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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-13-08 Ella Gravitt, D.C.

2006-SC-000072-MR

EARNIE VIRES APPELLANT

V.

ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE R. WARD, JUDGE
NO. 04-CR-00546

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Earnie Vires, was convicted of first-degree rape and sentenced to life imprisonment. He appeals to this Court as a matter of right. A number of trial errors, including improper questioning on voir dire, improper vouching for the alleged victim's credibility by two witnesses, and improper limitations on cross-examination require us to reverse and remand for a new trial.

The charge in this case stems from an allegation made in 2004 by Appellant's twelve-year-old step-daughter, K.C., that Appellant had raped her every day when she was between the ages of three and seven (1995-1998). K.C. was born in October 1991. K.C.'s mother, Pam, had four older children as well. When K.C. was a baby, Appellant and Pam moved in together and married. K.C. grew up believing Appellant was her biological father. From March 1995 to March 1997, Pam, Appellant, K.C., and

one of Pam's older daughters, Nina, lived in a small one story duplex in Bellevue, Kentucky. The home had three rooms – a living room, kitchen, and bedroom – and a bathroom. K.C. and Nina, who was five years older than K.C., shared the bedroom. Another of Pam's older daughters, Tonya, and her husband sometimes lived there as well. In 1996, Pam gave birth to Appellant's biological daughter, C.V. In March, 1997, the family moved to a larger duplex in Dayton, Kentucky. Again, Nina and K.C. shared a bedroom. Pam, Appellant, and C.V. shared another bedroom. Tonya and her husband also stayed there at times as well.

It was undisputed that Pam and Appellant had a volatile relationship. Appellant worked late hours as a tattoo artist and saw other women. Pam and Appellant argued frequently. At times, Appellant was physically violent towards Pam, and sometimes Pam and the children would stay at emergency shelters. There was alcohol, marijuana, and drug use by Appellant and Pam. Social services was frequently involved with the family over the years, and K.C. would talk with the social workers. K.C. never made any statements concerning sexual abuse to the social workers. Appellant left on November 24, 1998, when K.C. was seven years old. Pam and the children moved out of the Dayton residence in the summer of 1999. Appellant did not live with the family again until December, 2001.[1]

In May, 2003, Appellant and Pam mutually agreed to split up, and Appellant did not live with the family again. In late 2003 or early 2004, Pam informed K.C., who was then twelve years old, that Appellant was not her biological father. Pam told K.C. the truth because K.C. had begun dating a boy who was her (K.C.'s) half-brother. It became known at K.C.'s school that she had been dating her brother, and as a result,

[1] Appellant was incarcerated for the three years that he did not live with the family (November 24, 1998 to December 2001).

she became the subject of ridicule by other students. Shortly thereafter, in March, 2004, the Cabinet for Health and Family Services received a report that K.C. had been sexually abused by Appellant (it is unclear to whom K.C. made this allegation). As a result, a social worker came to K.C.'s school to talk to her. K.C. told the social worker she believed it was a dream. The social worker labeled the report as unsubstantiated, "due to the child not being able to remember any specific sexual act or if it ever really happened."

In June, 2004, K.C. told a friend's mother, Jenny Carpenter, that Appellant had physically and sexually abused her. Carpenter told Pam Vires, whom Carpenter described as "shocked". Pam Vires called her regular social worker,[2] after which law enforcement became involved. K.C. was sent to the Child Advocacy Center for a forensic interview. In the interview, K.C. apparently claimed that Appellant had raped her every day when she lived in Bellevue and Dayton (which would have been six to nine years earlier, when she was three to seven years old). K.C. was referred by the Child Advocacy Center to a physician, Dr. Catherine Gouldin, for a sexual abuse examination. The examination showed no physical evidence of sexual abuse. K.C. was also sent for counseling with Virginia Peppers, a psychiatric nurse practitioner.

In an indictment returned on October 28, 2004, Appellant was charged with one count of rape, occurring "between March 1, 1995 and November 24, 1998."[3] A jury trial commenced in December, 2005. K.C. was fourteen years old at the time of trial, and, over objection, was permitted to testify in chambers. K.C. testified that Appellant

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[2] In June 2004 the Cabinet received a report that K.C. was remembering things and had things she wanted to talk about.

[3] These dates reflect K.C.'s allegation that the abuse happened when Appellant lived with the family in Bellevue and Dayton. Appellant was also charged with being a second-degree persistent felony offender, which is not at issue.

touched her with his hands "everywhere" and put his penis inside her vagina. K.C. testified this happened every night when she lived in Bellevue and Dayton (when she would have been three to seven years old), on the floor in the bedroom she and Nina shared. She said Nina and Pam would be asleep when it happened. K.C. also said she watched pornography with Appellant. On redirect, the Commonwealth clarified with K.C. that she did not actually mean "every" night, because there were times when Appellant was not there at night.

K.C.'s older sister Nina, who shared the bedroom and sometimes a bed with K.C. during the time the abuse allegedly occurred, testified that she never saw Appellant abuse K.C. Nina testified that she was shocked by the allegations, and that K.C. had never said anything to her about being sexually abused by Appellant. K.C.'s mother Pam Vires testified that K.C. had never said anything to her, nor complained of pain. Pam testified that she had never noticed any evidence of sexual abuse at any time. Pam acknowledged that although K.C. had been to the doctor and attended school during the time the sexual abuse allegedly occurred, no doctor or teacher ever expressed concern to her that K.C. was sexually abused.

Dr. Gouldin testified that K.C.'s physical examination was normal, but that a victim of sexual assault can have a normal exam. Dr. Gouldin went on to testify, over objection, that she diagnosed K.C. as "sexually abused" and "sexually assaulted" based on what K.C. had reported. Nurse Peppers testified that K.C. suffered from Post-Traumatic Stress Disorder as a result of the abuse, and that this disorder caused her to delay disclosing the abuse for many years.

Appellant testified in his own defense and denied the allegations. Appellant was convicted of first-degree rape and sentenced to life imprisonment. He appeals to this court as a matter of right alleging a number of trial errors.

I. IMPERMISSIBLE VOIR DIRE AND REMOVAL OF THREE JURORS

Appellant's first assignment of error is that the prosecutor and trial court impermissibly attempted to define reasonable doubt during voir dire. Appellant contends that the following seven questions (during an approximately one hour long voir dire on reasonable doubt) by the prosecutor and the trial court were improper:

> (1) Commonwealth (to juror): "So, if it was solely a child's testimony, you may find that to be reasonable doubt?"
>
> (2) Trial Court (to same juror): "So sir what you're saying to this court is that if the prosecution only presents one witness in their case, and that's the child and the child accuses this individual of sexually abusing her, are you saying to this court that you wouldn't believe, you could not believe her testimony would be enough to convict this defendant?"
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> (3) Commonwealth (to same juror): "If it was the only person who testified to the act of being abused, there was no witnesses, there was no DNA, no pictures, no videotape, nothing like that, it was just the child who said what happened to her, and then all of the people that investigated, but only one witness to the act, would that alone, knowing only one person, the child, saw the act, would that be reasonable doubt in your mind?"
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> (4) Commonwealth (to another juror): "If the only witness to the act is the child but you have everyone else who investigated it and followed up, and you have the child, you'll see the testimony, but there is only one witness to the act, whether it be a robbery, a sex abuse in this incidence . . . only one witness to the act, no medical evidence . . . You have the child's testimony and you have everyone else who conducted the investigation . . . So if just the child testified, would that be reasonable doubt in your mind?"
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> (5) Commonwealth (to juror): "If the only witness to the act of the rape, the abuse, is the child, in your mind is that reasonable doubt?"

(6) Trial Court (to same juror, and then to entire jury): "Let's just assume Mr. Sexton[4] decided to punch me in the face, and I said to someone, Shannon Sexton last night when everyone left the courtroom he punched me in the face and perhaps he had on a glove or whatever the case may be and nothing, there was no physical evidence on my face, but I accused him of something and then you all were called in as jurors to listen to the case, and I got on the stand and raised my hand, swore to tell the truth, and I said to you all as a juror that this individual struck me in the face last night, and you believed what I had to say, you believed that I was telling the truth based on what you could see me say, watching my demeanor, watching my body action, and you believed me. Shannon got on the stand and testified quite the contrary, he said he didn't do it, but whatever he was saying, whatever his body language was, whatever his twitch of the eye, whatever it was, for some reason in your heart, you didn't believe what he had to say but you did believe what I had to say, could you convict Shannon Sexton of a crime? . . . Does anyone believe that if they believed me and they believed I was honest and they knew in their gut I was telling the truth that they can convict Shannon Sexton of a crime, despite the fact there's nothing wrong with my face, despite the fact no one else saw anything? . . . Does anyone disagree, anyone else disagree with the hypothetical that I posed, that if you thought I was credible and you thought in your gut I was telling the truth that you could convict Shannon Sexton of a crime?. . . If you believed me, if you believed what I was saying was true, that Shannon Sexton actually hit me in the face, despite the fact that I have no witnesses, I have no DNA evidence, if you believed I was being honest and telling the truth, can you convict Shannon Sexton? If anyone, if everyone could convict Shannon Sexton, raise their hand. If anyone could not convict, raise your hand . . . [to Commonwealth] Are you writing down the numbers?"

(7) Commonwealth (to juror): "If there is only a single witness to the act, there may or may not be additional witnesses who investigated, etc., but only a single witness to the act, is that reasonable doubt in your mind, because there is only a single witness to the act?"

"[T]rial courts shall prohibit counsel from *any* definition of 'reasonable doubt' at any point in the trial." Commonwealth v. Callahan, 675 S.W.2d 391, 393 (Ky. 1984). It goes without saying that this prohibition applies to the trial court itself as well. We do not believe that the prosecutor, by his questions, suggested a definition of reasonable

[4] Shannon Sexton was the prosecutor conducting voir dire for the Commonwealth.

doubt. Rather, the prosecutor's questions only sought the jurors' impressions as to sufficient proof in a single eyewitness case.[5]

The trial court's questioning, however, did violate Callahan. In Marsch v. Commonwealth, 743 S.W.2d 830, 833 (Ky. 1987), we held as a "clear-cut violation" of Callahan where, during voir dire, the prosecutor provided an example using himself as a hypothetical witness to an accident and suggested to the prospective juror that his hypothetical testimony would satisfy the "reasonable doubt" standard, but might not eliminate all possibility of a doubt. The trial court's lengthy hypothetical is similar to the Callahan violation found in Marsch. Further, "[q]uestions [on voir dire] are not competent when their evident purpose is to have jurors indicate in advance or to commit themselves to certain ideas and views . . . ." Woodall v. Commonwealth, 63 S.W.3d 104, 116 (Ky. 2001) (citing Ward v. Commonwealth, 695 S.W.2d 404, 407 (Ky. 1985)). The trial court, by asking jurors to raise their hands, was improperly requiring jurors to commit to a one witness equals beyond a reasonable doubt standard, without having heard any evidence.

The aforementioned voir dire violations by the trial court were so severe as to corrupt the entire jury panel. Therefore, the error is reversible. Having concluded the improper questioning corrupted the entire jury panel, Appellant's argument that three jurors were improperly stricken for cause (as a result of the questioning at issue) is rendered moot.

II. IMPROPER DIAGNOSIS TESTIMONY BY DR. GOULDIN AND IMPROPER LIMITS ON CROSS-EXAMINATION

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[5] "The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary, if, after consideration of all the evidence, the finder of fact assigns greater weight to that evidence." Commonwealth v. Suttles, 80 S.W.3d 424, 426 (Ky. 2002) (citing Murphy v. Sowders, 801 F.2d 205 (6th Cir. 1986)).

A. Improper Diagnosis Testimony

Due to the allegations, K.C. was referred by the Child Advocacy Center to Dr. Catherine Gouldin, a pediatrician at a Cincinnati, Ohio child abuse clinic, trained in performing child sexual abuse examinations. Dr. Gouldin saw K.C. on October 18, 2004. At the visit, a medical and social history was taken from K.C., and a physical examination was performed. Dr. Gouldin testified the history given was "that she had had prior sexual abuse with the last contact around age six, that it was genital to genital contact, and that she currently had behavioral changes . . . including nightmares and flashbacks for which she was in counseling." Dr. Gouldin testified that K.C.'s physical examination was normal but that victims of sexual abuse can have normal exams. Dr. Gouldin went on to testify, over objection, that she diagnosed K.C. as "sexually abused" and "sexually assaulted". On cross-examination, Dr. Gouldin admitted there was no physical evidence to support her conclusion, but that she based her diagnosis on K.C.'s allegations, and the behavioral symptoms K.C. reported.

On appeal, Appellant contends that it was error for the trial court to allow Dr. Gouldin to testify that she diagnosed K.C. as "sexually abused" and "sexually assaulted", because the diagnosis was based solely on K.C.'s allegations and behaviors. We agree, for two separate reasons. First, Dr. Gouldin does not qualify as an expert on the credibility of K.C. In fact, this Court has consistently recognized that "there is no such thing as expertise in the credibility of children." Newkirk v. Commonwealth, 937 S.W.2d 690, 693 (Ky. 1996) (citing Hall v. Commonwealth, 862 S.W.2d 321, 323 (Ky. 1993)); See also Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1993). Accordingly, Dr. Gouldin's "diagnosis" of sexual abuse, as it was based on K.C.'s allegations, has no probative value as to whether or not sexual abuse

occurred, and, further, improperly vouched for K.C.'s credibility. Hellstrom, 825 S.W.2d at 614.

Second, we have consistently held as inadmissible, expert testimony that a child's behavioral symptoms are indicative of sexual abuse, on grounds that this is not a generally accepted medical concept. Bell v. Commonwealth, 245 S.W.3d 738 (Ky. 2008); See also Brown v. Commonwealth, 812 S.W.2d 502 (Ky. 1991) (expert testimony that child's behavior "consistent with abuse" was reversible error), overruled on other grounds by Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997); Hellstrom, 825 S.W.2d at 613-14; Hester v. Commonwealth, 734 S.W.2d 457 (Ky. 1987); Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986); Bussey v. Commonwealth, 697 S.W.2d 139 (Ky. 1985). Accordingly, a diagnosis of sexual abuse based on behavior has no probative value and is inadmissible.

For the aforementioned reasons, the admission of Dr. Gouldin's diagnosis that K.C. was sexually abused or sexually assaulted was error. The improper diagnosis testimony was highly prejudicial, and unfairly vouched for the credibility of K.C. The error requires reversal.

B. Improper Limits on Cross-Examination

Appellant also contends that the trial court improperly limited cross-examination of Dr. Gouldin. The trial was scheduled to begin on June 13, 2005. The Commonwealth moved that Dr. Gouldin be permitted to testify via deposition because she was going to be unavailable for trial (because she was going to be on vacation). When defense counsel expressed that he was not sure he would agree to that, the trial court stated that doctors commonly testify through depositions. Over the defense's objection, the deposition was taken on June 9, 2005. On Appellant's motion (on other

grounds) the trial was continued until August 24, 2005, and on the Commonwealth's motion (on other grounds) the trial was continued until December 7, 2005.

Appellant moved to subpoena Dr. Gouldin to testify in person for the new trial date. The trial court was of the opinion there was no need for a personal appearance because they already had a "trial deposition". Appellant argued the Confrontation Clause allowed him to subpoena Dr. Gouldin and cross-examine her in person at the trial. The Commonwealth could not make a showing of unavailability. Reluctantly, the trial court allowed the Appellant to subpoena Dr. Gouldin for live testimony at trial, but placed an unusual limitation on both direct examination and cross-examination. The trial court ruled that whatever was asked or objected to in the original deposition could be asked or objected to at trial. However, no additional questions or objections would be permitted. The court explained that it was imposing these limitations because it was a "trial deposition", "its already done, its already taken", and it would not be fair to the Commonwealth to have the doctor testifying to new things. The Commonwealth asked for a qualification. Could the Commonwealth ask a question the defense asked during the deposition but did not ask again at trial? The trial court wanted the contents of the deposition in the trial as if the video was played, and clarified that if one party did not ask a question it asked in the deposition, the other side was free to ask it.

Defense counsel informed the trial court that he had been trying to review a copy of the tape of the deposition for some time, several weeks before trial, but that the court clerk did not know where it was, so it was unavailable. At that point, the Commonwealth volunteered it had had the tape in its office all along. The Commonwealth had made a partial transcript to follow for the questioning at trial. The examination of Dr. Gouldin proceeded, with a continuing objection to the limitations or constraints on cross-

examination and objections. When the Commonwealth objected to defense counsel not following the script, there would be a bench conference to review the script. Repeatedly defense counsel would claim he had objected, which objections were not reflected in the transcript. The Commonwealth explained that if the objection had been overruled, it was not included in this edited transcript. On cross-examination defense counsel was constrained to following the script. Following his restricted cross-examination, an obviously frustrated defense counsel asked for a mistrial because of the trial court's limitations, which was denied. Defense counsel then informed the court that he would have additional questions to put in by avowal.

The trial court sent the jury outside the courtroom for the avowal testimony. When defense counsel attempted to ask questions, the Commonwealth objected to many, and the trial court sustained the objections, not letting the witness answer – even though the questions were by avowal. Eventually, defense counsel informed the court that this was avowal testimony (meaning the witness should be allowed to answer). Thereafter, the Commonwealth reversed itself and withdrew its objections to the avowal testimony, and also informed the court that it had no objection to the defense re-asking questions that he was not allowed to have answered. The court then gave defense counsel an opportunity to re-ask questions, but he declined.

Appellant argues that the trial court erred in limiting cross-examination to what was asked in the deposition. We agree. The trial court was trying to stage a reenactment of the deposition. There is simply no basis in the law for the trial court's ruling. The ruling runs contrary to not only the Confrontation Clause, but also violates KRE 611(b), our rule of "wide open" cross-examination. Dr. Gouldin was the

Commonwealth's key witness (other than K.C.) and the trial court's limitation is reversible error.

III. ADMISSION UNDER KRE 803(4) OF THE UNSANITIZED "HISTORY" GIVEN TO NURSE VIRGINIA PEPPERS

The Commonwealth called as a witness, Virginia Peppers, a psychiatric nurse practitioner from Wilder, Kentucky. K.C. was referred to Nurse Peppers for counseling due to the allegations. Nurse Peppers first saw K.C. in August, 2004. At trial, Peppers testified that she first took a "history" from Pam Vires. When Peppers began to state what Pam told her, the defense objected on grounds that the testimony was in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The trial court overruled the objection and ruled the testimony was admissible because it was for the purpose of diagnosis and treatment (KRE 803(4)). Nurse Peppers then testified that Pam Vires told her that K.C. had recently disclosed that she had been sexually abused by her stepfather (Appellant) whom she had thought was her biological father and because of that she was experiencing nightmares, flashbacks, and had become very emotional and was crying a lot.

The trial court correctly found that Crawford did not apply in this case. Although the statement was double hearsay, both Pam Vires and K.C. testified at trial, hence the Confrontation Clause was not implicated. Crawford, 541 U.S. at 59, 124 S. Ct. at 1369 n.9. On appeal, Appellant argues that Nurse Peppers' repetition of the history was error, because it was "unsanitized", identifying Appellant as perpetrator. Appellant did not raise this argument in the trial court. The Appellant may not feed one can of worms to the trial court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976).

However, as we are reversing this case on other grounds, we shall briefly address this issue to avoid error on retrial. It is well-settled that statements of identity are rarely, if ever, pertinent to diagnosis and treatment. Garrett v. Commonwealth, 48 S.W.3d 6, 11 (Ky. 2001). The general rule would apply in this case. There was no need for Nurse Peppers to ascertain the identity of the perpetrator, as the case was already reported to law enforcement and the alleged perpetrator's identity was known. Id. (recognizing identity may be relevant to treatment in order to prevent further harm to child). Hence, upon retrial, any "history" repeated by Nurse Peppers should delete any reference to Appellant. Id. at 10, 14.

IV. IMPROPER "DELAYED DISCLOSURE" TESTIMONY

The Commonwealth intended to call Nurse Peppers to testify that, as a result of the sexual abuse, K.C. was suffering from Post-Traumatic Stress Disorder (PTSD), more specifically, to explain that K.C. had delayed disclosing the abuse for many years because she suffered from PTSD. Appellant filed a motion in limine to exclude any testimony by Nurse Peppers on the theory of delayed disclosure, recognizing this Court has consistently rejected expert testimony on "delayed disclosure", as a symptom of "Child Sexual Abuse Accommodation Syndrome" (CSAAS), to prove child sexual abuse.[6] The trial court held a Daubert hearing on the admissibility of "delayed disclosure" resulting from Post-Traumatic Stress Disorder. At the hearing, Nurse Peppers testified that PTSD is accepted in the scientific community, and that there is a four-prong test that must be satisfied for a PTSD diagnosis. Peppers stated that the

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[6] This Court has consistently held that neither Child Sexual Abuse Accommodation Syndrome, nor the symptoms comprising the syndrome, has attained general acceptance in the scientific community justifying its admission into evidence to prove sexual abuse or the identity of the perpetrator. Newkirk, 937 S.W.2d at 693. Neither the syndrome nor its components have been shown to meet the standard of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Id. at 694-95. "Delayed disclosure" is considered one of the symptoms of CSAAS. Id. at 692; Hellstrom, 825 S.W.2d at 613-14.

first criteria is that the person must have experienced something traumatic (life-threatening), which would include childhood physical or sexual abuse. Referring to the first criteria, Peppers clarified "You have to have that first [traumatic event] to have the diagnosis." Peppers testified that the remaining criteria are (2) "reexperiencing the trauma" which would include flashbacks, dreams, and intrusive thoughts; (3) "numbing and avoidance" which includes trying not to talk about what happened and forgetting aspects of what happened; and (4) "hyperarousal", which includes startling easily, looking around ("hypervigilance"), having trouble sleeping, and being very irritable. Peppers said K.C. displayed symptoms of PTSD per her reporting. Peppers then matched K.C.'s behavioral symptoms to the various criteria, that she has (2) "reexperiencing the trauma" because she has nightmares, intrusive thoughts and flashbacks; (3) "numbing and avoidance" because sometimes she tries not to think about what happened and sometimes denies it happened; and (4) "hyperarousal" in that she startles easily, is hypervigilant, and has difficulty sleeping. Peppers concluded that PTSD is what caused K.C.'s delay in disclosing the sexual abuse, without discussing the first criteria. Following the hearing, the trial court ruled that Peppers could testify to delayed disclosure as part of PTSD, on grounds that PTSD is an accepted psychiatric disorder. In her trial testimony, Nurse Peppers repeated the above. She stated that K.C.'s delay in disclosing the sexual abuse fell under the third criteria, "numbing and avoidance".

On appeal, Appellant contends that it was error for the trial court to permit Nurse Peppers to testify as to K.C.'s "delayed disclosure". In an unbroken line of cases, this Court has held as inadmissible, evidence of a child's behavioral symptoms or traits, including "delayed disclosure," as indicative of sexual abuse (sometimes referred to as

Child Sexual Abuse Accommodation Syndrome). Bell, 245 S.W.3d at 738; Newkirk, 937 S.W.2d at 690. This is because "[n]either the syndrome nor the symptoms that comprise the syndrome have recognized reliability in diagnosing child sexual abuse as a scientific entity." Hellstrom, 825 S.W.2d at 614.[7]

The Commonwealth, recognizing that this Court has consistently rejected expert testimony on "delayed disclosure" as a symptom of CSAAS, argues that in this case, it was admissible as part of the scientifically accepted Post-Traumatic Stress Disorder. We do not dispute that PTSD is a scientifically accepted psychiatric disorder, but it does not apply here. By Nurse Peppers' own admission, it requires, as the first criteria for the diagnosis, that the traumatic event occurred (in this case, that K.C. was sexually abused by Appellant). Nurse Peppers based the existence of the first criteria on her subjective belief that K.C. was truthful. Therefore, the whole diagnosis fails, because "there is no such thing as expertise in the credibility of children." Newkirk, 937 S.W.2d at 693 (citing Hall v. Commonwealth, 862 S.W.2d 321, 323 (Ky. 1993)). In fact, we have consistently recognized that "mental health professionals are not experts at discerning the truth; they are trained to accept facts provided by their patients without critical examination of those facts." Newkirk, 937 S.W.2d at 693 (citing Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1993)). "While it may be entirely proper for a clinician to accept a patient report of sex abuse at face value and proceed to render treatment on that basis, for forensic purposes, such an assumption is utterly inappropriate." Newkirk, 937 S.W.2d at 694.[8]

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[7] "[T]his Court has repeatedly expressed its distrust of expert testimony which purport[s] to determine criminal conduct based on a perceived psychological syndrome." Newkirk, 937 S.W.2d at 690-691.

[8] Further, "[t]he admission of theoretical expert evidence which presumes guilt from the very fact of the accusation is contrary to our most fundamental rights." Id. at 695.

The admission of Nurse Peppers' testimony that K.C. delayed disclosing as part of PTSD was reversible error. Nurse Peppers' "diagnosis" of PTSD required a belief in K.C.'s allegations to satisfy the first criteria, and Nurse Peppers' belief improperly vouched for K.C.'s credibility. On retrial, any testimony relating K.C.'s behavior to PTSD is inadmissible.

V. ADMISSION OF PHYSICAL AND EMOTIONAL ABUSE UNDER KRE 404(b)

The Commonwealth filed notice of its intent to introduce evidence that Appellant was physically and emotionally abusive of K.C. and family members under KRE 404(b). The Commonwealth asserted that this evidence was admissible under KRE 404(b)(1) to show a "common scheme;" under KRE 404(b)(2) as "inextricably intertwined" with the charged offense, and also to show why K.C. delayed disclosure. Following a hearing, the trial court ruled that evidence of physical abuse of K.C. or her mother could come in through K.C. The trial court did not specify the grounds for admitting said evidence, i.e. "common scheme," "inextricably intertwined" with the charged offense, that it was allowed to show why K.C. delayed disclosure, or all three. At trial, during Pam Vires' testimony, the court changed its ruling to allow others to testify to acts of abuse if K.C. had witnessed it. Again, the trial court did not explain its ruling, nor admonish the jury as to how or for what purpose they could consider this evidence.

At trial, Pam Vires testified before K.C. Pam testified that she was physically abused by Appellant and that K.C. witnessed this abuse. Pam described the abuse as that Appellant would grab her (Pam), throw her against the wall and "body slam" her. Pam testified that she did not know how much physical abuse K.C. saw or remembered, but that the children were in the house when it happened. Pam also described an incident where Appellant had come in intoxicated and told K.C. to go get a knife

because he was going to kill everything he loved, starting with the baby. K.C. brought a butter knife and Appellant grabbed Pam by the hair and got a butcher knife and told the girls to turn their backs. Pam testified as to an incident where Appellant threw C.V. into the car and her head hit the top of the car. Pam also described an incident where a fight broke out, and she (Pam) ended up on the ground, and Appellant picked up, and slung, C.V. by the hair. Pam testified that K.C. witnessed both of these incidents.

K.C. testified after her mother. She testified that she did not tell about the sexual abuse when it was happening because she was scared, that Appellant threatened he would hurt her and her family if she told. She testified that Appellant hit her and "would beat us with things," and that she saw Appellant beat and hurt Pam. Nina, the sister, testified about the butcher knife incident. She said the next morning Pam had scratches on her face and the knife was stuck in the wall. Nina also testified that she saw the incident where Appellant "slung" C.V. around.

On appeal, Appellant contends it was error to allow Pam Vires and Nina to testify to acts of physical and emotional abuse. Appellant argues this evidence was not admissible under KRE 404(b), that it was not probative of whether any sexual abuse occurred, and that it was repetitive, cumulative, and highly prejudicial character evidence. Evidence of other crimes or bad acts is generally not admissible to prove a person committed the crime charged. KRE 404(b). "[E]vidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). While recognizing KRE 404(b) is exclusionary in nature, and must be applied cautiously, Bell v. Commonwealth, 875 S.W.2d 882, 889

(Ky. 1994), we believe the evidence of physical and emotional abuse testified to by Pam Vires and Nina was relevant to show K.C.'s violent home environment, which was necessary for a full presentation of the case in light of K.C.'s allegation that she did not tell about the abuse because she was afraid. See Norton v. Commonwealth, 890 S.W.2d 632, 638 (Ky.App. 1994) (citing United States v. Masters, 622 F.2d 83 (4th Cir. 1980)). Further, we believe the danger of undue prejudice was alleviated by the Appellant's witnesses who testified that K.C. did not seem afraid of Appellant, including testimony that K.C. seemed very happy to see Appellant when he came to visit on Christmas, 2003, only a few months before making the allegations.

VI. ALLOWING K.C. TO TESIFY OUTSIDE THE COURTROOM PER KRS 421.350(2)

K.C. was fourteen years old at the time of trial. Over objection, K.C. was permitted to testify outside the courtroom via closed circuit equipment. Appellant contends this was error. As we are reversing this case for retrial, this issue is moot. Further, we decline to reverse our decision in Danner v. Commonwealth, 963 S.W.2d 632 (Ky. 1998), which interpreted KRS 421.350(2) to apply to the trial testimony of a child up to eighteen years old. On retrial, should the Commonwealth move to have K.C. testify outside the courtroom, the trial court must consider whether there is "compelling need" under the circumstances existing at that time. KRS 421.350(2), (5).

VII. APPLICATION OF PRIOR OR CURRENT VERSION OF KRS 439.3401 TO DETERMINE APPELLANT'S PAROLE ELIGIBILITY

Appellant was convicted of first-degree rape, a Class A felony, and sentenced to life imprisonment. KRS 439.3401(1) and (2) provide that a defendant convicted and sentenced as such shall not be eligible for parole until he has served 20 years in the penitentiary. KRS 439.3401(6), however, states "[t]his section shall apply only to those persons who commit offenses after July 15, 1998." KRS 439.3401(7) provides "[f]or

offenses committed prior to July 15, 1998, the version of this statute in effect immediately prior to that date shall continue to apply." The prior version would have required Appellant to serve 12 years in the penitentiary before becoming eligible for parole.

The indictment charged Appellant with first-degree rape of K.C. occurring between March 1, 1995, and November 24, 1998. These dates reflected K.C.'s allegation that Appellant had raped her every night when Appellant lived with the family in Bellevue and Dayton. At trial, K.C. was unable to specify the dates that rape allegedly occurred, only that it happened when she lived in Bellevue and Dayton. She also clarified it did not happen "every" night. Appellant lived with the family in Bellevue from March, 1995, to March, 1997, and in Dayton from March, 1997 to November 24, 1998. The trial court's instruction required the jury to find Appellant guilty of first-degree rape if it found he engaged in sexual intercourse with K.C. "between March 1, 1995 and November 24, 1998." At the penalty phase and final sentencing, Appellant moved that the prior version of KRS 439.3401 apply because the Commonwealth did not prove that the offense occurred after July 15, 1998. The trial court overruled the motion. The trial court was of the opinion that the defense should have "ferreted it out better on cross" when it happened, and the court "[didn't] know what the jury believed or didn't believe."

Because we are remanding this case for retrial, the issue is moot. However, on retrial, the court should give the jury the opportunity to decide if the offense occurred before or after July 15, 1998, the effective date of the amended statute.

For the aforementioned reasons, the judgment of the Campbell Circuit Court is reversed and the case remanded for a new trial.

All sitting. Minton, C.J.; Cunningham, Scott, and Venters, JJ., concur.

Abramson, Noble, and Schroder, JJ., concur except as to Part I, to which they concur in result only, believing that the prosecutor's questions also violated Callahan and Woodall.

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