Yes sir.
>
> Commonwealth: As part of that plea agreement, are you required to testify here today?
>
> Arnold: No sir.
>
> Commonwealth: You're doing this your own self?
>
> Arnold: Yes sir.

After this exchange, the Commonwealth proceeded to ask Andrea a series of questions about the events leading up to Ryan's death, none of which elicited any response implicating Sullivan, except for the fact that she left Ryan in Sullivan's care during the time he lost consciousness. The defense then cross-examined Andrea, asking her, "Rusty didn't give you any reason to believe he did it?" Andrea responded, "I didn't think he did it." On re-direct, the Commonwealth again asked Andrea about her guilty plea:

> Commonwealth: You didn't plead guilty to murdering Ryan Arnold, did you?
>
> Arnold: No.
>
> Commonwealth: You pled guilty to not protecting Ryan Arnold?
>
> Arnold: Yes.
>
> Commonwealth: Not protecting him from the defendant Russell Sullivan?
>
> Arnold: Yes.

On re-cross, the defense then elicited the details of Andrea's guilty plea and sentence, including the fact that it was the result of a plea agreement whereby the charge of Complicity to Murder was dismissed. At the end of the questioning, defense counsel asked, "During the plea, you didn't say you failed to protect Ryan from Rusty, did you?" Andrea responded, "no." On the second re-direct, the Commonwealth directly asked Andrea, "Who did you fail to protect your children from?" to which Andrea responded, "Rusty, he was the only one there." The inquiry surrounding Andrea's plea was finally concluded on the second re-cross when defense counsel asked, "You didn't say anything about Rusty during your plea, did you?" Andrea responded, "no."

On appeal, Sullivan argues that introducing evidence of Andrea's guilty plea to Complicity to Criminal Abuse in the case denied him a fair trial because it was offered by the Commonwealth as evidence of Sullivan's guilt.

> "It has long been the rule in this Commonwealth that it is improper to show that a co-indictee has already been convicted under the indictment." To make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does or does not testify, and whether or not his testimony implicates the defendant on trial.

Tipton v. Commonwealth, 640 S.W.2d 818, 820 (Ky. 1982) (quoting Parido v. Commonwealth, 547 S.W.2d 125, 127 (Ky. 1977)). One exception to the rule is when the evidence of the conviction is used to impeach the co-indictee, and, if so used, an admonishment should follow that it is only to be considered for credibility purposes. Parido, 547 S.W.2d at 127 (citing Webster v. Commonwealth, 223 Ky. 369, 3 S.W.2d 754 (1928)). And in St. Clair v. Commonwealth, 140 S.W.3d 510, 545 (Ky. 2004), this Court adjudged it was not reversible error to introduce evidence of the co-indictee's guilty plea when no objection was raised to the evidence and when the defense referenced the guilty plea as part of its trial strategy. See also Tamme v. Commonwealth, 973 S.W.2d 13, 33 (Ky. 1998), cert. denied, 525 U.S. 1153, 119 S. Ct. 1056, 143 L. Ed. 2d 61 (1999).

In the instant case, Sullivan admittedly failed to object to the introduction of the evidence of Andrea's guilty plea. Although the Commonwealth certainly used Andrea's guilty plea as evidence of Sullivan's guilt (by repeatedly asking her who she failed to protect Ryan from), defense counsel, for impeachment purposes, elicited more detailed information about the guilty plea and plea agreement on re-cross, and used the fact that Andrea did not mention Sullivan during her plea as evidence that Sullivan was not

guilty. Thus, it appears that defense counsel referenced the guilty plea as part of her trial strategy. Accordingly, it was not reversible error to allow in evidence of Andrea's guilty plea.

CONSECUTIVE SENTENCE

Sullivan received a ten-year sentence on the First-Degree Criminal Abuse charge and a life sentence on the Murder charge, with said sentences to run consecutively. Sullivan argues that it was error to run the ten-year sentence consecutively with the life sentence. We agree. In Bedell v. Commonwealth, this Court held that under KRS 532.110(1)(c), "no sentence can be ordered to run consecutively with . . . a life sentence . . . ." 870 S.W.2d 779, 783 (Ky. 1993); see also Mabe v. Commonwealth, 884 S.W.2d 668, 673 (Ky. 1994). Although this error was not preserved for review, under RCr 10.26 we adjudge said error to be palpable error affecting the substantial rights of Sullivan. Accordingly, this case is remanded for the limited purpose of correcting the sentence to run Sullivan's ten-year sentence concurrent with his life sentence.

For the reasons set forth above, the judgment of the Hardin Circuit Court is affirmed in part and remanded in part for proceedings consistent with this opinion.

All sitting. Abramson, Cunningham, Minton, Noble, Schroder, and Scott, JJ., concur. Lambert, C.J., concurs in result only.

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