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RENDERED: MARCH 18, 2010
NOT TO BE PUBLISHED



# Supreme Court of Kentucky

2008-SC-000236-MR

KENNETH PATTERSON — APPELLANT

V.

ON APPEAL FROM FULTON CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
NO. 06-CR-00034

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**REVERSING AND REMANDING**

Kenneth Patterson appeals as a matter of right from a February 28, 2008 Judgment of the Fulton Circuit Court convicting him of rape in the first degree, in violation of KRS 510.040, and sentencing him as a second-degree persistent felony offender to fifty years in prison. The Commonwealth alleged, and the jury found, that in February or March 2005 Patterson forcibly raped his girlfriend's then thirteen-year-old daughter. Patterson contends that his trial was rendered unfair by numerous evidentiary errors, including the admission of testimony improperly bolstering that of the victim and evidence not properly admissible under KRE 404(b) as well as the exclusion of evidence tending to show that the victim had made false allegations of sexual abuse against others. In addition, he contends that he was subjected to prosecutorial vindictiveness,

that the trial court erred by failing to conduct a competency hearing, that the Commonwealth failed to provide him with the tape of the grand jury proceedings, and that he should have been granted a hearing to determine whether his sex-offender evaluation had been properly prepared. Because we agree with Patterson that the victim's testimony was improperly bolstered, we must reverse the trial court's Judgment and remand this matter for additional proceedings. We will address the other issues Patterson has raised to the extent that they might bear on a new trial.

**RELEVANT FACTS**

The record indicates that in late 2004 Patterson became romantically involved with M.E.S. and that in early 2005 he moved in with, or at least frequently stayed overnight with, her and her three children, C.A.H., C.P., and S.P. C.A.H. turned thirteen years old in February 2005. C.P. and S.P., who were children of a different father, were several years younger. In 2005, a Fulton County grand jury indicted Patterson for the abuse of all three children. When Patterson refused the Commonwealth's proffered plea bargain on those charges, the prosecutor obtained additional indictments charging Patterson with complicity in a rape of M.E.S. and with the rape of C.A.H. This last charge was tried in November 2007 and is the subject of this appeal.

At the trial, C.P. testified that in late February 2005 his Cub Scout troop held a banquet, and that he, his mother, and S.P. attended the banquet, but that C.A.H. remained home with Patterson. C.A.H. testified that on the night of the banquet, which she remembered as having been in March, Patterson

forcibly subjected her to intercourse. She admitted that in June of 2005 she had initially accused Patterson of a single act of fondling, and that she had not alleged rape until November of that year. Furthermore, she had not spoken with a police officer about that allegation until March of 2006, after she had received a considerable amount of counseling. She testified that she withheld the more serious allegation because she feared her mother's reaction, but that counseling and her removal to foster care had enabled her to tell what she had undergone.

As noted, Patterson was convicted of raping C.A.H. He was sentenced to twenty years for first-degree rape enhanced to fifty years as a result of his being a second-degree persistent felony offender.

## ANALYSIS

### I. The Trial Court Erred By Admitting Evidence Of A Class Habit.

In support of C.A.H.'s testimony and over Patterson's objection, the police officer who interviewed C.A.H. in both June of 2005 and March of 2006 was permitted to testify that in his experience child sex-abuse victims were almost always initially reluctant to "give up information," and that commonly they provided additional details as time went on. Patterson's first contention is that this testimony about other victims was irrelevant and improperly bolstered the testimony of C.A.H. We agree.

In *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky. 2009), we recently reiterated the rule against this sort of class habit testimony and explained that

> a party cannot introduce evidence of the habit of a class of individuals either to prove that another

> member of the class acted the same way under similar circumstances or to prove that the person was a member of that class *because* he/she acted the same way under similar circumstances.

*Id.* at 613 (*citing Kurtz v. Commonwealth*, 172 S.W.3d 409 (Ky. 2005); internal quotation marks omitted). This rule applies to investigators, *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002), as well as to experts, *Sanderson*, and it applies whether the testimony is offered on direct examination of a witness during the Commonwealth's case in chief or, as it was here, on redirect examination for the purpose of rebuttal or rehabilitation. *Id.; Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996).[1]

The trial court erred, therefore, by permitting the class habit testimony, and because this case turned on the jury's assessment of C.A.H.'s credibility, we cannot say that testimony improperly bolstering her credibility was harmless. We are thus obliged to reverse Patterson's conviction and remand for additional proceedings.

**II. The Trial Court Also Erred By Admitting Evidence In Violation Of KRE 404(b).**

The propriety of reversing for a new trial is buttressed by two other obvious evidentiary errors. The first occurred when Charles Johnson, Patterson's cell mate for a time in the Fulton County Detention Center, was permitted to testify that Patterson had admitted to him that he had "fondled with the kids" and "wanted to make their lives a living hell." Johnson did not

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[1] To the extent that *Martin v. Commonwealth*, 170 S.W.3d 374 (Ky. 2005), holds otherwise, we regard it as anomalous and subject to reversal on that ground in a case in which the anomaly is properly raised.

testify that Patterson said anything about the alleged rape of C.A.H., and his reference to crimes—the fondling of the "kids,"—for which Patterson was apparently to be tried separately, was a clear violation of KRE 404's rule against such collateral crime evidence.

Yet another error occurred with reference to a visitation dispute M.E.S. had with her ex-husband, the father of C.P. and S.P. Patterson argued that M.E.S.'s life had been in disarray and that C.A.H. had accused him of rape in hopes of being removed from her mother's custody. As proof of M.E.S.'s difficulties, Patterson testified about a dispute M.E.S. had with her ex-husband over visitation with the two younger children. He admitted that he had gotten involved in that dispute and had left harassing phone messages on the ex-husband's answering machine. During cross-examination, however, he denied that in those messages he referred to himself as the children's "daddy" and to the ex-husband as merely their "father." Ostensibly to impeach that testimony, the Commonwealth was permitted to call the ex-husband as a witness and to play several minutes worth of the answering machine tape, on which an obviously drunken and belligerent Patterson spews a series of taunts and curses. When Patterson objected to the irrelevant evidence, the court permitted the witness, outside the hearing of the jury, to locate the impeaching portion of the tape, but by that point the jury had heard the damaging, irrelevant evidence.

As the trial court itself observed, Patterson's comment to the ex-husband was completely collateral to the issues being tried, and generally impeachment

is not allowed with regard to collateral matters. *Metcalf v. Commonwealth*, 158 S.W.3d 740 (Ky. 2005). Even if the impeachment were allowable—and Patterson did not object on collateral fact grounds—the impeaching portions of the tape were only a few seconds long. The long portion of the tape played for the jury had nothing to do with Patterson's "daddy" remark. It was introduced not as impeachment, but as collateral evidence of bad character, and thus, again, clearly violated KRE 404's rule against such evidence.

These evidentiary flaws, the improper bolstering of C.A.H.'s testimony and the improper evidence of Patterson's other crimes and character, denied Patterson a fair trial. We thus reverse his conviction and remand the matter for additional proceedings. We address Patterson's other claims of error only to the extent that the issues are apt to recur on remand.

## III. The Trial Court Did Not Abuse Its Discretion By Excluding Evidence Pursuant to KRE 412 and KRE 802.

### A. Evidence Of A Sex Crime Victim's Prior Abuse Allegations Is Not Admissible Unless Shown To Be Demonstrably False.

Patterson contends that the trial court erred by disallowing two lines of evidence tending to show that C.A.H.'s rape allegation was false. The first line concerns what Patterson maintains were C.A.H.'s false allegations of abuse against others. Outside the presence of the jury, C.A.H.'s social worker testified that she had heard that when C.A.H. was five years old she had complained that "Waldo" had touched her inappropriately. Waldo had not been identified or located, however, so apparently the matter had been dropped. The social worker was also aware that in late 2005 and early 2006, when C.A.H.

was thirteen, she had been hospitalized in psychiatric facilities and that at one of them she had accused a hospital employee of inappropriately touching her breast. The social worker had not been involved in the investigation of that complaint, however, and knew only that the employee had denied the allegation and that it had not resulted in criminal charges.

The parties also questioned C.A.H. outside the presence of the jury, and she testified that she had had a dizzy spell at the hospital, following which the employee had helped her to her room. While in the room, the employee had reached across her to turn on a light and in doing so had touched her breast. Unlike a mere brush, his hand had lingered on her breast, C.A.H. believed, in a manner that made the touch seem deliberate. She admitted that the touch could have been accidental, but reiterated that it had seemed deliberate to her. The parties did not question C.A.H. about the "Waldo" incident.

Patterson sought to cross examine the social worker and C.A.H. about both incidents in front of the jury and argued that both incidents could be construed as prior false accusations tending to show that the rape accusation was likewise false. The trial court disallowed that line of questioning, however, apparently on the ground that the prior allegations had not been shown to be demonstrably false. Patterson contends either that the trial court misapplied the demonstrably false standard or that that standard sets the bar of admissibility too high. We disagree on both counts.

As the parties note, a sex-crime victim's prior or collateral allegations of abuse implicate KRE 412, the rape shield rule. In *Dennis v. Commonwealth*,

released this same date, this Court has addressed the proper treatment of false allegations of abuse in the context of the Kentucky Rules of Evidence and the defendant's Sixth Amendment confrontation rights. Our discussion and adoption of the "demonstrably false" standard is dispositive of Patterson's argument that the standard is too high.

> Under these and similar rules, numerous courts, both federal and state, have held that the credibility of the complaining witness in a sex crime case may be attacked by cross-examination concerning a prior false accusation. This is so notwithstanding the fact that such an attack implicates KRE 412, the rape shield rule. Pursuant to that rule, as noted above, evidence that the alleged victim of sexual misconduct "engaged in other sexual behavior" is generally not admissible in any proceeding involving the alleged misconduct. False allegations of abuse, however, do not involve "other sexual behavior," and thus evidence of such false allegations is not barred by the rape shield rule and may be admitted in accord with the other rules of evidence. *See* Lawson, *Kentucky Evidence Law Handbook* § 2.30[7] (4th ed. 2003) (noting that drafters of federal rape shield rule did not intend for it to apply to false accusations and the federal courts have interpreted it accordingly). *See also* Nancy M. King, *"Impeachment or Cross-Examination of Prosecuting Witness in Sexual Offense Trial by Showing that Similar Charges were Made Against Other Persons,"* 71 ALR 4th 469 (1989). To insure that the rape shield rule is not circumvented, however, the proponent of such evidence is required to make a preliminary showing that the prosecuting witness made a prior accusation and that the accusation was in fact false. *State v. Guenther*, 854 A.2d 308 (N.J. 2004) (collecting cases); *United States v. Kenyon*, 481 F.3d 1054 (8th Cir. 2007).
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> Courts have differed in the standard of proof the defendant must satisfy to make this preliminary showing. Some permit cross examination about the matter if the defendant establishes the false allegation by a preponderance of the evidence. *Guenther, supra*; *Morgan v. State*, 54 P.3d 332 (Alaska App. 2002).

Some have required a showing by clear and convincing evidence. *State v. Brum*, 923 A.2d 1068 (N.H. 2007). Some require "a reasonable probability of falsity." *State v. Barber*, 766 P.2d 1288 (Kan. App. 1989). Some require "strong and substantial proof of actual falsity." *State v. Quinn*, 490 S.E.2d 34 (W.Va. 1997). Others, including our own Court of Appeals, have required that the prior accusation be shown to be "demonstrably false." *Capshaw v. Commonwealth*, 253 S.W.3d 557 (Ky. App. 2007) (*citing Hall v. Commonwealth*, 956 S.W.2d 224 (Ky. App. 1997)); *Blair v. State*, 877 N.E.2d 1225 (Ind. App. 2007); *State v. Casillas*, 205 P.3d 830 (N.M. App. 2009); *State v. Maxwell*, 18 P.3d 438 (Or. App. 2001).

In *Hall*, our Court of Appeals justified a heightened standard of proof by opining "evidence of this nature is without a doubt extremely prejudicial. Its admission would undermine the purpose of KRE 412, shifting the focus from the real issues, and effectively put the victim on trial." *Id.* at 227. Similarly, at least one commentator has argued that to further the important purposes of the rape shield rule, it is fair to require the defendant to establish by clear and convincing evidence that he is not probing prior sexual behavior but only prior dishonesty. Bopst, *"Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform,"* 24 J. Legis. 125 (1998). We recently noted the *Hall* "demonstrably false" standard in *Kreps v. Commonwealth*, 286 S.W.3d 213 (Ky. 2009), but without considering the propriety of that standard emphasized that evidence of false prior accusations remains subject to KRE 403's probative value-prejudicial effect balancing test and held that the prior-accusation evidence in that case was properly excluded under this latter rule.

The *Hall* panel did not attempt to define "demonstrably false" beyond saying that prior allegations could not be inquired about unless they were "proven" or "admitted" to be false. 956 S.W.2d at 227. The Court of Appeals did not indicate what proof of falsity would suffice, but it did hold in the case before it that the alleged perpetrators' denials of the allegations and the decision by the investigating agency (and apparently the victim herself) not to press

charges were by themselves insufficient. Numerous courts have similarly held that an alleged perpetrator's self-serving denial and a merely inconclusive investigation are not sufficiently probative of falsity to remove a prior allegation from the strictures of the rape shield rule. King, *supra*, 71 ALR 4th 469.

The standard of proof question is complicated, moreover, by the fact that evidence of an alleged victim's prior false accusations implicates not just the evidence rules but also the defendant's right under the Confrontation Clause of the Sixth Amendment to the United States Constitution to subject the witnesses against him to meaningful cross-examination. The rules of evidence, of course, may not be construed so as to usurp that right, and thus, although the United States Supreme Court has emphasized that state and federal rule makers have broad latitude "to establish rules excluding evidence from criminal trials," *United States v. Scheffer*, 523 U.S. 303, 308 (1998), and that trial judges enjoy wide latitude "to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), the Court has also declared that that latitude has limits: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. . . . This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations and internal quotation marks omitted).

"Arbitrary" rules, the Court explained in *Holmes*, are those "that exclude[] important defense evidence but that d[o] not serve any legitimate interests." *Id.* at 325. In determining whether an exclusion is "disproportionate," other courts have weighed "the importance of the evidence to an effective defense, [and] the scope of the ban involved," *White v. Coplan*, 399 F.3d 18, 24 (1st Cir. 2005) (*citing Davis v. Alaska*,

415 U.S. 308 (1974) and *Van Arsdall, supra*), against any prejudicial effects the rule was designed to guard against. *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008); *LaJoie v. Thompson*, 217 F.3d 663 (9th Cir. 2000).

Under this "arbitrary or disproportionate" standard, the Fourth Circuit Court of Appeals has held that the exclusion of prior allegation evidence where the only proof of falsity was the alleged perpetrator's denial did not run afoul of the defendant's constitutional rights. *Quinn v. Haynes*, 234 F.3d 837 (4th Cir. 2000). In *White v. Coplan, supra*, on the other hand, the First Circuit Court of Appeals held that the exclusion of prior-allegation cross examination did violate the federal constitutional rights of a defendant convicted of sexually assaulting two sisters, ages eight and twelve, where these was evidence of falsity beyond the alleged perpetrators' denials. Both girls had previously accused a neighbor of assaulting them and ultimately the neighbor had been acquitted by a jury. In addition, the older girl had accused a cousin of assault but had subsequently recanted those allegations, allegations which the police had investigated and found inconsistent with "background facts". *Id.* at 22. Finally, the younger sister had made an allegation against a man named "Mac" who was never identified or located in an ensuing investigation. Evidence of these allegations was not admitted because although the New Hampshire Supreme Court found them false to a "reasonable probability" they did not meet the state's higher "demonstrably false" standard. Although the First Circuit, on habeas corpus review, made clear that in its view a heightened standard of proof in these prior-allegation cases is not unconstitutional per se, it held that a "demonstrably false" standard could be unconstitutional in a particular application as it was on "the peculiar facts" of that case.[2] *Id.* at 26. The *White* Court noted the vital importance of impeachment in a case that turned

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[2] The three-judge panel specifically noted that in *Ellsworth v. Warden*, 333 F.3d 1, 6 (2003), the First Circuit sitting en banc held that a constitutional challenge to the demonstrably false standard would be "an uphill struggle", noting "the confrontation clause objection is pretty well limited to extreme cases where the state restriction is patently unreasonable." 399 F.3d at 26.

almost entirely on the alleged victims' credibility, and opined that the evidence of prior falsity (at least as to the allegations of which the neighbor was acquitted and the allegations against the cousin which were recanted and unsubstantiated by investigation) was substantial enough that cross-examination concerning it "could easily have changed the outcome." *Id.* at 25. *Cf. Delaware v. Van Arsdall*, 475 U.S. 673, 680 (holding that the Confrontation Clause was violated where the defendant was denied cross examination from which "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility. . . .").

With this constitutional background in mind, we turn again to KRE 412. Rape shield rules, the United States Supreme Court has recognized, serve the legitimate purpose of protecting the victims of sex crimes "against surprise, harassment, and unnecessary invasions of privacy." *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (upholding against constitutional challenge the application of a 10-day notice provision in Michigan's rape shield law to preclude the accused from presenting evidence of his prior sexual relationship with the accuser). They also enhance the fairness of trials by excluding irrelevant character evidence highly apt to distract and confuse the jury. We agree with the Court of Appeals in *Hall* that to prevent these important purposes from being undermined or circumvented, evidence, including cross examination, concerning an alleged sex-crime victim's allegations of sexual impropriety against another is not admissible at trial unless the proponent of the evidence establishes at a KRE 104 hearing that the prior accusation was demonstrably false. To meet that standard, the proponent must show beyond a preponderance of the evidence that there is a distinct and substantial probability that the prior accusation was false. This heightened standard of proof is meant to exclude the evidence where the proponent's only proof of falsity is the alleged perpetrator's denial and/or an inconclusive investigation of the allegation. Self-serving denials and investigations that do not exonerate but merely fail to substantiate are not sufficiently probative of falsity to justify breaching the alleged victim's shield. Applying the shield and excluding the evidence where there is no proof that the

> prior allegations were "demonstrably false" is neither arbitrary nor disproportionate.
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> This demonstrably false standard should be applied so as to balance the Commonwealth's and the victim's interest in excluding collateral character evidence against the defendant's interest in confronting the victim with evidence genuinely and significantly bearing on his or her credibility. So applied, the standard the Court adopts today does not create an impassable barrier for prior-allegation evidence. For example, the victim's recantation of the prior allegation, an investigation which establishes pertinent facts wholly inconsistent with the allegation, or circumstances strongly suggesting that the victim had a motive to fabricate the prior and current allegations are all instances potentially justifying confrontation on this issue. We reiterate, however, as we explained in *Kreps, supra,* that even if the prior allegation is demonstrably false and thus not barred by KRE 412, the evidence is still subject to other evidence rules, including KRE 608 and KRE 403, and may be limited or excluded as those rules require, consistent, of course, with constitutional restraints.

*Dennis*, ___ S.W.3d ___ (Ky. [March 18, 2010]).

In this case, the trial court did not misapply the demonstrably false standard. As noted above, Patterson did not attempt to demonstrate even the content of the supposed "Waldo" allegation, much less its falsity, and in support of his contention that C.A.H.'s allegation against the hospital employee was false, he relied exclusively on the employee's denial and on the apparent fact that the investigation into the incident did not result in charges. That evidence is not sufficient to demonstrate falsity under the principles outlined in *Dennis*. If the evidence at retrial is no different, the trial court should again disallow any inquiry into C.A.H.'s prior allegations.

### B. The Trial Court Properly Disallowed Hearsay Testimony Concerning C.A.H's Therapy.

Patterson also contends that he should have been permitted to question C.A.H.'s social worker about concerns raised by C.A.H.'s therapist to the effect that during group therapy C.A.H. seemed to mimic other members of the group and may have falsely claimed to have been abused in ways other members described. Apparently, the therapist discussed her concerns with the social worker, who then referred to them in her case notes. Patterson sought to question the social worker about the therapist's concerns or to have her read the pertinent portion of her notes into evidence. The trial court disallowed the evidence on the ground that the therapist's out-of-court statements were hearsay, disallowed by KRE 802. Patterson contends that the evidence was admissible under either of two exceptions to the hearsay rule: the so-called state-of-mind exception, KRE 803(3), and the exception for business records, KRE 803(6). Neither exception, however, entitles Patterson to relief.

By its own terms, KRE 803(3) does not aid Patterson, as pertinent to this case, because the exception does not apply to statements "of memory or belief to prove the fact remembered or believed." *Moseley v. Commonwealth*, 960 S.W.2d 460 (Ky. 1997). The state of mind exception thus does not apply to the therapist's belief that C.A.H. may have mimicked other girls during group therapy.

KRE 803(6) is no more availing. That rule allows for the introduction of records kept in the ordinary course of business by a person with a business duty to make or contribute to the record. In *Prater v. Cabinet for Human*

*Resources,* 954 S.W.2d 954 (Ky. 1997), we held that KRE 803(6) applies to case records prepared by social workers, but we explained that the rule does not render admissible opinions or hearsay statements contained in those records, which are otherwise inadmissible under the rules. Here, Patterson failed to establish that the therapist was qualified to render an opinion concerning C.A.H.'s purported mimicry, and he failed to identify an exception to the hearsay rules which would allow for admission of the therapist's hearsay. Even were there such an exception, moreover, this evidence would still have been subject to the KRE 403 balancing test, and the trial court might well have determined that absent an opportunity for cross examination to flesh out this topic, the prejudicial effect of its introduction substantially outweighed its probative value. In sum, the trial court did not abuse its discretion under the evidence rules by disallowing the purported group therapy evidence.

Nor did Patterson establish that the excluded evidence had sufficient probative value to implicate his constitutional rights. Patterson has not shown that the rape allegation against him occurred after C.A.H.'s group therapy, and even if it did there is no suggestion in the record that C.A.H. mimicked her rape allegation or that her therapist thought she might have. On the contrary, the social worker testified *in limine* that the therapist's concerns did *not* relate to the alleged rape. In these circumstances, exclusion of the group therapy evidence did not amount to an arbitrary or disproportionate application of the rule against hearsay.

## IV. The Trial Court Did Not Admit Irrelevant Evidence.

Finally, Patterson maintains that the trial court abused its discretion by admitting evidence of a medical exam performed ten months after the alleged rape and by admitting evidence that immediately before and after the alleged rape Patterson played a recording of one of his favorite songs. Both items of evidence, he insists, were irrelevant. We disagree.

### A. The Medical Exam Ten Months After The Alleged Rape Was Not Without Probative Value.

The examining physician testified that C.A.H.'s vaginal lining bore a small, well-healed cleft of indeterminate age. The cleft was compatible, he testified, with a penetrating injury. On cross examination, he conceded that the cleft could have been caused by a tampon. Although it may well be that the probative value of a gynecological exam diminishes with delay following the alleged sexual contact, that value does not vanish where, as here, the exam reveals an abnormality potentially the result of sexual misconduct. Delay in that case goes to the weight of the evidence, not its admissibility. The trial court did not abuse its discretion, therefore, by permitting the physician's testimony and allowing the defendant full cross-examination on the issue.

### B. Evidence That Patterson Played His Favorite Song Before and After The Rape Was Relevant.

Nor did the court abuse its discretion by permitting M.E.S. to identify two of Patterson's favorite songs and then allowing C.A.H. to testify that he played one of them, "Jokerman", immediately before and after the rape. Although the probative value of this evidence was not great, the fact that Patterson played

the music was properly admitted as part of C.A.H.'s testimony regarding the details of the rape including Patterson's demeaning attitude toward her. C.A.H. testified to being humiliated by Patterson's demands of her, which included requiring her to remove her clothes and dance for him prior to the assault. M.E.S.'s evidence tended to show that that particular song was significant to Patterson, a detail that jurors could deem relevant, albeit perhaps marginally, in assessing C.A.H.'s testimony regarding the circumstances surrounding the rape and Patterson's attitude toward it. Because, moreover, Patterson has identified no unduly prejudicial effect from that evidence, the trial court cannot be said to have abused its discretion by admitting it.

**V. Patterson Did Not Establish That He Was Prosecuted Vindictively.**

The last issue we address is Patterson's claim that he was prosecuted vindictively. As noted above, Patterson was initially indicted for abusing all three of M.E.S.'s children. The prosecutor offered a plea bargain on those charges, and, when Patterson declined the deal, the prosecutor followed through on his threat to bring additional charges of rape. Patterson contends that the rape charges were pursued vindictively to punish him for exercising his right to be tried for the alleged abuse.

As Patterson correctly notes, the Due Process Clauses of the United States Constitution prohibit judges and prosecutors from proceeding vindictively against criminal defendants for exercising their rights. *United States v. Goodwin*, 457 U.S. 368 (1982). Vindictiveness may be either actual or presumptive. *Id; Dickerson v. Commonwealth*, 278 S.W.3d 145 (Ky. 2009). The

United States Supreme Court has held, however, that no presumption of vindictiveness arises when a prosecutor adds charges after plea negotiations fail. As the Court explained, "in the 'give-and-take of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

Patterson was obliged, therefore, to show that the prosecutor in this case actually proceeded against him not in the legitimate furtherance of his prosecutorial duties but merely in order to punish Patterson for choosing to go to trial. He has made no such showing. He quotes his former attorney as having said that the prosecutor was "pissed off," but even if that remark were true it would not establish that the prosecutor sought to punish Patterson as opposed, say, to seeking to maintain a reputation for no-nonsense plea bargaining or to maximize the public benefit from bringing Patterson to trial. Because there is no presumption of vindictiveness in these circumstances, and because Patterson made no showing of actual vindictiveness, the trial court correctly declined to dismiss Patterson's indictment for the rape of C.A.H.

Patterson also complains that the trial court failed to conduct a competency hearing, that the Commonwealth failed to disclose in a timely manner the recording of the Grand Jury proceeding, and that he was not provided with an appropriate sex-offender evaluation. We need not address these issues as the alleged errors are either moot or not likely to recur on

remand. That is not to imply, of course, that Patterson is precluded on remand from revisiting the issue of his competence if there is reason to do so.

**CONCLUSION**

In sum, in a case that turned almost entirely on the jury's estimate of the credibility of Patterson and C.A.H., respectively, the improper admission of class habit testimony tending to bolster C.A.H.'s credibility, together with the improper admission of evidence attributing other crimes to Patterson and casting his character in a bad light require that Patterson's conviction be reversed and the matter remanded for additional proceedings. In the event of a new trial, the Commonwealth will be allowed to introduce the results of C.A.H.'s medical exam and testimony concerning Patterson's favorite songs. Patterson, absent a showing that they are demonstrably false, will not be permitted to introduce evidence or to cross-examine C.A.H. concerning allegations of sexual abuse she may have made against others, nor will he be permitted to introduce hearsay statements by C.A.H.'s therapist concerning C.A.H.'s possible mimicry of others during group therapy. In accord with the above, the February 28, 2008 Judgment of the Fulton Circuit Court is hereby reversed and the matter is remanded to that Court for additional proceedings consistent with this Opinion.

Minton, C.J.; Abramson, Noble, Schroder, Scott, and Venters, JJ., concur. Cunningham, J., not sitting.

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