RENDERED: NOVEMBER 25, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000301-MR

RANDY SPRINKLES — APPELLANT

V.

ON APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 07-CR-00047

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING AND REMANDING IN PART

Appellant Randy Sprinkles appeals as a matter of right from a judgment of the Knox Circuit Court convicting him of one count of first-degree rape where the victim is less than 12 years old and one count of first-degree rape where the victim is physically helpless. We affirm Appellant's conviction and sentence, but vacate the imposition of five years conditional discharge, and remand for imposition of three years conditional discharge.

I. BACKGROUND

Appellant was indicted for raping or otherwise sexually assaulting his stepdaughter, HS, and four of her friends: SB, WM, WL, and BH. Appellant ultimately pleaded guilty to first-degree rape of SB and second-degree sexual abuse of WM. While the charges relating to Appellant's stepdaughter (HS) were

severed, Appellant was tried jointly for the charges relating to WL and BH. It is the WL and BH charges that are the subject of this appeal. However, all five girls testified at Appellant's trial.

SB, whom Appellant pleaded guilty to raping, testified first. She testified that she was friends with Appellant's stepdaughter (HS), and lived next door.[1] One night in May 2003,[2] when SB was sleeping over at Appellant's house, Appellant gave her a pill, which he said was to help her sleep. SB went to sleep in HS's bed. When she awoke, Appellant was standing naked over her, having intercourse with her. She tried to resist, but lost consciousness. SB testified that she was no longer in the bed she had lain down in. She awoke the next morning back in HS's room. Her clothes were halfway off and she was bleeding. SB testified that she never slept over at Appellant's house again.

WM, whom Appellant pleaded guilty to sexually abusing, testified next at trial. WM testified that, while sleeping over at Appellant's house, he gave her and HS a pill, which he said was a vitamin. The pill made her feel "high," sick, and sleepy, and she vomited before falling asleep. WM lay down in HS's bed. She awoke in the morning to find Appellant standing over her, fondling her. WM went home, and never stayed the night at Appellant's house again.

BH, one of the victims in this case, testified that she spent the night with HS at Appellant's house once when she was 12 years old. She testified that

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[1] HS and Appellant lived together.

[2] All victims were between approximately 10 and 13 years of age at the time the various incidents occurred. At the time of trial, the victims were each 16 or 17 years old.

Appellant gave her and HS a pill, which he said was a vitamin. The pill made her drowsy, and she fell asleep much earlier than she usually did. She testified that she could not hold her eyes open.

BH lay down in HS's bed. She awoke to Appellant standing over her, with her shirt half unbuttoned. BH then fell asleep, and woke up again to find Appellant on top of her, raping her. BH testified that in the morning, she had blood in her underwear, as well as what she now recognized as "sperm." She testified that she was also physically sore. BH never spent the night at Appellant's house again.

WL, the second victim in this case, testified that she was friends with HS and spent the night at Appellant's house when she was 10 years old. Appellant gave WL and HS what he called a vitamin. WL said that she did not want to take it, and Appellant told her that she had to take it if she wanted to stay with HS. WL testified that the "vitamin" made her sleepy, and that she fell asleep watching TV.

WL woke up to Appellant touching her feet and legs, but she "couldn't really wake up." She witnessed Appellant taking HS out of the room before falling asleep again. WL woke up a second time to Appellant rubbing his hands up her shorts and shirt. She testified that Appellant took her shorts off, got on top of her, and raped her. Appellant then put her shorts back on. WL stated that she had blood between her legs the next morning (approximately a year before her first period), and that she was physically sore. WL testified that she

never spent the night at Appellant's house again.

HS, Appellant's stepdaughter, also testified at trial, corroborating and expanding on the statements of the other four girls. She testified that she took a "vitamin" at the same time as WL, and that it made her drowsy. That night, she woke up in Appellant's bed. The next morning, WL wanted to go home. HS also testified that BH stayed over, took a vitamin, and wanted to go home in the morning. She testified that SB stayed at her house regularly, and that both girls took a pill the last time she spent the night. HS testified that Appellant encouraged her to have her friends spend the night, and that none of her friends spent the night again after Appellant gave them a pill.

Detective Mark Mefford of the Kentucky State Police testified that he investigated charges against Appellant. He noted that interviews with one person would lead him to others, and that all victims mentioned being given some sort of pill. Detective Mefford also testified that Appellant told police he took sleep medication.

Appellant testified in his own defense. He admitted to having intercourse with SB and fondling WM. He also admitted that he had entered guilty pleas to charges related to both girls. However, Appellant denied ever giving pills of any sort to any of the girls, and he denied raping BH and WL.

The jury found Appellant guilty of first-degree rape of both BH and WL. For the rape of WL, a person under 12 years old (a Class A felony), the jury recommended, and the circuit court imposed, a sentence of life imprisonment.

For the rape of BH while she was physically helpless (a Class B felony), the jury recommended, and the circuit court imposed, a sentence of 10 years imprisonment. The court ordered that the sentences run concurrently, and also imposed a five-year period of conditional discharge upon release from incarceration or parole. Sprinkles now appeals these convictions as a matter of right. Ky. Const. § 110.

II. ANALYSIS

Appellant alleges errors in both the guilt phase and the penalty phase of his trial. These alleged errors are best analyzed by discussing each phase of the trial separately.

A. Guilt Phase of Trial

1. Joint Trial on Counts Against WL and BH and Prior Bad Acts Evidence

Appellant filed a motion for severance of trials for the charges relating to WL and BH. Appellant also filed a motion to exclude the testimony of SB, WM, and HS. The circuit court overruled these motions, and also found the testimony admissible under KRE 403. Appellant argues that these rulings by the circuit court were error.

With regard to the joinder of offenses, RCr 9.16 provides that:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

However, "a defendant must prove that joinder would be so prejudicial as to be 'unfair' or 'unnecessarily or unreasonably hurtful.' " Ratliff v. Commonwealth, 194 S.W.3d 258, 264 (Ky. 2006) (quoting Commonwealth v. Rogers, 698 S.W.2d 839, 840 (Ky. 1985)). In addition, we will not reverse a ruling on an RCr 9.16 motion absent an abuse of discretion. Ratliff, 194 S.W.3d at 264.

"[A] significant factor in determining whether joinder is proper is the extent to which evidence of one offense would be admissible in a trial of the other offense." Commonwealth v. English, 993 S.W.2d 941, 944 (Ky. 1999) (citing Rearick v. Commonwealth, 858 S.W.2d 185, 187 (Ky. 1993)). Therefore, Appellant's arguments about joinder and the testimony of SB, WM, and HS are closely intertwined. We reverse a trial court's decision to admit evidence only if doing so was an abuse of discretion, i.e., it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Clark v. Commonwealth, 223 S.W.3d 90, 95 (Ky. 2007) (citing Brewer v. Commonwealth, 206 S.W.3d 313, 320 (Ky. 2006); and quoting English, 993 S.W.2d at 945).

Under KRE 404(b), evidence of other crimes or bad acts of the accused is generally inadmissible. This evidence is, however, admissible if offered for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b). This list is not exhaustive, and another "generally recognized exception" to the prohibition on prior bad acts evidence is when such evidence is offered to prove modus operandi. Clark, 223

S.W.3d at 96.

"The modus operandi exception requires 'the facts surrounding the prior misconduct [to be] so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*.' " Id. (quoting English, 993 S.W.2d at 945). In many sex crime cases, the issue of whether the acts were committed by the same person is integrated with the issue of corpus delicti, i.e. "whether the event occurred at all." Dickerson v. Commonwealth, 174 S.W.3d 451, 469 (Ky. 2005) (quoting Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky.1992)).

When offering evidence to prove that the acts were committed by the same person, the proponent of the prior bad acts evidence must "demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual." Clark, 223 S.W.3d at 97 (quoting Commonwealth v. Buford, 197 S.W.3d 66, 71 (Ky. 2006)).[3] The commonality must be more than a mere statutory element of the offense. Clark, 223 S.W.3d at 98.

In this case, the four girls were HS's overnight guests. All five witnesses testified to some sort of pill. SB and WM (the prior victims) each testified that

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[3] "Evidence of other acts of sexual deviance . . . must be so similar to the crime on trial as to constitute a so-called signature crime." Rearick v. Commonwealth, 858 S.W.2d 185, 187 (Ky. 1993) as quoted by Dickerson, 174 S.W.3d at 469 and Clark, 223 S.W.3d at 97.

Appellant gave them a pill, which he either said would help them sleep or which he referred to as a "vitamin." HS testified that Appellant gave both girls a pill, and that she took the pill as well. SB and WM testified that they fell asleep, and when they woke up, Appellant was standing over them, either raping or fondling them. This testimony is remarkably similar to that of the victims in this case, WL and BH. Both WL and BH testified that Appellant gave them a pill, which he called a vitamin. Both girls became drowsy and fell asleep. They awoke to find Appellant fondling, and then later raping them.

SB, WM, and HS testified to acts by Appellant which, we believe, were strikingly similar to the acts alleged in this case, to the point of creating a reasonable probability that Appellant raped WL and BH as well. Furthermore, giving the victim a pill is not a statutory element of the offense of first-degree rape. While Appellant was convicted of raping BH while she was physically helpless under KRS 510.040(1)(b)1, the statute does not require that the defendant be the person who made the victim physically helpless. Evidence that Appellant gave the prior victims a pill and sexually assaulted them in their sleep when they spent the night with HS is "strikingly similar" enough to the charged conduct to meet the modus operandi exception of KRE 404(b). Therefore, the circuit court did not err in admitting the testimony of SB, WM, and HS.

In addition, with regard to the two charged counts, WL and BH described scenarios even more similar to each other than what was described by SB, WM,

and HS. Therefore, evidence of Appellant's actions against one of the victims would have been admissible in a trial for Appellant's actions against the other victim. The circuit court did not err in refusing to sever the charges related to WL and BH.

Even when evidence is admissible under KRE 404(b), the court must still conduct the balancing test required by KRE 403 to determine whether the probative value of the evidence is substantially outweighed by the danger of undue prejudice. See English, 993 S.W.2d at 945. While the testimony of the other victims was clearly prejudicial to Appellant, it was also highly probative of the corpus delicti. See Clark, 223 S.W.3d at 97. The probative value of the prior bad acts evidence is heightened by "the multiplicity of victims, the multiplicity of occurrences," and the striking similarities in each occurrence. English, 993 S.W.2d at 945. The circuit court did not abuse its discretion in ruling the prior bad acts evidence admissible under KRE 403.

2. Introduction of Certified Copies of Guilty Plea Final Judgments

During Detective Mefford's testimony, the Commonwealth sought to introduce certified copies of judgments showing Appellant's guilty pleas and convictions for first-degree rape (of SB) and second-degree sexual abuse (of WM). The Commonwealth argued that the judgments were admissible under KRE 404(b) as modus operandi evidence.

After considering the issue at length, the court ruled that the judgments

were not being admitted for bolstering or impeachment purposes, but only as KRE 404(b) evidence. The judge stated, "I will permit the Commonwealth to introduce this evidence consistent with the court's ruling as 404(b) evidence . . . to be introduced for the purposes allowed under that rule."

Admitting the certified copies of the prior judgments was error. While the testimony of WM, SB, and HS was admissible under KRE 404(b) to show modus operandi, the same cannot be said for the judgments of conviction related to the events testified to. None of the "strikingly similar" circumstances of the crime were present in the judgments (i.e. that Appellant gave the two girls a pill or that they were overnight guests of his stepdaughter). The judgments merely showed that Appellant pleaded guilty to, and was convicted of, first-degree rape and second-degree sexual abuse. The details of the crimes, which were the very reason why the prior bad acts testimony was admissible, were entirely lacking from the judgments of conviction.

In Benjamin v. Commonwealth, we permitted the introduction of Benjamin's prior conviction for assaulting his wife, because it showed that Benjamin had a motive for her murder. 266 S.W.3d 775, 791 (Ky. 2008). But in that case, the conviction *in and of itself* showed motive, making it admissible under KRE 404(b). We also criticized prior bad acts statements by a police officer in Dickerson v. Commonwealth, because the police officer's statements lacked any of the details that would make them admissible under KRE 404(b). 174 S.W.3d 451, 467 (Ky. 2005).

Although it was error to admit the certified copies of the judgments, the error was harmless. See RCr 9.24. During his testimony, Appellant admitted to having intercourse with SB and fondling WM. He also admitted to pleading guilty to charges relating to both girls. Therefore, the inadmissible evidence was cumulative of Appellant's own admissions, and it had no substantial influence on the verdict. Winstead v. Commonwealth, 283 S.W.3d 678, 689 (Ky. 2009). See also Harp v. Commonwealth, 266 S.W.3d 813, 821 n.32 (Ky. 2008) (citing Coulthard v. Commonwealth, 230 S.W.3d 572, 585 (Ky. 2007); Brewer v. Commonwealth, 206 S.W.3d 343, 352 (Ky. 2006)).

3. Prosecutor's Comment During Opening Statement

During the Commonwealth's opening statement, the prosecutor stated: "This is probably the most important case I've ever been involved in. I've done a lot more civil work than prosecution. This is the first time I have not slept or I have worried about how I did or what I do." Appellant argues that this comment was error.

This claim of error is not preserved, and Appellant requests we review for palpable error under RCr 10.26, which requires the error result in "manifest injustice" i.e., a substantial possibility of a different result. Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006). This is also often described as a defect, which is "shocking or jurisprudentially intolerable." Martin v. Commonwealth, 207 S.W. 3d 1, 4 (Ky. 2006).

In making the comment during his opening statement, the prosecutor

improperly injected his own personal beliefs and feelings about the importance of the case, and implicitly about the weight of the evidence.

> The office of an opening statement is to outline to the jury the nature of the charge against the accused and the law and facts counsel relies upon to support it . . . . It is never proper in an opening statement for counsel to argue the case or to give his personal opinions or inferences from the facts he expects to prove.

Turner v. Commonwealth, 240 S.W.2d 80, 81 (Ky. 1951). See also ABA Criminal Justice Section Standard 3-5.5 ("The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible.").

Although the prosecutor's statement was improper, we cannot say that it rises to the level of palpable error. The statement was brief, and was followed by a proper outline of the charges against Appellant. While improper, the prosecutor's statement does not rise to the level of "manifest injustice," as required by RCr 10.26. Martin, 207 S.W. 3d at 3. There is no substantial possibility the prosecutor's statement affected the result, and therefore no palpable error.

B. Penalty Phase of Trial

1. Victim Impact Testimony by Victims of Other Crimes

During the penalty phase of the trial, WL and BH, the two victims in this case, gave victim impact testimony. However, SB and WM, the two victims

Appellant had already pleaded guilty to raping or abusing, also testified.

BH, one of the victims in this case, testified that she was suicidal, had been "bad on drugs," and could no longer go to school. WL, the other victim in this case, testified that she was depressed, could not have relationships, and had trouble sleeping.

WM, whom Appellant pleaded guilty to sexually abusing, testified that she had been suicidal and had a drug problem. She stated that she had had counseling through Drug Court.

SB, whom Appellant pleaded guilty to raping, testified that she had been in and out of mental hospitals and that she had attempted suicide five or six times. She also testified that, after being raped by Appellant, she became pregnant and had an abortion. SB testified that she had not had any sexual partners prior to being raped by Appellant. Each of the four girls also thanked the jury for convicting Appellant. Each girl testified for two to three minutes.

The Commonwealth argued at trial that the testimony of WM and SB was allowed by KRS 532.055(2)(a), which permits the Commonwealth to offer evidence "relevant to sentencing including: . . ."

> 2. The nature of prior offenses for which he [the defendant] was convicted;
>
> . . .
>
> 7. The impact of the crime upon the victim or victims . . . including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim of victims . . . .

Appellant's counsel agreed that the testimony of WM and SB would be allowed under KRS 532.055(2)(a). However, counsel argued that SB's testimony about her pregnancy and abortion should be excluded as overly prejudicial under KRE 403. The circuit court ruled that SB's testimony was allowed pursuant to KRS 532.055(2)(a) 2 and 7. The court also ruled that, while testimony that she became pregnant and had an abortion would be prejudicial, the prejudicial effect was not substantially outweighed by its probative value, and the testimony was therefore admissible under KRE 403.

Appellant now objects to the entirety of WM's and SB's testimony, and requests we review his unpreserved claims for palpable error pursuant to RCr 10.26. Victim impact testimony always present difficult questions.[4] In this case, however, because Appellant agreed at trial that most of WM's and SB's testimony was permissible, we need only review the majority of the testimony for palpable error. Given that WM and SB each testified for approximately three minutes, and given that they were each properly permitted to testify about Appellant's prior bad acts during the guilt phase of the trial, we see no manifest injustice requiring reversal pursuant to RCr 10.26.

With regard to SB's testimony about her pregnancy and abortion, the Commonwealth essentially concedes error, but argues the error was harmless. In Robinson v. Commonwealth, this Court held that the "nature of prior offenses" under 532.055(2)(a)2 was limited to the generic character of the

[4] We have previously held that KRS 532.055 violates the principle of separation of powers, but, under the principle of comity, we have thus far declined to hold it unconstitutional. See Commonwealth v. Reneer, 734 S.W.2d 794, 798 (Ky. 1987).

offense. 926 S.W.2d 853, 855 (Ky. 1996). We held that it was reversible error to allow, in the penalty phase, the defendant's prior victim to testify "at length as to the specifics of this assault, including the nature of the injuries inflicted upon her and the fact that Appellant forced her to lie to emergency room personnel about the source of her injuries." Id. at 854.

In this case, SB's testimony about her pregnancy and abortion was very brief. SB was also properly allowed to testify to specifics of the crime during the guilt phase. Under these circumstances, SB's testimony did not have a substantial influence on the penalty phase verdict. Winstead, 283 S.W.3d at 689. The error was therefore harmless See RCr 9.24

2. Prosecutor's Statements During Closing Argument

Appellant argues that two statements by the prosecutor during the guilt phase closing argument were error. These errors are unpreserved, and Appellant requests review for palpable error under RCr 10.26, which requires the error result in "manifest injustice" i.e., a substantial possibility of a different result. Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006).

a. Prosecutor's Misstatement of the Law

During the penalty phase, the Commonwealth called Probation and Parole Officer Pamela Handy as a witness. Handy testified to the penalty ranges for each of Appellant's offenses. She testified that, for a person convicted of first-degree rape to be eligible for parole, he or she must first serve 85% of the total sentence or 20 years, whichever is less. She explained that if

Appellant were sentenced to 20 years imprisonment, and were paroled after 17 years, he would "only stay on parole until 20 years was actually expired." She further explained that, if Appellant received a sentence of life imprisonment, "he's going to remain on parole, under our supervision, for the remainder of his life."

On cross-examination of Handy, Appellant elicited the fact that the decision to grant parole is in the discretion of the parole board, and that sex offenders must complete mandatory treatment before being eligible for parole. Appellant's counsel also elicited information about the various conditions that are placed on parole.

During the Commonwealth's penalty phase closing argument, the prosecutor summarized Handy's testimony:

> If this defendant gets the 20 years . . . then in 17 years he's gonna meet the parole board. He can get parole. They will monitor him for 3 years, as long as they can monitor. And then he's gonna be free. He will have no supervision. He will have nobody checking in on him. He will have no drug testing.

Appellant argues that this statement was error, because it misstates Kentucky law.

Under the version of KRS 532.043 in effect at the time of Appellant's crimes, persons convicted of sex offenses must serve a three-year period of conditional discharge upon final release from incarceration or parole. Had Appellant received a 20-year sentence and been granted parole after 17 years,

he would have been on parole for three years, followed by an additional three years of conditional discharge, for a total of six years of supervision.

First, we note that a prosecutor's misstatement of the law does not automatically require reversal. Matheney v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006). The essence of the prosecutor's argument was that, if Appellant did not receive a life sentence, he would one day be free with no supervision. Given that the jury imposed a life sentence, we cannot say there was a substantial possibility of a different result had the jury been aware of the three-year period of conditional discharge. Therefore, there was no palpable error.

b. Alleged Prosecutorial Misconduct in Urging Jury to "Protect Our Community"

Related to the statement about Appellant's parole eligibility, the Commonwealth asked the jury to impose a life sentence, so that Appellant would be under the supervision of Probation and Parole for the remainder of his life. In so doing, the prosecutor stated, "If he gets out—I don't know that he will. Nobody can predict that. But if he does, let's make sure we protect our community."

In conducting a palpable error review of alleged prosecutorial misconduct during a guilt phase closing argument, we consider (1) the amount of punishment fixed and the weight of evidence supporting that punishment; (2) whether the Commonwealth's statements are supported by facts in the record;

(3) whether the challenged statements appear to rebut arguments raised by defense counsel; and (4) whether the closing argument, taken as a whole, is within the wide latitude grated to counsel during closing argument. Young v. Commonwealth, 25 S.W.3d 66, 74 (Ky. 2000).

In Brewer v. Commonwealth, the prosecutor used similar language to urge an 80-year sentence, so that, if the defendants received parole in eight years, they would still have "seventy-two years hanging over their heads." 206 S.W.3d 343, 349-50 (Ky. 2006). In that case, the prosecutor also urged the jury to "send a message," a statement with which we have frequently expressed disapproval. Id. at 350 (citing Commonwealth v. Mitchell, 165 S.W.3d 129 (Ky. 2005); Young, 25 S.W.3d at 73. Nevertheless, we concluded that the error in Brewer did not rise to the level of palpable error. 206 S.W.3d at 351.

The prosecutor's statement in this case was similar to that in Brewer, but without the more objectionable "send a message" language. As in Brewer, the prosecutor's argument was in response to defense counsel's plea for leniency on account of Appellant's age. Id. at 350. And as in Brewer, Appellant's crimes "were serious enough to warrant a high degree of punishment." Id. (citing Young, 25 S.W.3d at 75). In addition, the prosecutor's closing argument as a whole was within the wide latitude granted to counsel. We therefore find no palpable error.

3. Ex Post Facto Violation in Five-Year Period of Conditional Discharge

The circuit court imposed a five-year period of conditional discharge upon release from incarceration or parole. Appellant argues that this was error. The former version of KRS 532.043 required sex offenders, upon final release from incarceration or completion of parole, to be subject to a three-year period of conditional discharge. Effective July 12, 2006, the conditional discharge period increased to five years. 2006 Ky. Acts 182. Appellant committed his crimes prior to July 12, 2006, but was sentenced to five years conditional discharge upon release. The Commonwealth concedes that this was error, and we agree. See Purvis v. Commonwealth, 14 S.W.3d 21 (Ky. 2000).

The length of conditional discharge upon final release is unlikely to affect Appellant, given that he has received a life sentence. But this is nevertheless a clear constitutional error. The case must be remanded for the circuit court to enter a sentence of three years conditional discharge upon final release.

III. CONCLUSION

The imposition of a five-year period of conditional discharge upon Appellant's final release is hereby vacated, and the case remanded with instructions for the Knox Circuit Court to impose a three-year period of conditional discharge upon Appellant's final release. In all other respects, the judgment of the Knox Circuit Court is hereby affirmed.

All sitting. Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., concur. Cunningham, J., concurs in result only by separate opinion.

CUNNINGHAM, J., CONCURRING IN RESULT ONLY: I respectfully concur in result only.

I do not find error, palpable or otherwise, in the trial court allowing the introduction of copies of the guilty plea judgments of his previous sexual misconduct against other victims. The majority has decreed that the prior bad acts evidenced by the judgments are admissible under KRE 403. The details of these crimes had already been put into evidence by the victims. As the majority correctly notes: "[T]he ascendant issue [in many sex crimes cases is] whether the event occurred at all." Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). The certified copies of Appellant's guilty pleas and prior convictions show that Appellant admitted committing those acts. It is powerful evidence which practically removes any concern that these allegations by the previous victims might have been false.

Therefore, I concur in result only.

COUNSEL FOR APPELLANT:

Samuel N. Potter
Department of Public Advocacy
100 Fair Oaks Lane
Frankfort, KY 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, KY 40601

Supreme Court of Kentucky

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COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER OF CORRECTION

On the Court's own motion, the Memorandum Opinion of the Court rendered November 25, 2009, is hereby corrected by substituting pages 13 and 14 of the opinion as attached hereto, in lieu of pages 13 and 14 of the opinion as originally rendered. Said correction does not affect the holding.

ENTERED: May 5, 2010.

CHIEF JUSTICE