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RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000408-MR

DONALD E. HOWARD — APPELLANT

V.

ON APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
NOS. 08-CR-00095, 08-CR-00118, AND 09-CR-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART, AND REMANDING

Appellant, Donald E. Howard, appeals as a matter of right[1] from a judgment entered upon a jury verdict convicting him of four counts of first-degree trafficking in a controlled substance. Pursuant to the jury's recommendation, he was sentenced to a total of twenty years' imprisonment.

In his appeal, Howard contends that the trial court erred: (1) by denying his request to review the Kentucky All-Schedule Prescription Electronic Reporting (KASPER)[2] records of four witnesses testifying on behalf of the Commonwealth; and (2) by allowing the Commonwealth to introduce improper,

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[1] Ky. Const. § 110(2)(b).

[2] KASPER was created pursuant to KRS 218.A202 to track the dispensation of certain prescribed medications.

irrelevant, and prejudicial testimony which, although unpreserved, resulted in palpable error.

Because we determine that palpable error occurred as a result of the introduction of six instances of testimony referring to other, uncharged instances of Howard's drug dealing, and there is a substantial possibility that this evidence may have resulted in a different verdict on the three drug trafficking charges, we reverse those three convictions and remand for a new trial upon those counts.[3] We affirm, however, the remaining conviction.[4] We further conclude that the denial of Howard's request for the KASPER records was correct, albeit for a reason different than expressed by the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

In seeking assistance for his illegal drug investigation duties, Detective Dave Roberts of the Kentucky State Police enlisted Steve Hanlon to serve as an informant making controlled purchases from drug traffickers. One of the initial targets of the investigation was Natasha King, who is a niece, by marriage, to Howard. On August 1, 2008, Steve purchased twenty Opana[5] pills from King for $800.00. The transaction was observed and recorded by Detective Roberts. King later testified at Howard's trial that the pills she sold on that occasion had been provided to her by Howard.

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[3] These convictions we reverse are those obtained in Carroll Circuit Court Case Nos. 08-CR-00095 and 09-CR-00031.

[4] The conviction we affirm is that obtained in Carroll Circuit Court Case No. 08-CR-00118.

[5] Opana is a brand name for the narcotic pain relief drug oxymorphone.

Two similar controlled buys were made from King on August 7, 2008. In the first transaction, Steve purchased sixteen Oxycontin pills from King for $800.00. In the second controlled buy, Steve's wife, Brooke Hanlon, purchased six Oxycontin pills from King for $480.00. King testified at Howard's trial that the pills she sold to the Hanlons on that date had been provided to her by Howard.

The transactions were monitored and recorded by Detective Roberts.

Based upon the foregoing drug transactions, King was indicted and a warrant for her arrest was issued. Confronted with prosecution as a drug trafficker, King agreed to act as an informant and make a controlled purchase from Howard. On November 26, 2008 she did so, purchasing one Opana pill from Howard for $40.00. Detective Roberts monitored and recorded the transaction.

Based upon the four instances described above in which Howard allegedly transferred drugs to King, three indictments were returned against Howard, charging him with a total of four counts of first-degree trafficking in a controlled substance. The cases were consolidated and tried jointly. The jury returned guilty verdicts on all four counts, and fixed the sentence for each crime at ten years' imprisonment, with the recommendation that the sentences be served consecutively. Recognizing the twenty-year cap established by KRS 532.080 and KRS 532.110, the trial court directed two of the sentences be served consecutively,[6] for a total of twenty years. The remaining ten-year

[6] The sentences imposed for the two charges listed in Case No.09-CR-00031 were ordered to be served consecutively.

sentences were ordered to be served concurrently with the twenty-year sentence. This appeal followed.

II. THE TRIAL COURT PROPERLY DENIED HOWARD'S MOTION TO ACCESS THE KASPER RECORDS OF FOUR COMMONWEALTH WITNESSES

Before the case proceeded to trial, Howard requested the trial court to issue an order allowing him to review KASPER reports of four of the Commonwealth's trial witnesses: Steve Hanlon, Brooke Hanlon, Natasha King, and Donald Simons.[7] Citing the privacy rights of those witnesses, the trial court denied the request. Howard contends that the trial court erred by denying him access to the KASPER records of those witnesses.

We recently addressed the right of a criminal defendant to access KASPER records in *Commonwealth, Cabinet for Health and Family Services v. Bartlett*, 311 S.W.3d 224 (Ky. 2010). *Bartlett* set forth the following principles and procedures relating to this right:

> It is well established that a criminal defendant has a constitutional right to discover exculpatory documents, even if those documents are confidential or if their disclosure is prohibited by rule or statute. The U.S. Supreme Court has held that a criminal defendant's Sixth Amendment right to confront witnesses prevails over the government's interest in keeping juvenile records confidential. It has also held that a defendant's due process right to present a defense prevails over evidentiary rules and privileges. And a criminal defendant's right to compulsory process prevails over a statute prohibiting persons from testifying at trial.
>
> In addition, the U.S. Supreme Court has held that a defendant's right to discover exculpatory evidence in the government's

[7] Donald Simons testified at trial that he received ninety 80 milligram Oxycodone pills from the Veterans Administration on a monthly basis; that he sold his pills through Howard from about June 2007 until after December 2008; that Howard picked up pills from him on August 7, 2008; and that a $1,000.00 cash deposit made into his bank account on August 8, 2008, came from the proceeds of pills sold by Howard.

> possession prevails over a qualified privilege. In *Barroso*, this Court extended the logic of *Ritchie*, unanimously holding that a defendant's constitutional right to discover exculpatory evidence prevails over absolute privileges, too.
>
> The common and necessary thread of these cases is that a criminal defendant's constitutional rights to exculpatory information prevail over rules and statutes that prohibit the defendant from receiving the information. This is true even if those rules or statutes purport to absolutely prohibit disclosure. To put it simply, "constitutional rights prevail over conflicting statutes and rules."
>
> This is not to say, of course, that a criminal defendant has a right to review any confidential documents by baselessly asserting the documents might be helpful. When dealing with confidential records, this Court has previously stressed that it is necessary to "'preclude fishing expedition[s] to see what may turn up' and 'unrestrained foray[s] into confidential records in the hope that the unearthing of some unspecified information' " could be useful to the defense.
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> Thus, in *Barroso*, this Court held that two steps are required before a court may give a criminal defendant access to confidential records. First, the defendant must produce "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." Second, the trial court must conduct an in camera review to determine whether or not the records sought actually do contain such evidence.
>
> The *Barroso* procedure protects a criminal defendant's constitutional rights to exculpatory records, as well as the government's interests in keeping certain records confidential. Indeed, as this Court has said regarding a rape victim's confidential psychotherapy reports: "[T]he trial judge's in camera inspection of [the victim's] psychotherapy records protect[s the defendant's] constitutional rights without destroying [the victim's] interest in protecting the confidentiality of those portions of the records . . . irrelevant to the [defendant's] interests."

Id. at 227–228 (citation omitted).

The trial court did not have the benefit of the *Bartlett* decision when it denied Howard's request for the KASPER records. However, under *Bartlett* it is clear that the court erred in basing its denial of Howard's request upon the

privacy rights of the witnesses. It is now established that the privacy rights of the witnesses must yield to Howard's constitutional right to obtain exculpatory evidence contained in the confidential KASPER records.

However, as explained in *Bartlett,* there is no automatic right to access KASPER records. Rather, the right is constrained by the two-step procedure outlined in *Commonwealth v. Barroso,* 122 S.W.3d 554, 558-563 (Ky. 2003). As noted, under step one of this procedure, the defendant must overcome the threshold requirement of producing "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." If that is done, the trial court must then conduct an *in camera* review to determine whether or not the records sought actually contain exculpatory evidence.

While the trial court erred by failing to undertake the *Barroso* procedure, nevertheless, as explained below, the error was harmless because the trial court reached the correct result.

Sufficient evidence was developed in the trial record and in Howard's arguments upon appeal to enable us to assess the effect of applying the *Barroso* procedure to the KASPER records Howard sought. The record discloses that Howard failed to meet the threshold burden under *Barroso* for access to the records of any of the four witnesses. He did not present evidence sufficient to create a reasonable belief that the KASPER records contained exculpatory information.

In regard to Steve and Brooke Hanlon, Howard has identified no theory

under which their KASPER records would yield exculpatory evidence. Steve made the August 1 purchase and one of the August 7 purchases from King; Brooke made the other August 7 purchase from King. The purchases were monitored and recorded by Detective Roberts. If the KASPER records disclosed that the Hanlons had prescriptions for the type of pills they purchased from King, because of the monitoring and recording procedures undertaken by Detective Roberts, there is no possibility that the Hanlons could have used their own supply of pills to feign the purchases from King. Nor, would the lack of prescriptions in the Hanlons' records be exculpatory. In short, there is no plausible theory under which either of the Hanlon's KASPER records could contain evidence exculpatory of the charges against Howard. Accordingly, even if the *Barroso* procedure had been used by the trial court, Howard would not have been entitled to the Hanlons' KASPER records.

With regards to Simons' KASPER records, Howard states "Proof of amount, quantity and dates of dispensing could reasonably be argued to be relevant in terms of discovery. Not having the ability to inspect these reports denied the Defendant the ability to fully investigate the case, and to fully cross-examine a witness called to testify against him." As noted, Simons testified at trial that he received ninety 80 milligram Oxycontin pills from the Veterans Administration each month. Presumably these disbursements would be reflected in the KASPER records. Simons further testified that he sold his pills through Howard from about June 2007 until after December 2008; that

Howard picked up pills from him on August 7, 2008; and that a $1,000.00 cash deposit made into his bank account on August 8, 2008, came from the proceeds of pills sold by Howard. This narrative matches the theory that Simons supplied Howard with the pills purchased by the Hanlons from King on August 7.

Conceivably, the KASPER records could refute Simons's claim that he had a VA prescription for Oxycontin pills and thereby indicate that Simons was untruthful when he testified that he used Howard to sell those pills. That would be exculpatory evidence; however, the theoretical possibility that KASPER records could contain exculpatory evidence is not the standard. The standard is that the defendant must produce "evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." *Barlett*, 311 S.W.3d at 227. Thus, in order to obtain Simons's KASPER records, it was incumbent upon Howard to present facts sufficient to establish a reasonable belief that Simons misrepresented his VA prescription information. Mere suspicion (and Howard does not even claim he has that suspicion) or a remote possibility falls far short of a reasonable belief. The record clearly establishes Howard's inability to meet the threshold requirement under *Barroso* to access Simons's KASPER records.

With regard to KASPER records relating to King, Howard argues "she testified that she received the Oxycontin and Opana from [him]. However, without the ability to inspect any KASPER reports for her, the Defense was

denied the ability to fully investigate [her] history." We begin by noting that a need for "the ability to fully investigate the history" of a witness is not the standard. Nevertheless, King personally made the three August 1 and August 7 sales to the Hanlons and the only evidence linking Howard to those transactions was King's testimony that she received the pills from Howard.[8] It is possible that King had her own prescriptions for the Opana and Oxycontin pills she sold to the Hanlons. If so, then KASPER records proving this alternative source would be exculpatory evidence. Nevertheless, as with Simons, Appellant offers no more than a speculative possibility which falls well short of the reasonable belief standard contained in *Barroso* – a standard which specifically excludes "fishing expeditions." Accordingly, the *Barroso* standard is not satisfied in respect to King's KASPER records.

In summary, though the trial court's erred by basing its denial of Howard's motion to review the KASPER records on the privacy rights of the witnesses, and the error in failing to apply the *Barroso* standard was of constitutional dimensions, such errors are subject to harmless error review. As demonstrated by our discussion above, the error was "harmless beyond a reasonable doubt," and thus meets the requirement to be deemed harmless error under the applicable constitutional error standard. *Winstead v.*

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[8] Simons testified that he supplied pills to Howard on August 7, 2008, which is circumstantial evidence that Howard then supplied the pills to King to sell to the Hanlons later that day. Further, Detective Roberts provided testimony that Howard made a substantial deposit into his bank account on August 1, 2008, which, again, is circumstantial evidence that he was involved in the transactions. Again, however, King provided the only direct evidence of Howard's involvement.

Commonwealth, 283 S.W.3d 678, 689 n. 1 (Ky. 2009) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

III. UNPRESERVED ERRORS

Howard alleges several instances of improper testimony given by prosecution witnesses during his trial. Howard acknowledges that the alleged errors are unpreserved, and requests palpable error review. The instances of alleged improper testimony may be characterized as (1) evidence of prior drug dealing by Howard; (2) evidence of police familiarity with Howard, implying bad character; and (3) evidence that Howard had a sexual relationship with Natasha King.

Pursuant to RCr 10.26, an unpreserved error is reversible only if manifest injustice has resulted from the error. "That means that if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial." *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000) (*citing Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky. App. 1986)). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Id.* (citations omitted). "For an error to be palpable, it must be 'easily perceptible, plain, obvious and readily noticeable.' A palpable error 'must involve prejudice more egregious than that occurring in reversible error [.]'" *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)

(citations omitted). Thus, the alleged error must be "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Id.* (citing *Soto v. Commonwealth*, 139 S.W.3d 827, 873 (Ky. 2004)).

A. Evidence of Previous Uncharged Acts of Drug Dealing

Howard cites six occasions where he claims improper testimony relating to prior uncharged acts of drug dealing was admitted into evidence. The testimony to which we are cited is as follows (all questions are asked by the Commonwealth):

1. Prior drug trafficking testimony of Natasha King

Q. Have you gotten drugs from him since you have known him?

A. Yes, sir.

Q. Have you sold drugs for him since you have known him?

A. Yes, I have.

Q. I mean, you sold Opana and Oxycontin for Donald Howard regularly, didn't you?

A. Yes, sir.

2. Prior drug trafficking testimony of Steven Hanlon

Q. Have you ever gotten pills from him or have you ever seen people get pills –

A. Yes, sir.

Q. Directly from him?

A. Yes, sir, I have.

Q. You have what?

A. I have seen Donald Howard - - I purchased pills from Donald Howard.

I have traded drugs for pills from Donald Howard.

3. Prior drug trafficking testimony of Brooke Hanlon

Q. And had you purchased pills or been given pills by the Defendant in the past?

A. Yes, sir.

Q. On how many occasions?

A. Five or six probably.

Q. What type of pills?

A. Or, no, probably five to ten probably.

Q. And what type of pills did he give or sell or traffic to you?

A. Those are his, the ones that he was prescribed to the Oxymorphone.

Q. Opanas?

A. And they were – yeah, the Opanas and they were 40 milligrams.

4. Prior drug trafficking testimony of Robert Scott Wilson

Q. Okay, have you ever traded pills?

A. Yeah.

Q. You ever traded pills with this man right here [referring to Howard]?

A. Yeah, on occasion if I was out or something.

. . . .

Q. Have you ever seen Donald Howard sell any of those pills?

A. Yes.

Q. Tell me about that?

A. What do you mean tell you about it?

Q. Just exactly what I asked. You just told me you had seen him selling pills. Tell me when is the last time before you got arrested you saw him selling pills if you remember? This year? Last year?

A. Last year.

Q. Last year. How many times did you see him selling pills?

A. Several I guess.

Q. Several you guess. Who did you see him peddling pills to?

A. Natasha. Cody Tingle.

Q. Who else?

A. John Marsh.

Q. These people that you have named, those kind of people hang out at his house?

A. Yes.

5. Prior drug trafficking testimony of Donald Simons

Q. When did you get started, and how, fronting these pills to Donald Howard?

A. I don't know. He started talking about he could get rid of pills I told him I was getting. He said he would get rid of them so I started doing it.

Q. How much could he get rid of them for?

A. $80.00 I think for the 80s.

Q. So, a dollar a milligram?

A. Yes, sir.

Q. How long did that go on?

A. From about June of '07 till after December '08.

6. Prior drug trafficking testimony of Detective Roberts

Q. Let me show you a document we will identify as 6-C and ask you if you can identify it?

A. Yes, sir, that is the document I have prepared showing the prescription versus the deposits into the bank.

. . . .

Q. All right, and what you have done here and what the jury will see when they get it individually is you have shown the date of the doctor's visit, is that correct?

A. That's correct.

Q. You have shown the prescription that he got.

A. Yes, sir.

Q. On that particular date? *For example January 9th of '08?* (emphasis added).

A. That's correct.

KRE 404(b) provides as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As this Court has previously stressed, KRE 404(b) is "exclusionary in nature," and as such, "any exceptions to the general rule that evidence of prior bad acts is inadmissible should be 'closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.'" *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007)(quoting *O'Bryan v.*

Commonwealth, 634 S.W.2d 153, 156 (Ky. 1982)). As recognized in *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998), the list of exceptions enumerated in the rule is illustrative, not exclusive.

Although testimony explaining why a defendant had become a suspect in a drug investigation is admissible and relevant to avoid any implication that the defendant was unfairly singled out, testimony that the defendant is an established and known drug dealer, solely to establish that as a fact for the jury's consideration, is improper. As stated in *Gordon v. Commonwealth*, 916 S.W.2d 176, 179 (Ky. 1995):

> In the case at bar, it was not improper to admit evidence that appellant had become a suspect in the county-wide drug investigation. This avoided any implication that appellant had been unfairly singled out and explained why the police equipped an informant with a recording device and money with which to attempt a drug buy from appellant. The next question [eliciting prior drug dealing evidence], however, was utterly unnecessary and unfairly prejudicial. *There was no legitimate need to say or imply that appellant was a drug dealer* or that he was suspected by the police department of selling drugs in a particular vicinity.

(emphasis added); *see also Peyton v. Commonwealth*, 253 S.W.3d 504, 516 (Ky. 2008).[9]

Similarly, in *Muncy v. Commonwealth*, 132 S.W.3d 845, 847 (Ky. 2004), we recognized, "it would typically be improper for the Commonwealth or a

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[9] The Commonwealth, relying upon *Gordon*, argues "The Commonwealth was permitted to show the course of the investigation. The remarks of Detective Roberts did no more than explain why the police were interested in [Howard] and that they were not unfairly picking on him." However, the testimony presented went far beyond the bounds of *Gordon*, and, in any event, *Gordon* is not applicable here. King's sales to the Hanlons, alone, supplied the explanation of why Howard was targeted for the November transaction and not singled out, and so there was no need to present additional instances of prior drug dealing. *Gordon* does not, as suggested by the Commonwealth, stand for the principle that when a defendant is on trial for drug trafficking then *all* of his prior, uncharged acts of trafficking are admissible.

testifying witness to refer to the [uncharged] undercover buys as Appellant was not being tried for such conduct." Although *Muncy* ruled that the evidence was admissible, the ruling was based on the fact that Appellant had opened the door to such evidence when he denied having knowledge of the drugs, and is therefore distinguishable from this case. *Id.*

The only relevance of the testimony of Howard's other alleged drug dealing was to prove his character so that the conduct for which he was on trial would be seen as being in conformity with such character. Evidence of prior, uncharged drug dealing in a drug trafficking case is precisely the kind of evidence KRE 404(b) is designed to exclude. Howard was not being tried for those drug deals, and the testimony was not admissible under any of the exceptions contained in KRE 404(b)(1). The only question, then, is whether the improper evidence rises to the level of palpable error. We conclude that it does.

This is not a case of a fleeting reference to a prior bad act unsolicited by the Commonwealth. Rather, this is a case where on multiple occasions the Commonwealth deliberately and methodically elicited inadmissible testimony relating to past drug dealing by Howard. It is self-evident that the parade of witnesses testifying concerning prior drug dealing by Howard was overwhelmingly prejudicial. Through this testimony Howard was comprehensively and definitively portrayed as a habitual drug dealer.

Moreover, as previously noted, Natasha King was the only witness directly implicating Howard as the source of the pills sold to the Hanlons on

the three August transactions. King, according to the record, is herself a drug dealer and drug user, who agreed to testify against Howard in order to strike a better deal for herself on her own drug trafficking indictments. Therefore, to a significant degree, the case for each of the three August transactions simply pitted King's credibility against Howard's credibility. It follows that the plethora of witnesses who were examined by the Commonwealth regarding Howard's prior drug dealing was particularly significant under the facts of this case.

For these reasons, and based upon our consideration of the whole case, we are constrained to conclude that a substantial possibility exists that, absent the erroneous prior drug dealing evidence, the verdict returned by the jury may have been different for any of the three charges occurring in August 2008. *Graves v. Commonwealth*, 17 S.W.3d at 864 (holding unpreserved trial error is non-prejudicial if "upon consideration of the whole case, a substantial possibility does not exist that the result would have been different."). While reversal upon grounds of palpable error is an exceptional measure, all of the elements to do so are met here. We therefore reverse the three convictions relating to the transactions occurring on August 1 and August 7, 2008, and remand for a new trial upon these charges, with the multiple instances of Howard's other uncharged drug activity excluded.

The conviction relating to the November 2008 drug sale was based upon overwhelming evidence. This sale was monitored and taped by Detective

Roberts, and the recording of the transaction was played for the jury. The verdict on this transaction did not depend solely on King's credibility. We see no reasonable possibility that the outcome for this conviction would have been any different had the proceeding not been tainted by the improper testimony of Howard's other drug transactions. We further conclude that the conviction on this count was unaffected by the other instances of improper testimony described in the following sections of this opinion. Thus, the conviction relating to the November transaction is affirmed.

B. Evidence of Police Familiarity With Appellant

Howard next alleges that palpable error occurred when Detective Roberts testified that Howard's name had frequently arisen during prior investigations he conducted during his time on the police force. In support of his claim, he cites us to the following exchanges which occurred at trial:

> Q. Had the name of the Defendant come up at any time, Donald Howard?
>
> A. Yes sir. Yes sir. Not only, not only through Mr. Hanlon, but also in my previous five years working the road in uniform, Mr. Howard's name had come up on several occasion through investigations that I had.

As reflected by the exchange, the testimony tended to show that Howard was familiar to police as one whose name frequently comes up during their investigations; that is, that his character is such that he is often a suspect in criminal conduct. "The prosecutor may introduce evidence of the accused's bad character only to rebut evidence of the accused's good character[.]" *Metcalf v. Commonwealth*, 158 S.W.3d 740, 745 (Ky. 2005); KRE 404(a)(1) ("Evidence of

a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" subject to exceptions not applicable here). Here, Howard had not yet put his character at issue so as to permit the use of the testimony to rebut evidence of his good character.

Accordingly, the testimony "served no purpose other than to insinuate that Appellant was a person of bad character in contravention of KRE 404(a)(1)," *Thomas v. Commonwealth*, 170 S.W.3d 343, 352 (Ky. 2005), and that he is just the sort of person apt to commit the alleged crimes. As such, upon retrial, Detective Roberts should not be permitted to testify that Howard's name has come up on several occasions during prior criminal investigations unless such testimony fits into one of the exceptions provided by KRE 404(a)(1).

C. Evidence of Howard's Sexual Relations With King

Howard contends that palpable error occurred as a result of Natasha King's testimony concerning their prior sexual relationship. In support of his argument, he cites the following testimonial exchange between King and the prosecutor:

Q. How long have you known the Defendant, Donald Howard?

A. For about two and a half years.

Q. How do you know the Defendant?

A. He was married to my mom's sister.

Q. So you are [a] niece to him.

A. Yes, sir.

. . . .

Q. Have the two of you had a sexual relationship also?

A. Yes, sir.

Q. How long has that gone on?

A. The whole time I have been around him.

Howard argues that "this testimony cannot be justified to serve absolutely any legitimate purpose, and was merely intended to 'shock' the conscious [sic] of the jury" and further demonstrates that "the Commonwealth seeks to secure a conviction through slander and not proof."

He bases his argument against the evidence on KRE 404(b), the improper use of character evidence. We begin our analysis of it with the more fundamental question of relevance. In order to be admitted, evidence must be relevant. KRE 402. Relevant evidence is "evidence having 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.

The Commonwealth, in response, argues that the testimony "was admissible [and therefore relevant] to establish that Ms. King knew the Appellant and was close to him," and that "the evidence was background information about two people involved in illegal narcotics trafficking and how

close they were to each other, which could help the jury decide if there *might* be any bias *one way or the other* in Ms. King's testimony." (emphasis added).

A romantic relationship, or the failure thereof, between a defendant and a witness may often be indicative of the witness's bias. However, as demonstrated by the Commonwealth's argument, it is unclear whether the testimony was presented to demonstrate that King was biased against Howard because of the relationship, or biased in his favor because of it, or whether she was not biased at all. Thus, under the facts of this case, whether there is bias because of the relationship is speculative. It follows that the information regarding the sexual relationship had slight probative value.

On the other hand, testimony that a defendant has had a sexual relationship with his niece (albeit by marriage) is, obviously, of significant prejudice to Howard's overall character. The information clearly may tend to inflame the jury against the defendant. It follows that, without more, any probative value of evidencing regarding the relationship "is substantially outweighed by the danger of undue prejudice[.]" KRE 403.

Accordingly, upon retrial, if the Commonwealth seeks to prove that Howard had engaged in sexual relations with King merely to inform the jury of a possibility of bias "one way or the other," the trial court should sustain Howard's objection to its admissibility. However, the trial court will retain its discretion to admit evidence of the relationship for legitimate evidentiary purposes, if the occasion arises, as guided by KRE 401, 402, 403, and 404.

IV. CONCLUSION

For the foregoing reasons the judgment with respect to Case No. 08-CR-00118, and the ten-year sentence imposed thereunder, is affirmed. The judgment with respect to Case Nos. 08-CR-00095 and 09-CR-00031 is reversed and the matter is remanded to the Carroll Circuit Court for additional proceedings consistent with this opinion.

Minton, C.J., Abramson, Noble, Schroder and Venters, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion in which Cunningham, J., joins.

SCOTT, J., CONCURRING IN PART AND DISSENTING IN PART:

Although I join the majority as to the other issues in this case, I cannot agree that the trial court erred by admitting the prior acts testimony. I would affirm the convictions in this case and hold that the testimony addressing the prior drug transactions, the officer's familiarity with Appellant, and King's sexual relationship with Appellant were properly admitted.

Testimony Regarding Prior Drug Transactions

Necessarily, one would—and should—recognize a significant difference in evidence detailing that a defendant is a *major supplier* of drugs to other dealers, rather than a street dealer himself. This is particularly so when the Commonwealth's proof directly shows that the defendant is an up-the-ladder, major supplier of drugs to various street peddlers, as it did in this case. Thus, one should not expect such evidence to be limited to one supply and one sale.

Necessarily, it must consist of testimony regarding multiple instances of conduct (as we have here)—such as to distinguish the major supplier from the street dealer. I believe such testimony comports with KRE 404(b) and would hold the testimony in this case tended to show, *inter alia*, the ultimate dealer's "resources" to carry out his distribution of illicit drugs and further his access to the drugs.

KRE 404(b) provides in pertinent part:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

We have long recognized this rule as "exclusionary in nature," and I agree that trial courts should closely watch and strictly enforce the rule so as to be sure that a defendant does not suffer an unfair trial. *See Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). However, as recognized by the majority, that rule is not finite; the list is illustrative rather than exhaustive. *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998). Thus, where the Commonwealth seeks to introduce prior acts, it may do so as long as it does not introduce the acts "to show action in conformity therewith."

In this case, I believe the testimony regarding the prior drug transactions was properly introduced to show that Appellant had the resources and ability to supply intermediate drug dealers. I liken this case to the facts presented in

Latorre v. United States, where the United States Court of Appeals for the First Circuit, interpreting FRE 404(b) (the nearly identical federal rule), affirmed the trial court's admission of prior acts. 922 F.2d 1 (1st Cir. 1990). In that case, the defendant was being tried for crimes stemming from the theft of tractor trailers and the United States sought to introduce testimony regarding several other trailer hijackings similar to those at issue. *Id.* There, the court, while noting the possibility that the jury "might have been tempted to find the [defendants] guilty merely because of the great number of other hijackings they had carried out," affirmed the trial court's ruling notwithstanding the possibility that the introduction of such evidence was "overkill." *Id.* The court concluded that "[t]he testimony about the prior trailer thefts, if believed, established beyond any doubt that the Latorres had the . . . *resources* . . . to plan and carry out a successful hijacking." *Id.* (emphasis added).

I believe the testimony presented in this case likewise establishes beyond a reasonable doubt that Appellant possessed the ability and resources to be a major supplier. Given the Commonwealth's theory of the crime—that Appellant was the primary distributor to intermediate drug peddlers—I believe it perfectly permissible for the jury to hear testimony about Appellant's prior drug distributions to the extent that the Commonwealth sought to prove his capability to do so. I would therefore affirm the trial court in this regard.

Testimony Regarding Officer's Familiarity With Appellant

I also disagree with the majority's holding that it was error to admit the

officer's testimony concerning his familiarity with the defendant, to wit:

> Commonwealth: Had the name of the Defendant come up at any time, Donald Howard?
>
> Officer: Yes, sir. Yes, sir. Not only, not only through Mr. Hanlon, but also in my previous five years working the road in uniform, Mr. Howard's name had come up on several occasions through investigation that I had.

I agree with the Commonwealth that this testimony was necessary to show why the officers were interested in Appellant, particularly given our ruling in *Gordon v. Commonwealth*, 916 S.W.2d 176, 178 (Ky. 1995). There, we held it proper to admit similar testimony and reasoned:

> In the case at bar, it was not improper to admit evidence that appellant had become a suspect in the county-wide drug investigation. This avoided any implication that appellant had been unfairly singled out and explained why the police equipped an informant with a recording device and money with which to attempt a drug buy from appellant. The next question [eliciting prior drug dealings evidence], however, was utterly unnecessary and unfairly prejudicial. There was no legitimate need to say or imply that appellant was a drug dealer or that he was suspected by the police department of selling drugs in a particular vicinity.

Id. Given this discussion, it is clear that the Commonwealth may admit evidence regarding why a defendant is singled out, but, generally, may not testify regarding a defendant's prior drug dealings or the fact that the defendant was suspected of selling drugs in a particular vicinity.

A perusal of the officer's testimony here shows that the officer made no statements implying that Appellant was a drug dealer or that he was suspected by the police department of selling drugs in a particular vicinity. Rather, the officer confined his statements to why Appellant garnered the attention of the

officers in this case and made clear "why the officers equipped an informant with a recording device and money with which to attempt a drug buy from" Appellant. We allowed similar testimony in *Gordon*, and I would allow it here.

Testimony Regarding Sexual Relationship Between Appellant and King

Finally, the majority holds that the trial court erred by admitting testimony from Natasha King, i.e.:

> Commonwealth: How long have you known the Defendant, Donald Howard?
>
> King: For about two and a half years or so.
>
> Commonwealth: How do you know the Defendant?
>
> King: He was married to my mom's sister.
>
> Commonwealth: So, you are a niece to him?
>
> King: Yes, sir.
>
> . . .
>
> Commonwealth: Have the two of you had a sexual relationship also?
>
> King: Yes, sir.
>
> Commonwealth: How long has that gone on?
>
> King: The whole time I have been around him.

The majority laments that this testimony was irrelevant and concludes that it had a "significant prejudice to [Appellant's] overall character." The majority goes further and posits that this testimony "may tend to inflame the jury against the defendant" and holds the testimony irrelevant under KRE 402.

I simply cannot agree.

At first blush, this type of testimony may, in some circumstances, be so inflammatory that it should be excluded, particularly if such testimony insinuates some type of incestual relationship or other type of criminal conduct. But we do not have that here. Here, King, age twenty-eight at the time of trial, testified that she had an ongoing sexual relationship for roughly two-and-a-half years with Appellant who "was married to [her] mom's sister." According to King's testimony, she must have been beyond the age of majority when the relationship began. Thus, there is no indication that the relationship was one of a criminal nature, albeit provocative; and neither is there any indication that the two committed incest as defined by our Legislature under KRS 530.020.[1] The jury simply heard that there was a sexual relationship between a major drug supplier and one of his intermediate peddlers.

Given that this testimony lacks the incendiary quality of incest or other type of sexual crime, I cannot say that it was so inflammatory such that it deserved exclusion under KRE 403.

I also disagree that this information is irrelevant. Under KRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

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[1] A person is guilty of incest when he or she has sexual intercourse or deviate sexual intercourse, as defined in KRS 510.010, with a person whom he or she knows to be an ancestor, descendant, brother, or sister. The relationships referred to herein include blood relationships of either the whole or half blood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.

probable or less probable than it would be without the evidence." Here, the jury was called on to decide one question: whether Appellant was guilty of the abovementioned drug crimes. As part of its case-in-chief, the Commonwealth offered eye-witness testimony from King, someone close to Appellant. King's testimony directly implicated Appellant, and, indeed was the crux of the Commonwealth's evidence. As such, I believe the jury was entitled to know how King knew Appellant, the extent of their relationship, and why Appellant would have trusted her such that he would have made her one of his intermediate drug peddlers. Thus, testimony regarding their relationship would have given the background information necessary to equip the jury with the ability to evaluate the veracity of her statements.

The majority's contrary conclusion, in my opinion, leads to a dangerous result and unnecessarily ties the hands of the Commonwealth. Given the rule announced today, that a sexual relationship between a confidential informant and the defendant on trial is of no relevance, the majority does damage to the Commonwealth's ability to give the jury the proper background to a case and to one of its witnesses. I do not believe the jury should be blinded from the relationship existent between a confidential informant and a defendant on trial—particularly when the confidential informant is the star witness. The jury's primary function is to give weight and credibility to witnesses and, thus, I believe they are entitled to know how well the witness and the defendant know each other. Such knowledge is imperative and necessary for the jury to

make a more informed decision and ultimately serves the search for the truth. I would therefore affirm the trial court on this issue as well.

Cunningham, J., joins.

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