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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000364-MR

STEPHEN TANNER — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 10-CR-002671

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After a jury trial, Appellant Stephen Tanner was convicted of two counts of misdemeanor theft by deception, three counts of felony criminal possession of a forged instrument, and one count of being a first-degree persistent felony offender. He was sentenced to twenty years for his convictions. Appellant raises four issues on appeal. Because the trial court committed no reversible error, his convictions are affirmed.

I. Background

In January 2008, Appellant Stephen Tanner was on parole and living in Louisville, Kentucky at Our Father's House, a drug and alcohol halfway house, where he was receiving treatment for his addiction to hydrocodone. That month he also opened a checking account at Old National Bank.

Sometime in January, Appellant met Susan Pierce through a singles phone service. The two began speaking on the phone. A few weeks later, they

met in a public location and went to a nearby casino. Appellant told Susan that he was living in Indianapolis, Indiana and working as a construction supervisor. In reality, he had gotten a job at Turner Construction in Louisville as a construction laborer. The couple continued seeing each other for the next few months. They usually saw each other once a week and usually spent time at her house watching movies.

Appellant did not have a car during this time, so Susan would pick him up in New Albany, Indiana for their dates and would drop him off at a home in downtown Louisville. Appellant told Susan that the home belonged to a friend from whom he would get a ride back to Indianapolis. It was not until March or April that Appellant began spending the night with Susan at her Louisville home.

At the end of May or the beginning of June, Appellant told Susan that he was quitting his job in Indianapolis and moving to Louisville. Susan tried to help him find a rental home, but ultimately he moved in with her and her nineteen-year-old son, Aaron Pierce.

Susan began supporting Appellant financially very early in their relationship. For example, in April 2008, Susan gave Appellant money for the first time for a down payment on a vacation to South Carolina or Key West. Additionally, Susan gave Appellant thousands of dollars to purchase a car for her son Aaron. Appellant, who supposedly knew a man who wanted to sell a Honda Civic, was to act as the middle-man for the purchase. Appellant never purchased the car for Aaron, and when Susan asked for the money back, Appellant told her that the man he was planning to buy it from was going

through a divorce and his assets were frozen. Susan also gave Appellant money in April or May to bail his brother out of jail. She gave him approximately $1000 during the summer of 2008 to get his tooth fixed, so he could be presentable for his job. Appellant promised to repay this amount.

Susan also allowed Appellant to use her ATM card issued by Kentucky Telco Federal Credit Union and the pin number for that account early in their relationship in order to pay for gasoline for her automobiles. Meanwhile, Appellant's own Old National Bank account was closed on May 16, 2008 after Appellant wrote three checks to himself for $350, $750, and $825 from May 5 to May 9 without sufficient funds in the account. The highest available balance ever in the account was $321 on April 4, 2008.

Despite his Old National Bank account being closed in May, Appellant continued to write checks from it. On July 10 and 11, 2008, Appellant wrote Aaron two $350 checks from his Old National Bank account in exchange for cash. He explained to Aaron that he wanted to purchase Susan a birthday present and also discussed the possibility of marrying her. Aaron endorsed the checks and attempted to cash them the same day or the day after. Both checks bounced.

Appellant also wrote checks to Susan for $985, $1,500, and $965 in early July from his closed Old National account, which she believed to be repayment for money she had loaned him previously. She attempted to cash them either the same day or the day after Appellant wrote them, but they also bounced.

Susan began to get suspicious that Appellant was conning her and Aaron out of money. In August 2008, after her Kentucky Telco account was depleted, Susan opened another checking account at Republic Bank without telling Appellant. She hid the ATM card, pin number, and account information between two floor mats in her automobile. After Appellant had borrowed her automobile, however, she noticed later that day that the card and account information were missing. She discovered ATM transactions on her account and filed an affidavit with Republic Bank, and ultimately contacted the police about Appellant's use of the card.

On September 24, 2008, Appellant was arrested. His wallet was searched and the officer discovered four checks from Susan's accounts, three from the Telco account and one from the Republic Bank account, along with her ATM card. One of the checks was entirely blank. The remaining three had signatures purporting to be Susan's, two had a date filled in, and one had an amount ($3200) filled in. Susan was unaware that Appellant had these checks. The signatures on the checks were not hers and she never gave Appellant permission to sign her name. Appellant claimed that Susan had given him the checks so he could show potential employers that he had backing for bonding and insurance for construction jobs.

Appellant was indicted on ten counts: three counts of theft by deception over $300; two counts of theft by unlawful taking over $300; one count of fraudulent use of a credit card; three counts of second-degree criminal possession of a forged instrument; and one count of being a first-degree persistent felony offender (PFO). Appellant filed a notice requesting application

of the current versions of KRS 514.040 (theft by deception), KRS 514.030 (theft by unlawful taking), and KRS 434.650 (fraudulent use of a credit card), which raised the minimum value of property lost to $500 as the threshold.

The Commonwealth moved to amend the indictments to reflect changes to the minimum threshold for when the offense becomes a felony offense. As to Aaron Pierce, the Commonwealth amended the charges of theft by deception to misdemeanors because there was clear evidence that the amount of the checks did not meet the $500 threshold for a felony. *See* KRS 514.040(8). As to the theft by unlawful taking and fraudulent use of a credit card counts, Appellant was charged with felonies, but the eventual jury instructions included the option to convict on a lesser-included misdemeanor charge.

After a week-long trial, Appellant was convicted of two misdemeanor counts of theft by deception as to Aaron Pierce, three felony counts of criminal possession of a forged instrument for the three checks discovered in his wallet at the time of his arrest, and one count of first-degree PFO. He was sentenced to 45 days for his misdemeanor convictions and five years for his felony convictions, enhanced to twenty years by virtue of the PFO charge. The misdemeanor sentence was run concurrently with the enhanced twenty-year sentence.

He now appeals to this Court as a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

A. Appellant was not entitled to a directed verdict.

Appellant claims that the trial court erred in denying his motion for a directed verdict as to the theft by deception and criminal possession of a forged instrument charges. This issue will be examined first because it is potentially dispositive; if the trial court did commit reversible error, Appellant's convictions would be vacated and he would stand acquitted, at least of the highest level of offense. *See, e.g., Paulley v. Commonwealth*, 323 S.W.3d 715, 727 (Ky. 2010) (addressing directed-verdict claims even after reversing for other reasons because the claims were "potentially dispositive").

Under the standard for a directed verdict, a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187–88 (Ky. 1991). The trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence; but if more evidence is produced and it would be reasonable for the jury to return a verdict of guilty, then the motions should be denied. *Id.* On appellate review, the standard is slightly more deferential; the trial court will be reversed only if "it would be *clearly unreasonable* for a jury to find guilt." *Id.* (emphasis added).

1. Theft By Deception

Appellant claims that the Commonwealth failed to present sufficient evidence that Appellant was guilty of theft by deception under KRS 514.040, two elements of which are obtaining property by deception and intending to

deprive the victim of the property. Essentially, Appellant maintains that the Commonwealth did not present sufficient evidence that he "deceived" Aaron Pierce or that he intended to deprive Aaron of money.

Appellant's theft-by-deception convictions were for giving Aaron Pierce two checks in exchange for cash. At trial, Appellant did not deny that he gave Aaron those checks in exchange for a total of $700 cash. Rather, he testified that Aaron loaned him the money to buy painting supplies, and that he advised Aaron to hold the checks until he was paid by his contractor. While Aaron did not testify, Susan testified that Aaron told her that he had given Appellant money to buy her a gift and that Appellant had written him two bad checks.[1] The Commonwealth also introduced evidence that Aaron had attempted to cash the checks the same day or the day after they were signed by Appellant. Certainly he was aware that his checking account was closed when he issued the checks.

KRS 514.040 provides the elements of theft by deception. The statute states that "[a] person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof." KRS 514.040(1). The statute goes on to list five ways in which a person "deceives" another for the purposes of the statute, and expressly requires that each must be done intentionally.[2]

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[1] Whether this was hearsay requiring reversal is addressed below.

[2] The five ways a person can "deceive" another are when he: (a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; (b) Prevents another from acquiring information which would affect judgment of a transaction; (c) Fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing

Appellant cites *Martin v. Commonwealth*, 821 S.W.2d 95, 97 (Ky. App. 1991) to support his claim, specifically the Court's interpretation of KRS 514.040. In that case, the appellant had paid for previously performed services with a check that he claimed he had post-dated until he could get his finances in order. When the check was cashed, however, the account had been closed and there were insufficient funds. *Id.* at 96. The court stated that the focus of its inquiry was at the time of the issuance of the check, and whether its issuance was in contravention of KRS 514.040, and stated:

> The obvious interpretation of the foregoing statute is that there must be a parting with property or services based upon the deceptive intent to deprive the owner thereof. The mere issuance of a "cold check" in payment for property or services not obtained by deceptive intent is insufficient. It is the fraudulent intent which forms the basis of the crime, and not a mere inability to pay an indebtedness with a check backed by sufficient funds.

Id. at 97. The court ultimately held that "the issuance of the check in question by appellant in payment for the services already rendered ... did not come within purview of the statute" and thus "[a]ppellant was entitled to a directed verdict of acquittal." *Id.*

Martin's result, however, does not dictate the result in this case. The court in *Martin* expressly stated that the issuance of the check did not come within the purview of KRS 514.040 because it was for payment for services already rendered. Here, however, the Appellant and Aaron exchanged cash for

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another to whom the person stands in a fiduciary or confidential relationship; (d) Fails to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which the person transfers or encumbers in consideration for the property obtained, whether the impediment is or is not valid or is or is not a matter of official record; or (e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

checks, and therefore Aaron parted with property simultaneously with the giving of checks. The deception in *Martin* did not induce the victim to part with his property. There must a causal link between the defendant's deception and the victim's handing over property. That link existed in this case, since the proof showed that Appellant's bank account was closed when he wrote the check, he lied to Aaron that the check was to buy a gift, and Aaron gave him money as a result.

Appellant also claims that he told Aaron that the checks would not be honored if they were presented to the bank at the time and that the Commonwealth presented no evidence to the contrary. He cites *Owsley v. Commonwealth*, 621 S.W.2d 21 (Ky. 1981), in which the Court held that there was "no deception, actual or presumed," *id.* at 22, where the appellant and a stockyard from which he had purchased livestock had a custom of holding checks as postdated or where payment was made after the check had been returned due to insufficient funds. While the Court's conclusion that there was no deception in *Owsley* is a sound one given the facts in that case, it is easily distinguishable from Appellant's case. Unlike in *Owsley*, there was no proof here of a common practice of holding checks, and Appellant's claim that Aaron knew not to try to cash the checks is contradicted by the fact he indeed attempted to cash both checks either the same day or the day after Appellant wrote them. Further supporting the inference of deception is the fact that the account on which the checks were written was closed and thus they could not be honored even if presented at a later date.

Appellant repeatedly points to the fact that Aaron did not testify in the case,[3] and therefore argues that the Commonwealth did not present evidence to refute Appellant's myriad claims that he and Aaron had an agreement not to cash the checks, that the checks would not be honored, and that Appellant had in fact paid Aaron back the money he loaned him in cash. While it is true that Appellant is entitled to take the stand and make those claims and that the Commonwealth is required to prove each element, including the deception and the intent to deprive, the law does not require Aaron to testify to refute Appellant's story. The Commonwealth refuted Appellant's account of the events by presenting evidence that Aaron attempted to cash the checks written on a closed account immediately upon receiving them.

Moreover, Appellant himself testified that he had written the checks in exchange for money to buy Susan a present, but also mentioned immediately thereafter that he told Aaron that he needed the cash for building materials. This evidence suggests that Appellant was deceptive, that the two parties did not have an agreement, and that Appellant was deceiving Aaron in one of the ways enumerated in KRS 514.040(1)(a)-(e), such as "[i]ssu[ing] or pass[ing] a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee," KRS 514.040(1)(e). The proof also supports an inference that Appellant intended to deprive Aaron of the money he gave in exchange for the bad checks.

[3] Appellant states that the only testimony regarding Aaron came from hearsay testimony from Susan Pierce. He does not, however, state whether he objected at the time to the hearsay testimony, nor does he discuss, even in passing, why such testimony was hearsay. Because the issue has not been properly briefed for the Court, we decline to engage in a palpable error analysis under RCr 10.26.

As the Court held in *Benham*, it is the province of the jury to consider the weight and credibility of evidence, *Benham*, 816 S.W.2d at 187, and on appeal the Court must ask whether it was "clearly unreasonable for a jury to find guilt," *id.* Here, the jury considered the weight and credibility, acquitted Appellant of one count of theft by deception as to Susan, and convicted him of the two remaining counts as to the two checks written to Aaron in exchange for cash. Because this Court does not believe that it was clearly unreasonable for a jury to do so, we affirm the trial court's denial of Appellant's directed verdict of acquittal as to those two counts.

2. Second-Degree Criminal Possession of a Forged Instrument

Appellant was also convicted of three counts of second-degree criminal possession of a forged instrument under KRS 516.060. The statute states: "A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in KRS 516.030." KRS 516.060. Appellant concedes that he was in possession of Susan's checks at the time of his arrest and that he signed each check with Susan's signature. He notes, however, that none of the three checks had a payee listed and only one contained an amount listed. Appellant claims that the Commonwealth did not present sufficient evidence to establish that he possessed the checks with the intention of using them or permitting them to be used to "defraud, deceive, or injure" Susan Pierce, and therefore the trial court erred in denying his motion for a directed verdict.

At trial, the Commonwealth called Robert Kieswetter, who testified that Appellant approached him and showed him a check that belonged to Susan written in the amount of $5000, and asked him to cash it in repayment of a loan that Kieswetter had made to Appellant. Kieswetter declined to do so. Appellant admitted at trial that the check that he showed to Kieswetter was one of the checks that was discovered in his wallet when he was arrested, but denied that it was for $5000. In his brief, Appellant asserts that Kieswetter's testimony was at most sufficient to show an intent to defraud with that one check, but not all three. We disagree.

The standard for appellate review of a directed verdict in *Benham* requires only that the Commonwealth present sufficient evidence so that it would not be "*clearly unreasonable* for a jury to find guilt." *Benham*, 816 S.W.2d at 187 (emphasis added). Evidence that Appellant had attempted to convince a third-party to cash one of the forged checks was sufficient that it would not have been clearly unreasonable for the jury to find that Appellant intended to defraud Susan Pierce "or another." KRS 516.060. All three checks were found together in Appellant's possession, he had signed all of them in Susan's name without her permission, and he had otherwise filled them out to different degrees. Proof of Appellant's intent as to one of the checks would support an inference of his intent as to the other checks.

The Commonwealth also presented evidence that Susan had opened the Republic Bank account without Appellant's knowledge, and not only did she not give Appellant permission to use the funds in this account, she also took affirmative steps to prevent his discovering the existence of the account by

hiding the card and account information under the floor mat in her automobile. One of the three checks discovered in Appellant's wallet was a check from Susan's Republic Bank account, and Appellant's possession of that check was grounds for one of his convictions. Susan's testimony that she never gave Appellant permission to use that account whatsoever is further evidence that his possession of a check from that account evinced an intent to defraud her.

Appellant also implies that because all three checks were incomplete as to a drawer and two were incomplete as to an amount, they do not demonstrate an intent to defraud Susan. Although Appellant does not directly argue that an incomplete check may not be considered forged, he cites *Frazier v. Commonwealth*, 613 S.W.2d 423 (Ky. 1981), which discusses that very proposition. In *Frazier*, the Court stated that "a written instrument is forged only if it is falsely altered, completed or made so that the instrument appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer, real or fictitious." *Id.* at 426.

The Court went on to note that "[w]ithout a maker *or* drawer, a written instrument is simply a piece of paper with writing on it," and that "[i]t can contain many falsehoods, but without an ostensible creator it is not a forged instrument." *Id.* (emphasis added). Although the checks did not contain a drawer, they contained a maker whose name was forged by Appellant. The Court also rejected the argument that "a written instrument must appear completed after the forgery," noting instead that "[b]oth the definitions of 'to falsely alter' and 'to falsely make' [for the purposes of forgery under KRS

516.020] a written instrument contemplate that the final false writing may be an incomplete written instrument." *Id.*

Appellant does not directly make a claim like that presented in *Frazier*, but merely asserts that the fact that these checks were incomplete "should be considered in evaluating whether [Appellant] intended to use the checks to defraud, deceive, or injure Susan Pierce or another person." Such a statement implies that Appellant understands that the effect of completeness or incompleteness of the checks is a question for the jury to consider, not grounds for finding that the trial court erred in denying his directed-verdict motion. That evidence does create a question for the jury, but it does not require a directed verdict. This Court therefore affirms the trial court's denial of Appellant's motion for a directed verdict on the possession of forged instruments charges.

B. The introduction of KRE 404(b) evidence is not reversible error.

Because of the nature of the crimes with which Appellant was charged, the Commonwealth intended to introduce evidence showing Appellant's long-term deception of Susan and Aaron Pierce. Appellant objected to the introduction of such evidence as violating KRE 404(b)'s prohibition of evidence of other crimes, acts, or wrongs. Thus, prior to trial, the trial court held a hearing to rule on the admissibility of certain KRE 404(b) evidence that the Commonwealth wished to introduce.

The Commonwealth sought to introduce evidence of other cons that Appellant had committed in other states, and cons he committed during the same time period as his relationship with Susan against other individuals. The

trial court did not allow this other bad acts evidence. But the trial court did permit the Commonwealth to introduce the following four limited and sanitized pieces of evidence:

> (1) That Appellant had admitted to a New Albany, Indiana detective that he knew his Old National Bank account was closed, and that he closed the account, but the Commonwealth was not allowed to introduce evidence of Appellant's then-pending charges in Indiana or any other jurisdiction.
>
> (2) That Appellant resided at Our Father's House and was required to sign in and out, but not that this facility as a "halfway" house or that Appellant was on parole.
>
> (3) That Appellant attempted to repay a loan from Bob Kieswetter with a check from Appellant's girlfriend's account.
>
> (4) That Appellant worked with Jamie Meyer and asked Mr. Meyer to refrain from telling Susan Pierce where he lived (at Our Father's House).

Appellant claims that the trial court erred in admitting each of these pieces of evidence on KRE 404(b) grounds.

KRE 404(b) states that "[e]vidence of crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule does, however, provide well-delineated exceptions to this general rule, stating that such evidence may be admissible if offered "for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). Of course, even if the evidence is admissible "for some other purpose," it must nevertheless be relevant, and its probative value must not be substantially outweighed by the danger of undue prejudice to the defendant. KRE 403. A trial court's decision to admit other crimes evidence is reviewed for

an abuse of discretion. *Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997).

1. Old National Bank Records

The Commonwealth sought to introduce detailed records of Appellant's account with Old National Bank to show that he intended to deceive the Pierces when he wrote them checks from what he knew was an insufficiently funded and closed account. At trial, Tina Sherrill, an employee at Old National Bank, testified about Appellant's account, which was opened on January 18, 2008. Her testimony included a full account of every check that Appellant wrote from the time that it was opened, including checks that he wrote from the account to Susan and Aaron Pierce and others after it was closed, and that Appellant's greatest account balance was $321.

Appellant agreed some of the records were relevant to prove an intent to defraud Susan, but objected to Sherill's testimony about checks he wrote after the July 2008 checks he wrote to Susan and Aaron. He also objected to evidence of checks he wrote that gave rise to charges against him in Indiana. The Commonwealth agreed to redact the names of the payees of any checks that gave rise to charges in Indiana, and Appellant agreed that the redactions would alleviate many of his concerns. On appeal, however, Appellant now claims that any evidence of his banking records from Old National Bank violated KRE 404(b)'s prohibition against other bad acts evidence because it was merely used to portray Appellant as financially irresponsible.

The Commonwealth also called Detective Todd Bailey from the New Albany Police Department to testify about his interview with Appellant

regarding insufficient funds in Appellant's account and the reason why the account had been closed. The trial court allowed the Commonwealth to introduce, over Appellant's objection, a redacted, sixty-second snippet of a July 2008 interview between Detective Bailey and Appellant, in which Appellant stated that he knew the account was fully closed as of June 10, 2008, that he had engaged the process of closing it, that he knew the bank had already begun closing the account before he attempted to do so, that the account was closed because he was unhappy with some of the bank's procedures, that he believed he had no insufficient funds checks from that account, and he had no other bank accounts. The Court admitted the sixty-second snippet as an exhibit and the jury was permitted to review it during deliberation.

This Court is unpersuaded by Appellant's argument that the Commonwealth introduced this evidence merely to portray him as financially irresponsible, which would be an impermissible use of the evidence under KRE 404. Rather, the Court is convinced that the trial court properly admitted the testimony for "some other purpose." As noted above, the crimes with which Appellant was charged and convicted required the Commonwealth to prove that Appellant deceived Susan and Aaron Pierce and that he possessed other forged checks with intent to defraud, deceive or injure.

Evidence of Appellant's bank records and his check history was relevant to show a "lack of mistake or accident," KRE 404(b)(1), in writing the checks to Aaron and Susan. Specifically, this evidence showed that Appellant wrote checks to Susan and Aaron from an account that he knew was closed a month before. It also showed "intent" to deceive them because Appellant did not ever

have more than $321 in his account at any time, let alone $700 required to cash the checks he wrote to Aaron, and the account was already closed when those checks were written. Generally, Appellant appears to have used the account to deceive others, and whatever prejudicial effect the Appellant may have experienced, namely that he was seen by the jury to be financially irresponsible, does not substantially outweigh the evidence's probative value.

In addition to his general claim that testimony regarding his Old National Bank records violated KRE 404(b), he also claims that the trial court erred by allowing the jury to review Detective Bailey's recorded interview with Appellant during deliberations, which Appellant argues was highly prejudicial because it suggested that there was an ongoing police investigation into his activities in another jurisdiction. He claims the jury might have placed "undue emphasis" on that evidence.

Appellant is correct that the Court has carved out exceptions to the rule that "[u]pon retiring for deliberation the jury may take all papers and other things received as evidence in the case." RCr 9.72. One of those exceptions is that the jury may not take "testimonial" evidence with them to deliberations. *See, e.g.*, *Burkhart v. Commonwealth*, 125 S.W.3d 848, 850 (Ky. 2003) ("'undue' emphasis claims involve juror review of exhibits which are 'testimonial' in nature, such as a witness statement or depositions"); *Berrier v. Bizer*, 57 S.W.3d 271, 277 (Ky. 2001); *Wright v. Premier Elkhorn Coal Co.*, 16 S.W.3d 570, 572 (Ky. App. 1999). Like a witness statement, the recorded interview between Appellant and Detective Bailey is the type of "testimonial" statement covered by those cases. The problem with this type of exhibit is that there is danger that

the jury will place "undue emphasis" on the "testimony re-examined during deliberations, as compared to the 'live' evidence heard at trial, because the unreviewed testimony 'can only be conjured up by memory.'" *Burkhart*, 125 S.W.3d at 850 (quoting *Wright*, 16 S.W.3d at 572).

While we hold that the trial court technically erred in admitting this testimony, the differences between Appellant's case and others examined by this Court on the issue convince us that the error was harmless beyond a reasonable doubt. In cases where this Court has found the error to be prejudicial, additional factors and errors, beyond the mere error in allowing the jury to take the evidence into deliberations, were present. In those cases, the danger of undue emphasis manifested into prejudice that is not present here.

For example, in *Berrier*, the Court considered a claim that the trial court erred in allowing the jury to examine witness interview summaries during its deliberation and found that it was not harmless error. *Berrier*, 57 S.W.3d at 274-75. The summaries had been prepared by counsel and contained notes and opinions that the witnesses themselves did not testify to at trial. *Id.* at 276. The trial court, over objection, admitted them into evidence and allowed the jury to take them back to the jury room. The Court held that the trial court erred because admitting the witness interview summaries was akin to allowing counsel to testify on behalf of the witnesses, and the summaries were also inadmissible hearsay evidence. *Id.* The Court went on to note that the error was "compounded when the jury was permitted to take the 'witness interview' summaries to the jury room for consideration during deliberations" and noted the general rule that "a jury is not permitted to take even a witness's sworn

deposition to the jury room." *Id.* at 277. Importantly, the Court noted that while this type of error can be harmless, it was not in that case because of "the prejudicial content of [counsel]'s 'witness interview' summary and the fact that similar summaries were introduced during [appellee]'s direct examinations of eight other witnesses." *Id.*

Unlike in *Berrier*, the statement in this case was not an inaccurate summary prepared by counsel. Instead, it was a recording that the jury properly heard during the trial. It was that additional factor, the inaccuracy, that led to prejudice in *Berrier*.

Additionally, in *Mills v. Commonwealth*, 44 S.W.3d 366 (Ky. 2001), the Court reversed the appellant's convictions on the grounds that the trial court erred in allowing the jury to review pre-trial taped statements between witnesses who had testified at trial and the Kentucky State Police. The tapes were not introduced into evidence during the trial and were only admitted after the close of proof for the benefit of the jury during deliberations. The Court held that the tapes violated KRE 613's rule on the admissibility of prior inconsistent statements. But the Court also held that the error went beyond merely a violation of an evidentiary rule, deeming it an "error of serious constitutional magnitude" because the jury's review of the tapes also violated the bar on allowing the jury to be given information during deliberation "except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties." RCr 9.74. And because the statements were

not introduced during trial, they "were not subjected to adversarial testing." *Mills*, 44 S.W.3d at 372. This was found to be prejudicial error.

The difference between this case and *Mills* is significant. First, RCr 9.74, unlike RCr 9.72, is only triggered where information has first been requested by the jury, and even then only where a specific procedure is followed. Because that procedure, which implicates a number of due process rights such as notice and right to counsel, was not followed, the court found the error to be especially egregious. That is not the case here, where the trial court obeyed the letter of RCr 9.72, but the "testimonial" nature of the evidence itself injected the error.

Second, and most important, unlike in *Mills*, the short snippet had been introduced at trial and played for the jury in open court. It was subjected to adversarial testing through Appellant's own testimony and the testimony of other witnesses, and Detective Bailey was subjected to cross-examination.

Given the very important differences between this case and *Berrier* and *Mills*, the abundance of other evidence regarding Appellant's history with the account when compared to the heavily redacted, sixty-second snippet of an interview, and the lack of any evidence whatsoever that the jury even reviewed the recording during deliberation, the Court holds that the error in allowing the jury to review the tape was harmless because we can say with fair assurance that the judgment was not swayed by the error. *See Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) ("non-constitutional evidentiary error may be deemed harmless ... if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the

error." (citing *Kotteakos v. United States*, 328 U.S. 750 (1946))); *see also* RCr 9.24 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.").

2. Our Father's House

Appellant next argues that the trial court abused its discretion by permitting the Commonwealth to introduce evidence that he resided at Our Father's House in Louisville between January and May of 2008. Appellant's records from Our Father's House were to be redacted of any mention of probation or parole. Appellant had lied to Susan about living there early in their relationship, instead maintaining that he had lived and worked in Indianapolis. Appellant continued to withhold this information from Susan throughout their relationship and specifically asked those who knew not to mention it. Here, the Appellant's charges, specifically theft by deception and criminal possession of a forged instrument, required the Commonwealth to prove that Appellant deceived Susan and Aaron. Thus, the Commonwealth wished to introduce the evidence that he had in fact lived there to show Appellant's plan or scheme to deceive Susan Pierce, including direct evidence that he had lied to her about where he lived. Appellant objected on the grounds that the evidence merely made him look like a convicted felon who was on parole. The trial court admitted the evidence, but instructed the Commonwealth to tell its witnesses that it could not call it a "halfway house" or make any mention of Appellant's parole status.

KRE 404(b) generally does not permit the introduction of evidence that a person lied or other "bad acts," but here there were "some other purpose[s]" for the introduction of evidence. For example, demonstrating that he had begun gaining the Pierces' trust from the very beginning of his relationship with them through lies about his employment status and where he lived showed "intent," as well as a "plan" or "preparation," to deceive them. The probative value of this evidence, that Appellant had engaged in a long-term deception of Susan Pierce by gaining her confidence and lying about where he lived, is not substantially outweighed by the danger of undue prejudice, namely, that the jury may have believed that he was merely a criminal on parole. The trial court took affirmative measures to sanitize the most prejudicial information regarding parole and the characterization of Our Father's House as a "halfway house," and the Court therefore holds that the trial court did not abuse its discretion in admitting this evidence.

Appellant also claims, for the first time, that the records which were admitted were not properly redacted to remove all mentions of his parole status. Specifically, he points to Page 163 of Commonwealth's Exhibit No. 11, titled "On Campus Parole Officer's Inspection Report" and lists the name of Appellant's parole officer. When the Commonwealth moved to introduce the records, the trial court held a bench conference during which the Commonwealth stated that it thought that it had fully redacted all information relating to probation and parole. Appellant's counsel then asked the trial court for an opportunity to review it before the jury actually saw it to make sure that the exhibit was entirely redacted. The trial court granted that request and

Appellant never again objected to the exhibit nor did he request any pages be removed.

That Appellant's counsel asked to further review the redactions and never again raised the issue is indicative of a waiver. He, in effect, signed off on the redactions. At the very least, the lack of on objection means this alleged error was not preserved and thus can only be reviewed for palpable error, which occurs when the substantial rights of a defendant are violated and a manifest injustice results. RCr 10.26. As we have noted, palpable error's requirement of manifest injustice requires "showing ... [a] probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). Elsewhere in that decision, we stated that the rule required deciding "whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Id.* at 4.

Appellant had the opportunity to review the materials to ensure that all mention of parole was removed. Additionally, the page within the exhibit was one page of a twenty-page exhibit, which was only one of many exhibits the jury reviewed.

While the Court has implied in previous opinions that the failure to redact similar information is error, it simply does not rise to the level of palpable error here. *See, e.g., Mason v. Commonwealth*, 331 S.W.3d 610, 627 n.53 (Ky. 2011) ("[A]ny extraneous materials should have been redacted from Exhibit 19 ... [b]ut [appellant] raised no objection whatsoever below to the lack of redaction, and we conclude that no palpable error resulted from the lack

of redaction of the extraneous portions of Exhibit 19."); *Brown v. Commonwealth*, 313 S.W.3d 577, 608 (Ky. 2010) ("While this was a violation of the hearsay rule, Brown did not draw it to the trial court's attention by requesting redaction and it does not approach palpable error.").

3. Jamie Meyer

Appellant's third claim is that the trial court erred in admitting testimony from Jamie Meyer, Appellant's coworker at the construction company in Louisville, whom Appellant twice asked not to mention to Susan Pierce that he had lived in Our Father's House at any point. Appellant claims that the Commonwealth should have only introduced the address of Our Father's House as evidence that he had not told Susan the truth about where he was living.

Meyer's testimony demonstrated Appellant's "intent" to deceive Susan Pierce, "knowledge" of his deception, as well as other exceptions to KRE 404(b)'s general prohibition on proof of other bad acts. Additionally, Appellant's request that Meyer not mention his living in Our Father's House is at least circumstantial proof of his consciousness of guilt. Indeed, the enumerated list of exceptions in KRE 404(b) has been held to be "illustrative rather than exhaustive," *Colwell v. Commonwealth*, 37 S.W.3d 721, 725 (Ky. 2000), and the Court has held that evidence that demonstrates a consciousness of guilt to be a further exception to the KRE 404(b)'s rule of inadmissibility. *See, e.g., Rodriguez v. Commonwealth*, 107 S.W.3d 215, 219-220 (Ky. 2003) (holding that evidence introduced about appellant's theft of a truck and flight from police was admissible to show consciousness of guilt of robbery of convenience store).

The Court therefore finds that the trial court did not abuse its discretion in admitting Meyer's testimony.[4]

4. Robert Kieswetter

Appellant's final claim is that the trial court erred in admitting testimony by Robert Kieswetter that Appellant had tried to get him to cash a check from Susan's account as repayment for a loan. The Court need not again belabor KRE 404(b)'s general prohibition of evidence of prior acts and the exceptions to those rules. As mentioned above, evidence that shows a defendant's "intent" to commit a crime is an enumerated example of "some other purpose" to admit evidence under KRE 404(b). Clearly, Kieswetter's testimony showed that Appellant intended to deprive Susan of her property by use of deception for the purposes of theft by deception under KRS 514.030. The testimony also showed that Appellant intended to use the forged checks in his possession. The testimony had high probative value and while the testimony was certainly prejudicial to Appellant, as most evidence presented by the Commonwealth against a criminal defendant is, it was certainly not unduly so in light of the crime with which he was charged. Thus, the trial court did not abuse its discretion by admitting this testimony.

[4] During his testimony, Meyer said that Appellant lived at Our Father's House and that Turner Construction, the company where he and Appellant worked, "does most of the halfway houses" around Louisville. As noted above, the Commonwealth was told to instruct its witnesses not to refer to Our Father's House as a "halfway house." Appellant argues that Meyer's testimony allowed the jury to infer that Our Father's House is a halfway house. Such testimony, however, was not solicited by the Commonwealth and, moreover, the statement that Turner Construction "does most of the halfway houses" in Louisville does not mean that Our Father's House must be a halfway house.

C. Unanimous and Majority Verdicts

Appellant claims that he was denied his right to a unanimous verdict under Section 7 of the Kentucky Constitution and his right to a majority verdict under the Sixth and Fourteenth Amendments to the United States Constitution because the jury instructions for theft by deception as to Aaron Pierce allowed the jury to consider multiple theories of the crime without sufficient evidence to support each theory.

Instruction No. 2 for theft by deception as to Aaron Pierce stated that the jury should find Appellant guilty if it found:

> (a) That in Jefferson County, Kentucky, between on or about the 1st day of January, 2008, and on or about the 24th day of September, 2008, and before the finding of the indictment herein, he obtained a sum of money from Aaron Pierce by issuing check #1026 drawn on Old National Bank:
>
> AND
>
> (b) creating or enforcing a false impression as to law, value, intention or other state of mind with intent to deprive Aaron Pierce thereof;
>
> AND/OR
>
> (c) failing to correct a false impression which the Defendant previously created or reinforced or which the Defendant knew to be influencing Aaron Pierce to whom he stands as a fiduciary or confidential relationship, with intent to deprive Aaron Pierce thereof;
>
> AND/OR
>
> (d) issuing or passing said check, on the account of the Defendant, for the payment of money, knowing that the check would not be honored, with intent to deprive Aaron Pierce thereof.

Instruction No. 3 was identical except the check number listed in that instruction was #1027.

These instructions reflected three of the five means enumerated in KRS 514.040(1) by which a person can deceive another for the purposes of theft by deception, and thus presented a situation where the jury could convict

Appellant based upon multiple theories of the same offense. Appellant claims the evidence did not support all of these theories and that this prevented him from being assured of his right to a unanimous verdict.

"Kentucky's Constitution requires unanimous jury verdicts in criminal cases." *Wells v. Commonwealth*, 561 S.W.2d 85, 87 (Ky. 1978) (citing Ky. Const. § 7). "Unanimity becomes an issue when the jury is instructed that it can find the defendant guilty under either of two [or more] theories, since some jurors might find guilt under one theory, while others might find guilt under another." *Davis v. Commonwealth*, 967 S.W.2d 574, 582 (Ky. 1998). However, the use of multiple theories of a crime is permissible in Kentucky and does not violate the unanimous verdict requirement where all interpretations "are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense." *Wells*, 561 S.W.2d at 88; *see also Halvorsen v. Commonwealth*, 730 S.W.2d 921, 925 (Ky. 1986). In *White v. Commonwealth*, the Court further simplified the test:

> If the evidence would support conviction under both theories, the requirement of unanimity is satisfied. However, if the evidence would support a conviction under only one of two alternative theories, the requirement of unanimity is violated.

White v. Commonwealth, 178 S.W.3d 470, 484 (Ky. 2005). Thus, in order for Appellant's convictions for theft by deception to avoid violating the unanimous verdict requirement, each of the three theories of what constituted "deception" must have been supported by sufficient evidence.

Principally, Appellant reiterates his contention that there was not sufficient evidence whatsoever to support the notion that he deceived Aaron

Pierce. As discussed above in addressing the directed-verdict claim, the Court believes that there was sufficient evidence that Appellant deceived Aaron Pierce.

Appellant also complains about the three specific theories of deceptive conduct so as to satisfy the right to a unanimous verdict.

Appellant concedes in his brief that there was likely sufficient evidence to support the third theory, that Appellant issued the checks knowing that they would not be honored. Indeed, Appellant testified to that very fact, despite his claim that Aaron Pierce also knew that the checks would not be honored.

As to the first theory, that Appellant created or enforced a false impression as to law, value, intention or other state of mind with intent to deprive Aaron Pierce of money, the Court holds that there was sufficient evidence to support a conviction under that theory. Appellant created a false impression with Aaron that he intended to marry his mother, a false impression that he intended to use the money to buy her a birthday gift, and a false impression as to the value of the checks he gave to Aaron, which proved to be worthless when Aaron attempted to cash them. That evidence was sufficient to support this theory of deception.

Under the second theory, that Appellant failed to correct a false impression that Appellant previously created or reinforced or that he knew to be influencing Aaron Pierce while in a fiduciary or confidential relationship with Aaron Pierce, the Court notes that there are actually two separate theories within this single instruction. The first is that Appellant failed to correct a false impression that he previously created or reinforced, in essence that by giving

the checks to Aaron he misrepresented that they were able to be cashed. The second is that while acting as a fiduciary, he failed to correct Aaron's misunderstanding. This distinction between the two theories is important because each theory, even where two theories are contained in the same statutory provision, must be supported by sufficient evidence.

There was sufficient evidence to support the theory that by giving the checks to Aaron, Appellant misrepresented that the checks could be cashed. Appellant's testimony was that he was using the money Aaron gave him in exchange for the two bad checks to purchase Susan a gift (and his different testimony that the money was going to be used to buy construction equipment), but there is no indication that the money was used for that purpose. The ordinary understanding, upon receiving a check written and signed by the issuer, is that it can be cashed. Moreover, despite Appellant's testimony that Aaron knew that the checks would not be honored, the evidence suggested that this was not the case, as Aaron attempted to cash the checks almost immediately.

There was no evidence presented at trial, however, as to the theory that Appellant was serving in a confidential or fiduciary relationship with Aaron. That type of relationship implies that Appellant owed some kind of duty to Aaron, either because Aaron was a minor, he was mentally challenged, or that Appellant was in a position of managing Aaron's finances or property. But Aaron was an adult and there was no indication that he suffered from any mental illness. The only relationship between the two was that Appellant was

Aaron's mother's boyfriend. This is neither a fiduciary nor a confidential relationship.

Thus, there was no evidence to support this theory and the trial court erred in including it. This created a unanimity question under this Court's prior jurisprudence.

The Commonwealth argues if there was any error in the instructions, it was harmless. As in *Travis v. Commonwealth*, 327 S.W.3d 456, 462 (Ky. 2010), the instruction in this case "contain[s] language describing theories of liability that do not relate to any evidence presented or even alluded to at trial." *Id.* Such language was "superfluous." *Id.* "Instead of serving to aid the jury, such language was simply inserted to reflect the various possible theories of statutory liability, notwithstanding their inapplicability to the instant case." *Id.* We noted in *Travis* that "such flawed instructions only implicate unanimity if it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict." *Id.* at 463. But, on the other hand, "if there is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem." *Id.* The Court went on to note in *Travis* that "[t]hough such a case presents an error in the instructions, namely, the inclusion of surplus language, the error is simply harmless because there is no reason to think the jury is misled." *Id.*

There was *no* evidence presented at trial about whether the relationship between Aaron and Appellant gave rise to any special duty, either fiduciary or confidential. In light of there being no evidence of the theory to mislead the

jury that Appellant had a fiduciary relationship with Aaron, there is no reason to think the jury *was* misled. That Aaron was an adult, had his own money in cash, and had no mental illness tends to show that the jury was not presented with any evidence that would have led them to reasonably believe that such a relationship existed. Thus, we agree that the instructional error was harmless beyond a reasonable doubt.

Appellant also claims that he was deprived of his right to a majority verdict under the United States Constitution, citing *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972). Appellant's reliance on those cases, however, is misguided. Both cases considered non-unanimous jury verdicts in states whose laws allowed for less than a unanimous verdict for criminal convictions. The question for the Supreme Court, then, was whether a unanimous verdict is constitutionally mandated. It held in both cases unanimous verdicts were not required under the Sixth and Fourteenth Amendments to the United States Constitution, but that a majority verdict was. But these cases are inapplicable to Appellant's case because the Kentucky Constitution, unlike that of Louisiana and Oregon, requires a unanimous verdict for all criminal convictions. *See* Ky. Const. § 7. Additionally, because the Court has held that any error as to unanimity was harmless, we likewise find any error as to a majority verdict was harmless.

D. PFO Proceeding & Penalty Phase

Appellant next claims that the trial court committed reversible error by admitting evidence of two dismissed charges against Appellant during the combined persistent felony offender and penalty phase. During this proceeding,

the Commonwealth called a paralegal to testify about Appellant's prior convictions. She testified pursuant to certified copies of Appellant's criminal records about the convictions, sentences, offense dates, and sentencing dates. At the conclusion of her testimony, the Commonwealth moved to enter the certified judgments of conviction into evidence. Appellant's counsel requested an opportunity to look at the judgments before they were submitted to the jury. Upon examining the judgments, Appellant's counsel objected to their introduction on the grounds that some of the judgments contained inadmissible evidence, such as references to charges that had been dismissed. The trial court denied the motion and admitted them into evidence.

Appellant argues to this Court that two of the judgments given to the jury contained such inadmissible evidence. First, a 1990 judgment from Fayette Circuit Court stated explicitly that two theft-by-deception charges had been dismissed. Second, a 2005 judgment from Grant Circuit Court specifically mentioned that Appellant had been indicted for two counts of theft by deception and one count of being a persistent felony offender in the first degree. The court's order, however, only showed that Appellant pleaded guilty to the two theft by deception charges, and implied that the PFO charge had been dismissed.[5]

KRS 532.055 states that the Commonwealth may introduce evidence relevant to sentencing, including "prior convictions of the defendant," KRS 532.055(2)(a)(1), and the "nature of prior offenses for which he was convicted," KRS 532.055(2)(a)(2). The Court has held, however, that the Commonwealth

[5] Indeed, the PFO charge was dismissed as part of a plea agreement.

may not introduce charges that were subsequently dismissed. *See, e.g.*, *Robinson v. Commonwealth*, 926 S.W.2d 853, 854 (Ky. 1996) ("KRS 532.055(2)(a) permits the introduction of prior convictions of the defendant, not prior charges subsequently dismissed."). Thus, it is obvious that the trial court erred in admitting evidence that referred to dismissed charges against Appellant.

The question is whether such error was harmless under RCr 9.24. In two recent cases, the Court looked at the issue of whether evidence of dismissed or amended charges during the PFO proceeding amounted to palpable error under RCr 10.26. In *Chavies v. Commonwealth*, 354 S.W.3d 103 (Ky. 2011), the Court stated that the Commonwealth's introduction of a prior indictment that included a dismissed second-degree PFO charge and an amended charge, while error, was not palpable error.

The Court considered two factors in reaching its determination that the error was not palpable. First, the appellant in *Chavies* had not received the maximum penalty allowed by statute. Second, the Court noted that the dismissed and amended charges were "were never pointed out to the jury by the trial judge, the Commonwealth, or the Commonwealth's witness." *Id.* at 115. Because the Court believed that it was more likely that the jury was influenced by evidence of the appellant's many other prior convictions, it deemed that the introduction of the prior amended and dismissed charges did not seriously affect the fairness of the proceedings. *Id.* at 115-16.

A few months after our decision in *Chavies*, we once again tackled the same issue in *Blane v. Commonwealth*, 364 S.W.3d 140 (Ky. 2012), in which we

found that the trial court committed palpable error when it admitted evidence that the appellant had been charged with two trafficking offenses that were later amended to possession. The Court noted the case required a different outcome than in *Chavies* because, unlike that case, the Commonwealth had specifically elicited responses about the trafficking charges from its witness and also mentioned the amended charges in its closing argument, and the appellant had received the maximum penalty under the statute. The Court suggested that the specific error in *Blane* was particularly egregious and "affected a substantial right to due process, resulting in a manifest injustice." *Id.* at 153.

In Appellant's case, one of these factors weighs in favor of a finding of reversible error and one weighs against it. Like in *Blane*, Appellant received a maximum sentence for his convictions, which tends to imply a more egregious error. On the other hand, at the crux of *Blane* was the Commonwealth's conduct in both eliciting testimony about the amended charges and repeating them during closing testimony. Appellant does not argue that the Commonwealth did anything similar and seemingly concedes that the only mention of dismissed charges was in the certified judgments themselves. In fact, Appellant concedes that the 2005 judgment does not even expressly mention that the PFO charge had been dismissed, but merely that the jury could infer that it must have been dismissed.

As noted above, that Appellant properly preserved this issue for appeal means that we will reverse unless we find the error to be harmless. The Court

recognizes that we have long-cautioned against confusing harmless error and palpable error. *See Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

While we heed that warning and do no conflate the concepts, our discussion in *Blane* and *Chavies* is nevertheless helpful because it provides non-exhaustive factors by which to examine the egregiousness of the error. An error is harmless when the Court can say "with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). The Commonwealth properly introduced evidence of ten convictions over the course of approximately eighteen years, including nine convictions for various types of theft and one conviction for criminal possession of a forged instrument. One of those convictions includes a passing reference to two dismissed charges, and one would have required the jury to infer (if not speculate) that a charge was dismissed. The Commonwealth never mentioned the dismissed charges, nor did it elicit any testimony relating to them.

While admission of this evidence was error, it was nevertheless harmless. When judging harmless error, "[t]he inquiry is not simply whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 689 (quoting *Kotteakos v. United States*, 328 U.S. at 765) (internal quotation marks omitted). This Court has no doubt that this erroneous proof of dismissed charges did not influence the jury to find

Appellant guilty of being a PFO or affect the recommended sentence of twenty years. Thus, the error was harmless.

III. Conclusion

For the foregoing reasons, the Appellant's convictions and sentence are affirmed.

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

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