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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MAY 20, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000138-MR
2008-SC-000651-TG

NICHOLAS WILLIAMS — APPELLANT

V.

ON APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE JEFFREY THOMAS BURDETTE, JUDGE
NO. 07-CR-00043-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

VACATING AND REMANDING

These are matter of right appeals from a judgment in which Appellant was convicted of incest and first-degree sodomy and an order denying Appellant's CR 60.02(b) motion for a new trial based on newly discovered evidence. Because of the admission of improper and highly prejudicial KRE 404(b) evidence of vaginal and anal injuries to the victim, we vacate the convictions and remand for a new trial or further proceedings consistent with this opinion. Appellant's CR 60.02 motion and appeal therefrom is thus rendered moot.

Appellant, Nicholas Williams, was indicted on one count of incest and one count of first-degree sodomy based on allegations that he had sexual contact with his then 21-month old daughter K.W. while in bed with his wife,

Virginia Williams. Upon investigation of the incident by police, Williams stated to police that the child was in bed with him and his wife when his wife was giving him oral sex. At some point, he heard his wife laughing. Williams stated that he then looked up and saw his penis in his child's hand, but he did not know if the child ever put her mouth on his penis. Williams told police that he could not tell the difference between his wife and his child because his wife was not very good at performing oral sex.

A neighbor of the Williamses, Tommy Smith, who was friends with Virginia Williams, testified that Virginia told him that she let K.W. suck Williams' penis and he "got harder and hornier" than he had ever been in his life. According to Smith's testimony, Virginia also told him she allowed K.W. to suck on her nipples because the child had witnessed Williams doing it and wanted to do it too. Smith understood that the child was encouraged to do this for sexual pleasure. Smith also testified that once, when K.W. was at his apartment with Virginia, the child pulled at his shorts while saying "suck, suck." In seeing this, Virginia told Smith that sometimes when K.W. would be in bed while she and Williams were having sex, K.W. would grab Williams' penis and bite it. Finally, Smith testified he observed a dildo on the Williamses' bedroom floor.

Holly Kirby, who was K.W.'s foster mother for about four months after K.W. was removed from the Williamses' home, testified that when she changed K.W.'s diaper, K.W. "spread herself apart," cussed, and "asked me to 'suck it.'"

Kirby also testified that during this period, when K.W. would see males, she would grab her crotch and say "suck it." Kirby described one incident in which K.W. went up to a man in Walmart and said "suck" to him. Kirby stated that these behaviors became less frequent after three months.

The social worker on the case, Joyce Cummings, testified that when she went to the Williamses' house to investigate the matter and told Appellant about the allegations of sexual abuse, Appellant acted nonchalant and offered her a Mountain Dew. In the course of testifying about Williams' computer use, Cummings testified that Williams maintained a Myspace.com account, and his user name was "Demon Man" and his password was 666.69.

Appellant's mother, Carolyn Bray, who sometimes watched K.W., testified that she became concerned about K.W. when she observed redness and injury to her vaginal area on April 11, 2007. Bray testified that Appellant and K.W. were at her house on that day, and she changed K.W.'s diaper. At that time, K.W.'s vaginal area did not appear red or swollen. Later on that same day, she took Virginia and K.W. (without Appellant) to visit Virginia's family. When they got home two hours later, K.W. was saying "hurt," and when Bray checked her diaper, her vaginal area was again red and swollen. When Bray told Virginia what she observed, Virginia told her that K.W. had straddled a toy without her diaper on, and the toy had hurt her. Bray testified she later learned that Tommy Smith had been with Virginia and K.W. that day.

K.W.'s paternal great-grandfather, Benny Miller, who had custody of the

child at the time of trial, testified for the defense. He testified that the child acted afraid to visit Virginia's family and said to him when he was taking her to visit Virginia's family, "Nana hurt me real bad." He stated the child also told him that a man at Nana's house "took off my clothes and made me naked."

Sheena Ballard, a friend of Tommy Smith, testified that once when she was at Smith's apartment and Virginia and K.W. were there, she observed K.W. suck on a protuburance on a computer tower cd holder and say "suck." Ballard testified that she thought this was unusual for a child this age.

Dr. Jacky Crawford, a physician employed by the Child Advocacy Center, performed an examination of K.W. on April 26, 2007, about a week after the child was removed from the Williamses' home. Dr. Crawford found bruising around K.W.'s rectum and abrasions on her labia major, and abrasions and small tears inside the vagina all the way back through the inner lips. Dr. Crawford testified that there had been trauma to the vagina, and something had been pushed against the rectum to cause swelling. Dr. Crawford opined that K.W. had been sexually assaulted fairly recently, within a couple of days to a week. Dr. Crawford's report was admitted into evidence.

Williams was indicted on June 8, 2007. In the same indictment, Virginia Williams was indicted on one count of complicity to incest and one count of complicity to first-degree sodomy. On July 13, 2007, the Commonwealth moved for a speedy trial pursuant to KRS 421.510, which provides for a speedy trial where the victim is less than sixteen (16) years of age. The motion was

granted and, over defense objection, trial was set for October 23, 2007. Eight days before trial, the defense filed a motion in limine pointing out that the Commonwealth had not given notice of any "other crimes" evidence and moving to exclude: 1) statements by Virginia Williams; 2) statements by K.W. weeks after the alleged crime; 3) a social workers' report, including hearsay statements by Virginia; and 4) any and all other KRE 404(b) evidence of "other bad acts" including vaginal and/or anal injuries, including the testimony and report of Dr. Jacky Crawford.

In response, the Commonwealth filed its first notice of potential KRE 404(b) evidence seven days before trial. The notice stated that the Commonwealth intended to introduce evidence of vaginal injuries to K.W. suffered while in the custody of Williams and evidence that Carolyn Bray had inquired about injuries to the child's genitals just prior to the investigation. This notice stated that it took the position that these items were direct evidence of guilt and not KRE 404(b) evidence. That same day, the Commonwealth filed a second notice of potential KRE 404(b) evidence stating its intent to call Tommy Smith to testify about what Virginia had told him, and Holly Kirby to testify about K.W.'s behaviors and her saying "suck" and "fuck." The day before trial, the court issued its order on the motion in limine permitting the testimony of Tommy Smith, Dr. Jacky Crawford, Carolyn Bray, and Holly Kirby to be admitted, as well as evidence that K.W. watched her dad suck on Virginia's nipples and, as a result, also sucked on Virginia's nipples.

At the jury trial in which the charges against Virginia were severed, the jury was instructed on incest, first-degree sodomy, and first-degree sexual abuse. The jury found Williams guilty of incest and first-degree sodomy, and recommended that he be sentenced to ten (10) years on the incest charge and twenty (20) years on the sodomy charge, to be served concurrently. The trial court the accepted jury's recommendation of the ten-year and twenty-year sentence, but ordered that they be served consecutively, for a total of thirty (30) years. From this final judgment, Williams now appeals to this Court as a matter of right.

Ninety days after the final judgment was entered, Williams filed a CR 60.02 motion for a new trial alleging newly discovered evidence that witness Tommy Smith had recently been charged with sexually abusing a child other than K.W. The motion claimed that had Williams known of this charge against Smith, he could have attempted to show that Smith (who also had access to K.W.) was the one who had molested K.W. or, at the very least, impeached Smith with this information. From the order denying the CR 60.02 motion, Williams appealed to the Court of Appeals. Williams' motion to transfer the appeal to this Court was granted and the appeal was consolidated with the appeal from the final judgment.

TESTIMONY OF DR. JACKY CRAWFORD

In reviewing the record, it appears to this Court that, up until the Commonwealth's response to the motion in limine, Williams was on notice that

he was charged with acts only relating to the one incident in bed with his wife and child when K.W. allegedly put Williams' penis in her mouth. The basis of both the incest charge and the first-degree sodomy charge in the indictment was that Williams "on or about January 2007 through April 19, 2007" committed the offenses by "engaging in deviate sexual intercourse with K.W.[,]" who was his daughter and under twelve years of age at the time of the offenses. The uniform citation dated April 19, 2007 charges first-degree sodomy and incest and describes only the incident in bed with Virginia and K.W. where K.W. allegedly had Williams' penis in her mouth. The second citation, dated June 13, 2007, which was executed pursuant to service of the indictment, stated no additional facts or allegations. No bill of particulars or motion therefore was filed in the record.

On October 16, 2007, one week before trial, the Commonwealth responded to Williams' motion in limine as follows with regard to its position that the evidence of Dr. Crawford's findings should be admitted:

> Defendant is charged with Sodomy and Incest. Dr. Crawford has found injuries to the vaginal area of the young child and determined that there is sexual abuse. This evidence is relevant in terms of the abusive nature of the environment KBW was in while placed in the parents' home.
> In light of all the other evidence, this evidence tends to show ongoing abuse of the child, **beyond what the Commonwealth has charged**. While the Commonwealth takes the position that this evidence is direct evidence, to the extent that it might be considered "other act evidence" the Commonwealth gives notice of its intent to introduce such to prove common scheme or pattern of conduct with regard to

this victim during this same time frame.

(emphasis added).

The only allegation made by the Commonwealth against Williams in its opening statement was relative to the incident in bed when K.W. had Williams' penis in her mouth. Although the Commonwealth made reference to Dr. Crawford's testimony and report in its opening statement, the prosecutor did not claim that Williams had caused these injuries or that they would show that Williams committed these acts. The opening statement of the defense addressed only the allegation regarding the incident in bed when the child had Williams' penis in her mouth.

The jury instructions for incest, sodomy and sexual abuse were worded generally and contained no language indicating allegations of multiple, separate acts. Further, the time period for commission of the offenses in all three instructions was the same: "On or about January 2007 through April 19, 2007 . . . "

Prior to the filing of this response wherein the Commonwealth claims that the evidence of vaginal or anal injury to K.W. was direct evidence of the crimes charged, there was no indication that Williams was being charged with an act related to contact with K.W.'s anal or vaginal area. There was no allegation or evidence that the incident in bed with K.W. and Virginia involved any contact by Williams with K.W.'s vagina or rectum.

Thereafter on October 19, 2007, Williams filed a reply to the

Commonwealth's response, maintaining that any evidence of vaginal or anal injury to K.W. would have to be KRE 404(b) evidence and could not be direct evidence because Williams was never charged with an act relating to contact with K.W.'s vagina or rectum. Williams argued that said evidence was not admissible under KRE 404(b) because there was no evidence that Williams committed any prior act relating to contact with K.W.'s vagina or rectum, as required by *Bell v. Commonwealth*, 875 S.W.2d 882, 890 (Ky. 1994), and the evidence of vaginal or anal injury to K.W. was not sufficiently similar to the offense charged (K.W. having Williams' penis in her mouth).

The Commonwealth filed a second response to the motion in limine on October 19, 2007, in which it conceded that Williams was only being charged with an act involving oral sex:

> With regard to the perianal-anal area, this is most certainly related to sodomy. **While the charged act involves oral sex**, the fact there is evidence of anal bruising is most certainly relevant to whether this child was involved in an ongoing sexually abusive relationship with her parents, since they were in custody and control of her.
>
> . . .
>
> [T]he injuries to the two year old's intimate areas are highly probative of the abuse suffered by THIS child, during THIS timeframe. To the extent that this might be KRE 404(b) evidence, it is thus pattern or common scheme evidence highly probative of whether Defendant would subject the two year old to oral sex.

(emphasis added).

In its order entered one day before trial, the trial court ruled it would

allow the report and testimony of Dr. Crawford to be admitted at trial as KRE 404(b) evidence, because the evidence involving injury to the rectum was direct evidence of the crime of sodomy, and the evidence of injury to the vagina was relevant because Williams requested an instruction on the lesser included offense of sexual abuse, first degree, of which vaginal trauma is direct evidence. The trial court went on in its order to find that Dr. Crawford's report and testimony were probative because "the evidence of trauma to K.[W]. contained in the doctor's report is inexorably intertwined with the crimes as charged and probative in value." At trial, the trial court did grant Williams' motion for a limiting instruction regarding the testimony and report of Dr. Crawford. The trial court admonished the jury that they could only consider the evidence of vaginal trauma to K.W. for purposes of plan, scheme, or course of conduct.

Williams argues that it was reversible error to admit the evidence of vaginal and anal injuries to K.W. under KRE 404(b) because there was no evidence that he was the one who caused these injuries to K.W. and the evidence of vaginal or anal trauma to K.W. was not relevant to the crime with which he was charged – K.W. having Williams' penis in her mouth.

The Commonwealth counters that the evidence of vaginal/anal trauma was direct evidence of the charge of sodomy and thus Williams incorrectly characterizes it as evidence of prior bad acts. In the alternative, the Commonwealth maintains that the evidence was admissible under KRE 404(b) to prove that any sexual contact with K.W. was intentional on his part and

rebut Williams' claim of mistake – that he did not know the child had put his penis in her mouth – and his assertion that it could have been Virginia's relatives or Tommy Smith who caused the vaginal and anal injuries to K.W.

The confusion in this case stems from the fact that the record is unclear whether the Commonwealth intended to charge Williams with incest and first-degree sodomy for the one act of K.W. having Williams' penis in her mouth or a second additional act of causing the vaginal and anal injuries to K.W. It appears that the Commonwealth and the trial court were confused on this issue as well. Although Williams was charged with incest and first-degree sodomy, the allegation that Williams allowed or encouraged K.W. to put his penis in her mouth could constitute either or both of those offenses. *See Wombles v. Commonwealth*, 831 S.W.2d 172 (Ky. 1992). There was nothing in the record indicating that Williams was being charged with an offense/act relating to contact with K.W.'s vagina or rectum until the Commonwealth's response to the motion in limine one week prior to trial. And the indictment was never amended to reflect that he was being charged for committing a crime related to contact with K.W.'s vagina or rectum. Finally, the Commonwealth admitted Williams was not being charged for causing the injuries to K.W.'s vagina or rectum when it stated in its responses to the motion in limine that the "charged act involved oral sex" and that the evidence from Dr. Crawford's report was relevant "to show ongoing abuse of the child, beyond what the Commonwealth has charged." Thus, the Commonwealth's and the trial court's

position that Dr. Crawford's testimony and report was direct evidence of the crime charged is specious.

Even more unfounded is the assertion that the evidence of the injuries to K.W.'s vaginal and anal areas was admissible **under KRE 404(b)** as direct evidence of the crime charged. An act cannot be direct evidence of the crime charged **and** be evidence of "**other** crimes, wrongs or acts" under KRE 404(b).

Accordingly, we shall proceed to an analysis of whether the evidence of vaginal and anal trauma to the child was properly admitted under KRE 404(b) as an uncharged act offered to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident" or because it was "inextricably intertwined with other evidence essential to the case." This Court will review a trial court's determinations on the admissibility of evidence for abuse of discretion. *See, e.g. Cook v. Commonwealth*, 129 S.W.3d 351, 362 (Ky. 2004). The court has abused its discretion when "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). According to *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994), for evidence to be admitted under KRE 404(b), it must meet the three-prong test this Court has established, which looks to the (1) relevance (2) probativeness and (3) prejudice of the proposed other crimes evidence. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 791 (Ky. 2008).

The Commonwealth argues that the evidence of the vaginal and anal

trauma to K.W. was admissible under KRE 404(b)(1) to show his intent to have sexual contact with K.W. and prove the absence of mistake in rebutting Williams' claim that he was not aware of and did not encourage the child to put his penis in her mouth. Williams maintains that Dr. Crawford's testimony and report could not be admitted for this purpose because of a lack of probativeness in that there was insufficient proof that Williams was the one who had caused the vaginal and anal injuries to K.W. We agree.

On the issue of probativeness, the test is whether "evidence of the uncharged crime [is] sufficiently probative of its commission by the accused to warrant its introduction into evidence." *Bell*, 875 S.W.2d at 890. The United States Supreme Court has held that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689 (1988).

In the instant case, there was no evidence that Williams was the one who caused the vaginal and anal trauma to K.W. While the child was very young and there was evidence that she was in Virginia's and Appellant's custody before she was removed from the home, there was no evidence even tying K.W.'s injuries to a time when she had been in Appellant's care. On the contrary, there was evidence from Carolyn Bray's testimony that she did not observe the redness and swelling to K.W.'s vaginal area after she had been with Appellant. Rather, she specifically noted that she observed the redness and

swelling after K.W. had been with Virginia's family and Tommy Smith. Similarly, Benny Miller testified that the child claimed she had been hurt at Nana's house and that a man there had taken off her clothes and made her naked.

Accordingly, we adjudge the trial court abused its discretion in allowing the testimony and report of Dr. Crawford to be admitted. There is no question that this evidence was extremely prejudicial to Williams in this case. Hence, we must vacate the convictions and remand for a new trial or for proceedings consistent with this opinion. We shall address only the remaining assignments of error which we anticipate will arise again on retrial.

TESTIMONY OF TOMMY SMITH REGARDING STATEMENT OF VIRGINIA WILLIAMS

Virginia Williams did not testify in this case because she invoked the spousal privilege in KRE 504(a). As stated above, however, the court allowed neighbor Tommy Smith to testify to certain statements made by Virginia to him when she was visiting him at his apartment.[1] One of the statements Smith testified to was that K.W. wanted to suck on Virginia's nipples after watching her father suck on Virginia's nipples. Smith testified that he said to Virginia that Williams had been gone at his mother's house for most of the week, so why was she letting the child do it now? According to Smith, Virginia said "because she wanted to." The following exchange then occurred:

[1] Although the trial court analyzed these statements under *Crawford v. Washington*, 541 U.S. 36 (2004), Williams does not argue on appeal that allowing Smith to testify to the above statements of Virginia violated his Sixth Amendment right to confrontation.

Commonwealth: Was she breastfeeding?

Smith: I don't know ... not at the time. I mean, [K.W.] wasn't even on the bottle then.

Commonwealth: Your understanding was this was for a sexual purpose?

Smith: That's the way I took it.

On cross-examination, defense counsel asked Smith about Virginia's statement that she let K.W. suck on her nipples:

Defense: Did you get the idea it was for a purpose other than child nourishment?

Smith: [K.W.] was too old to be breastfed.

Defense: So you took it that she meant for some kind of pleasure?

Smith: Yes.

Williams argues that this statement should not have been admitted under KRE 404(b) because it was not relevant for an acceptable purpose. The trial court ruled that it was probative of the offense charged, reasoning that if the child was permitted to suck on Virginia's breasts after watching Williams do it, then it tended to show it was probable that she was likewise permitted to suck on Williams' penis.

In this case, Smith's testimony indicated that the nipple sucking by the child, although it was alleged to have been prompted by the child watching her father do it, did not occur contemporaneously with the charged offense. There

was no evidence that the nipple sucking by K.W. involved Williams, other than the fact that the child wanted to because she had witnessed him doing it to his wife. It was undisputed that this was a separate incident or incidents. Thus, it could not have been admissible under KRE 404(b)(2) (inextricably intertwined with other essential evidence).

The Commonwealth argued that it was admissible under KRE 404(b)(1) to show pattern of conduct and to rebut Williams' claim of mistake and that he did not encourage the child's behavior. Given the nature of the charges against Williams, we cannot say it was an abuse of discretion to allow the evidence that Williams encouraged and Virginia allowed K.W. to suck on her breasts for pleasure. We agree that it was admissible to show pattern of conduct, intent, and absence of mistake. *See Clark v. Commonwealth*, 223 S.W.3d 90, 96-97 (Ky. 2007).

TESTIMONY OF TOMMY SMITH REGARDING K.W.'S ACTIONS AND UTTERANCES

Smith also testified that K.W. pulled on the front of his shorts and said, "suck, suck" when she was visiting his apartment with Virginia. When Smith asked why K.W. would do this, Virginia replied that sometimes when K.W. would be in bed while she and Williams were having sex, K.W. would grab Williams' penis and bite it. Williams argues that the utterances and actions by K.W. were inadmissible as hearsay and as evidence of child sexual abuse accommodation syndrome.

The trial court ruled that Smith's testimony of the actions and utterances of K.W. were admissible, reasoning as follows:

> As the statements purportedly made by [K.W.] are not being offered to prove the truth of the matter asserted, the statements are not hearsay. Moreover, it is significantly probative that three ("3") weeks after the alleged events [K.W.], an infant with highly limited communication skills, uttered these words and made sexual gestures. Considering the nature of the crimes charged, Incest and Sodomy, First Degree, the Court finds that the significant probative value of such statements is not substantially outweighed by any danger of undue prejudice to the Defendant's right to a fair trial.

We agree with the trial court that the testimony that K.W. pulled on Smith's shorts while saying "suck, suck" would not be hearsay because it was not being offered to prove the truth of the matter asserted. *See Osborne v. Commonwealth*, 43 S.W.3d 234, 242 (Ky. 2001); KRE 801(c). Rather, it was being admitted to show that the child made the gestures while she said the words "suck, suck."

Williams next claims that admission of such evidence amounted to improper child sexual abuse accommodation syndrome (CSAAS) testimony. The rule prohibiting admission of CSAAS testimony is 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." *Kurtz v. Commonwealth*, 172

S.W.3d 409, 414 (Ky. 2005) (quoting *Miller v. Commonwealth*, 77 S.W.3d 566, 571-72 (Ky. 2002)). Here, we agree with the Commonwealth that Smith's testimony about K.W.'s actions and utterances did not fall within the proscription against CSAAS testimony. There was no testimony by an expert or anyone else in this case that K.W.'s behavior and words were consistent with those of other children who had been sexually abused. Rather, Smith simply testified to what he observed K.W. doing and saying.

The question then is one of relevance. Evidence will be considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Given the act that was the basis of the charges against Williams – allowing K.W. to suck his penis – we believe the evidence that K.W. pulled on another male's shorts while saying "suck, suck" was sufficiently probative to render it admissible.

TESTIMONY OF HOLLY KIRBY REGARDING K.W.'S ACTIONS AND UTTERANCES

K.W.'s foster mother, Holly Kirby, testified that when she changed K.W.'s diaper, K.W. "spread herself apart," cussed, and said "suck it." Kirby also testified that during this period, when K.W. would see males, she would grab her crotch and say "suck it," and described one particular incident in which K.W. went up to a man in Walmart and said "suck" to him. As with Smith's testimony regarding K.W.'s actions and utterances, Williams argues that

Kirby's testimony was likewise improperly admitted as hearsay and CSAAS evidence. For the same reasons stated above, we conclude that Kirby's testimony was not hearsay or CSAAS evidence. However, there is still a question of its relevance to the charges against Williams.

Because of the child's young age (21 months) and the charges against Williams, we believe it was significant that K.W. would associate the phrase "suck it" with her genitals and would say the word "suck" to another male. Further, we do not see that the probative value of said evidence was outweighed by the potential for undue prejudice. KRE 403. Accordingly, we cannot say that it was an abuse of discretion for the trial court to allow this evidence to be admitted.

EVIDENCE OF DILDO AND K.W. SUCKING ON CD TOWER

Williams argues that the evidence of the dildo on the floor of the Williamses' bedroom and Sheena Ballard's testimony that she observed K.W. sucking on a protuberance on a computer tower while saying "suck" was irrelevant and improperly admitted. Again, in light of the child's young age and the charges against Williams, we believe it was significant that K.W. associated the word "suck" with the act of sucking on the end of the computer tower. We also view the presence of the dildo on the floor where K.W. would see it as relevant in this case because it tended to corroborate the allegation that the Williamses openly engaged in sexual acts in front of the child. Hence, there was no abuse of discretion in allowing this evidence to be admitted.

REFERENCE TO APPELLANTS' COMPUTER USER NAME AND PASSWORD

During the testimony of social worker Joyce Cummings, the Commonwealth asked what Williams liked to do in his spare time. Cummings replied that he liked to play computer games, and in the course of this testimony, stated that his user name was "Demon Man" and his password was 666.69. The defense objected and moved for a mistrial. The trial court agreed that the evidence was irrelevant and prejudicial, but declined to grant the mistrial. Instead the judge admonished to jury to disregard the references to his user name and password. We agree that this evidence was irrelevant and prejudicial in this case and trust that it will not be repeated on retrial. KRE 401; KRE 402.

JURY INSTRUCTIONS

Williams submitted jury instructions for incest and sodomy, first degree, stating that the jury must find that Williams "intentionally engaged in deviate sexual intercourse with [K.W.]" The trial court ruled that the instructions should not contain the specific mental state of "intent" because neither crime is defined as an intentional offense. KRS 510.070; KRS 530.020. Rather, the court adjudged that the required mental state was covered by the element of "sexual gratification" in the definition of "deviate sexual intercourse." KRS 510.010(1).

KRS 501.030(2) provides that a person cannot be guilty of a criminal

offense unless that person has

> engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense, except that this requirement does not apply to any offense which imposes absolute liability, as defined in KRS 501.050.

Pursuant to KRS 501.050, one of the culpable mental states is required for all criminal offenses unless the offense is a violation, a misdemeanor, or one defined outside the Penal Code. Williams asserts that because incest and sodomy do not fall within any of these categories, a culpable mental state is required to convict him of either of these offenses.

The offenses of sodomy and incest do not specifically contain a culpable mental state within their definitions. KRS 510.070; KRS 530.020. They do require a finding that the defendant engaged in "deviate sexual intercourse," i.e., an "act of sexual gratification," which is a jury question that was decided adversely to Williams. KRS 510.010. This is consistent with our previous rulings in *Malone v. Commonwealth*, 636 S.W.2d 647 (Ky. 1982) and *Isaacs v. Commonwealth*, 553 S.W.2d 843, 845 (Ky. 1977). *See also Meadows v. Commonwealth*, 178 S.W.3d 527, 532 (Ky. App. 2005) ("[T]he statute for first-degree rape does not require any particular state of mind, such as intent or knowledge.").

In *Malone* and *Isaacs*, wherein the defendant was convicted of first-degree rape and first-degree sodomy in the former case and first-degree rape of a child under age 12 in the latter, the Court had before it the question of

whether lack of a mental state to form intent to commit the crimes due to voluntary intoxication was a defense to the crimes. In both cases, this Court found that the act constituted the crime without any other showing of intent, reasoning that the Legislature did not intend to inject a culpable mental state such as knowledge or intent into the crimes of rape and sodomy so as to make the defense of voluntary intoxication available to the defendant. *Malone,* 636 S.W.2d at 647-48; *Isaacs*, 553 S.W.2d at 845.

In the instant case, there is no claim of intoxication. However, Williams argues that due to his claim that he was unaware that the child had her mouth on his penis, he was entitled to an instruction on sodomy and incest containing an intentional mental state. We agree with the trial court that the requirement of a finding of "sexual gratification" in KRS 510.010(1) subsumes the element of intent because one cannot engage in an act of sexual gratification without the appropriate level of consciousness to achieve it.

Williams also argues that he was entitled to a specific definition of "engaging in" in the instructions. The trial court rejected Williams' request to include this definition in the instructions, but advised defense counsel that he could make the argument about what constitutes "engaging in" in his closing argument. Given our preference for "bare bones" instructions, we adjudge that the trial court did not err in not including a definition for "engaging in" in the instructions. *See Hodge v. Commonwealth,* 17 S.W.3d 824, 850 (Ky. 2000).

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and

Venters, JJ., concur. Schroder, J., concurs in part and dissents in part by separate opinion.

SCHRODER, J., CONCURRING IN PART, DISSENTING IN PART: While I agree with the majority on the main issue here – that it was reversible error to permit the testimony of Dr. Crawford regarding the physical injuries to the child – I depart from the majority on certain of the other evidentiary rulings in the case.

As to the testimony of Tommy Smith about the child sucking on the mother's breast, Smith did not witness the act and it was apparent from Smith's testimony that he did not know whether K.W. was breastfeeding at the time. He simply presumed she was not breastfeeding because of her age and the fact that she was not drinking from a bottle anymore. It is not uncommon for children to still be breastfeeding at 21 months of age, and KRS 211.755 specifically provides that breastfeeding a child shall not be considered "sexual conduct." Virginia did not tell Smith that she was allowing K.W. to suck on her breasts for sexual pleasure. Rather, according to Smith's testimony, Virginia stated that she allowed K.W. to do it because she (K.W.) wanted to. Smith merely testified that he "took it" she was doing this for pleasure or for a sexual purpose.

Moreover, there was no evidence that the act of K.W. sucking on Virginia's breast involved Williams. It was undisputed that these were separate acts that did not occur contemporaneous with the charged offense. Given the

speculative nature of Smith's testimony and the fact that there was no evidence linking Williams to the act, I believe it was not sufficiently relevant to, or probative of, the charged act of oral sodomy to be admissible in Williams' case. *See Bell*, 875 S.W.2d at 889.

I likewise believe that the testimony of Holly Kirby about K.W. touching her own genitals and saying "suck" while having her diaper changed was admitted in error. Unlike the evidence of K.W. saying "suck" while pulling on the front of Tommy Smith's shorts, I do not believe that the evidence of the child touching herself while saying "suck" can be considered evidence tending to show that Williams encouraged or allowed K.W. to suck his penis. Williams was not charged with a crime involving contact with K.W.'s genitals and that is why the majority properly adjudged that the evidence of injury to the child's genital areas was improperly admitted. I would agree with Williams that evidence of this type is in the nature of the discredited child sexual abuse accommodation syndrome evidence because of the inference that a child touching her genitals while saying "suck" is proof that a sexual crime has been committed against the child. *See Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992) (diagnosis of sexual abuse based on behavior has no probative value and is inadmissible).

As to the evidence of K.W. sucking on the computer tower while saying "suck," I fail to see how this is relevant to the charge against Williams. The charge against Williams did not involve the use of any inanimate object or sex

toy. I believe this is clearly in the nature of child abuse accommodation syndrome evidence because of the sweeping inference that if the child sucked on an artificial object while saying "suck," it means she has performed oral sex on a male. *See Lantrip v. Commonwealth*, 713 S.W. 816 (Ky. 1986). Even if there was some probative value to the evidence, under KRE 403, I believe it was substantially outweighed by the danger of undue prejudice.

Finally, as to Smith's testimony that he observed a dildo on the Williamses' bedroom floor, I view this evidence as KRE 404(b) evidence which was not admissible for any of the purposes in KRE 404(b)(1). There was no evidence that the dildo was involved with or had any relevance to the crime for which Williams was charged, and I believe the evidence to be highly prejudicial.

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