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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000473-MR

EARL CHANLEY — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 10-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On October 17, 2009, Donia Gilbody left her home at 221 Ludford Street, Ludlow, Kentucky, for the weekend. When she returned, she found that her home had been broken into and many items were missing, including several pieces of jewelry. On October 22, 2009, Julie McGuire turned over a gold bracelet to the Ludlow Police Department. McGuire explained that Appellant had given her the bracelet and had told her that he had taken it from a woman's house. Gilbody later identified the bracelet as belonging to her. The day after she returned home, Gilbody also found a cordless phone on the ground outside the window of her residence. The Ludlow Police Department determined that the phone was from the residence of Appellant's father, where Appellant had been staying.

On January 11, 2010, Appellant was indicted on one count of second-degree burglary. On April 29, 2010, he was charged with being a first-degree persistent felony offender. Appellant was subsequently convicted in the Kenton Circuit Court of both offenses. He was sentenced to ten years for the burglary conviction, which was enhanced to twenty years based on the PFO conviction. Appellant now appeals the judgment and sentence as a matter of right. Ky. Const. § 110(2)(b).

When McGuire testified at trial on May 18, 2010, Appellant sought to impeach her with three pieces of evidence: (1) a 2004 misdemeanor conviction for theft by deception (writing cold checks); (2) a 2008 misdemeanor conviction for theft by unlawful taking under $300 (stealing money from a wallet belonging to her son's friend); and (3) the conditionally discharged sentence received as a result of the 2008 conviction. The trial court ruled that Appellant could question McGuire regarding the 2004 misdemeanor theft conviction, but could not question her concerning the 2008 misdemeanor theft conviction and her conditional discharge status. The trial court ruled that the 2004 cold-checking offense was probative as to truthfulness or untruthfulness, but that the 2008 theft by unlawful taking offense and conditional discharge status were not. Appellant now appeals the trial court's ruling, arguing that the last two pieces of evidence should have been admitted under KRE 608.

We must first address whether this issue was preserved for appellate review. This Court is "not at liberty to review alleged errors when the issue was not presented to the trial court for decision." *Henson v. Commonwealth*, 20

S.W.3d 466, 470 (Ky. 1999) (citing *McDonald v. Commonwealth*, 554 S.W.2d 84 (Ky. 1977)). Here, however, the issue of admissibility of the evidence under KRE 608 was presented to the trial court. Pursuant to KRE 608, the Commonwealth objected to the introduction of all the evidence, and the trial court sustained the objection as to the 2008 conviction and conditionally discharged sentence. It appears Appellant was attempting to introduce the evidence both to show bias and character for truthfulness or untruthfulness under KRE 608(b). Accordingly, we find that the issue of admissibility under KRE 608 was presented to the trial court and adequately preserved for appellate review.

The Commonwealth did not cross-appeal the court's ruling on allowing impeachment pursuant to the 2004 misdemeanor cold-checking conviction. At the outset, it is important to note that this case was tried before our opinion in *Childers v. Commonwealth,* 332 S.W.3d 64 (Ky. 2010). In that case, in a close 4-3 vote, we decided that "KRE 608 permits impeachment only by specific acts that have not resulted in a criminal conviction [while] [e]vidence relating to impeachment by criminal conviction is governed solely by KRE 609." *Id.* at 72. Appellant argues that *Childers* should not be applied retroactively to bar the introduction of this evidence. Furthermore, Appellant asks that we overrule *Childers* and reinstate for the law in this case our predecessor decision in *Fields v. Commonwealth*, 274 S.W.3d 375 (Ky. 2008).

Under the facts before us, we need not reach either of those issues. We can affirm this decision without resort to *Childers*.

It is difficult to determine from the record what Appellant's exact argument was at trial. During the bench conference, Appellant appears to be seeking to use the evidence to show that McGuire had a motive to lie because of her 2008 misdemeanor conviction and conditional discharge status. The reasoning is that McGuire was afraid her conditional discharge might be revoked for having stolen property in her possession; therefore, she made false statements against Appellant as a cover story.

KRE 608(b) refers to the admission of certain "specific instances of conduct" on cross-examination of a witness which goes to credibility. However, the admission of such evidence is subject to the discretion of the trial judge who must determine that it is "probative of truthfulness or untruthfulness."

In the case before us, the trial court did not exclude the evidence as not being admissible as a "specific instance[] of conduct" under KRE 608, nor as to the issue covered in *Childers*. Instead, the trial court ruled that it was not "probative of truthfulness or untruthfulness." The trial court held that the 2004 misdemeanor conviction (cold-checking) was probative of truthfulness or untruthfulness, but that the 2008 misdemeanor theft by unlawful taking conviction and conditionally discharged sentence were not. In other words, the *Childers* issue which dealt with the tension between KRE 608 and KRE 609 was side-stepped here. In essence, it makes no difference whether our holding in *Childers* is applied retroactively to this case. The evidence did not come in on the grounds of not being probative.

The trial court is taken to task by Appellant for holding that the 2008 conviction and conditional discharge were not probative.

We review a trial court's decisions concerning the admission of the evidence under the abuse of discretion standard. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

We have serious questions about the materiality of the evidence proposed to be introduced. If the report by McGuire of receiving the stolen bracelet from Appellant had surfaced after her possession of it had been discovered, then it could clearly be a motivation for her to lie against Appellant. It would serve as a cover story to keep McGuire from being revoked on the conditional discharge under the conviction. But here, she apparently turned over the bracelet to law enforcement on her own volition and without fear of detection. It could be argued that this act actually enhanced McGuire's credibility rather than diminished it. All of this supports the trial judge's decision to exclude such evidence, albeit maybe for slightly different reasons. So we cannot find that the trial court abused its discretion in holding that the evidence was not probative.

We also note that, even if there had been error, it was clearly harmless. Here, if the exclusion of the 2008 conviction and conditional discharge status was erroneous, the result would be a violation of Appellant's Sixth Amendment right of confrontation. *Davis v. Alaska,* 415 U.S. 308, 316 (1974). A trial error that involves the denial of a federal constitutional right is harmless when it

appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Here, Appellant's conviction was not affected by the exclusion of the evidence. Even if the 2008 misdemeanor conviction and the conditionally discharged sentence were improperly excluded, Appellant was allowed to challenge McGuire's veracity through other means. The jury was shown that McGuire had a prior misdemeanor theft by deception conviction. The jury also learned that she had been given immunity by the Commonwealth in exchange for her testimony. There was evidence that she had been in a previous relationship with Appellant and that he owed her money. A cordless phone from the residence of Appellant's father—practically a calling card—was discovered at the victim's house.

All of this convinces us, beyond a reasonable doubt, that the exclusion of the 2008 misdemeanor conviction and conditionally discharged sentence did not contribute to Appellant's conviction. As a result, we find that, even if the evidence was probative and admissible, the exclusion was harmless error.

For the above mentioned reasons, the judgment of the Kenton Circuit court is hereby affirmed.

All sitting. All concur.

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