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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 27, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000092-MR

MICHAEL D. JOHNSON — APPELLANT

V.

ON APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 05-CR-00095

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Michael D. Johnson, was convicted by a Wolfe Circuit Court jury of two counts of second-degree manslaughter, two counts of second-degree assault, one count of operating a motor vehicle without a license, and one count of leaving the scene of an accident. He was sentenced to forty years' imprisonment and appeals to this Court as a matter of right. Ky. Const. §110(2)(b).

Appellant asserts three arguments on appeal: (1) that certain incriminating statements were not properly disclosed to Appellant by the Commonwealth in discovery, and were improperly admitted as evidence; (2) that the trial court improperly denied his motion for a change of venue; and (3) that the trial court imposed a sentence in excess of the statutory maximum. We now reverse Appellant's conviction and sentence because the

Commonwealth's failure to disclose Appellant's incriminating statements pursuant to RCr 7.24 undermines our confidence in the outcome of the trial.

On September 4, 2005, two people, Justin Amburgey and Jason Tolson, were killed in a single car accident in Wolfe County. Evidence gathered after the accident indicated that Appellant was the driver of the car and was under the influence of alcohol and drugs at the time of the accident. On October 31, 2005, Appellant was indicted by a Wolfe County Grand Jury on two counts of murder, two counts of first degree assault, one count of operating a motor vehicle without a license, and one count of leaving the scene of an accident. At trial, Appellant testified that another man, Kevin Smith, was the driver. His entire defense centered on proving that he was not behind the wheel of the car at the time of the accident.

On cross-examining Appellant, the prosecutor asked if, after the accident he told Mike Sherouse, a friend of Appellant's, "I wrecked my car," "I tore my car all to pieces," and "I think I killed three of my friends." Appellant testified that he did not recall making those statements. The prosecutor then informed the trial court that she intended to call Sherouse as a rebuttal witness. Appellant's counsel objected to the introduction of Appellant's incriminating statements through Sherouse's testimony, because the Commonwealth had failed to disclose them in discovery pursuant to RCr 7.24. The prosecutor responded that Sherouse was disclosed as a potential witness in *voir dire* and that his testimony would be provided for impeachment purposes only. The

trial court overruled Appellant's objection.

Sherouse testified that after the accident Appellant said, "I wrecked my car," "I tore my car all to pieces," and "I think I killed three of my friends." On cross-examination, Sherouse testified that he previously told the police about Appellant's incriminating statements, that he spoke with the prosecutor prior to trial, and that he was under subpoena to appear at trial. In closing argument, the prosecutor emphasized Sherouse's testimony.

The prosecutor's failure to disclose Appellant's incriminating statements clearly violated RCr 7.24(1). Chestnut v. Commonwealth, 250 S.W.3d 288, 296 (Ky. 2008). The Commonwealth concedes this error, but argues that it is harmless. However, under the facts presented in this case, we find that the error is not harmless, and that Appellant's conviction must be reversed.

"The United States Supreme Court has held that a discovery violation serves as sufficient justification for setting aside a conviction when there is a reasonable probability that if the evidence was disclosed the result would have been different." Id. at 296-297; see also Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995); Kyles v. Whitley, 514 U.S. 419, 433-434 (1995). "A reasonable probability of a different result" is shown when the violation "undermines confidence in the outcome of the trial." Kyles, 514 U.S. at 434 (citing United States v. Bagley, 473 U.S. 667, 678 (1985)). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a

trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. We include as part of our concern about the outcome of the trial, not only the jury's verdict on guilt, but the effect that the error may have had on the sentence it imposed.

The prosecutor's actions in this case prevent us from having confidence in the trial's outcome. It is clear from the record that the prosecutor knew about Appellant's incriminating statements and willfully failed to disclose them in discovery. This is not a situation where the existence of Appellant's incriminating statements spontaneously came out at trial for the first time. Sherouse testified that he told the police and prosecutor well in advance of trial about Appellant's incriminating statements. It appears as though the prosecutor attempted to blindside Appellant with Sherouse's testimony concealed as rebuttal. See Chestnut, 250 S.W.3d at 297 (holding that it was reversible error for the Commonwealth to introduce evidence which was not disclosed under RCr 7.24 under the guise of rebuttal evidence). "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." James v. Commonwealth, 482 S.W.2d 92, 94 (Ky. 1972).

We decline to address the venue issue because on retrial, any questions that arise regarding a change of venue should be based upon current conditions. Additionally, since the parties agreed that the original sentence was inconsistent with KRS 532.110, we presume that upon retrial, that issue

will not arise again.

We thus, must reverse Appellant's conviction and sentence, and remand this matter to the Wolfe Circuit Court for further proceedings.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Michael John Marsch
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601