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RENDERED: JUNE 20, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000274-MR

AARON D. MOORE — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES LOUIS CUNNINGHAM, JUDGE
NOS. 11-CR-001488 & 11-CR-003333

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Aaron D. Moore, appeals as a matter of right, pursuant to Ky. Const. § 110, from a judgment of the Jefferson Circuit Court convicting him of two counts of robbery in the first-degree and two counts of unlawful imprisonment in the second-degree, enhanced by the status offense of persistent felony offender (PFO) in the first-degree, and sentencing him to twenty years' imprisonment.

On appeal, Appellant raises the following arguments: (1) the trial court improperly prohibited cross-examination regarding one of the victim's potential motive and bias for reporting the crime to the police; (2) the trial court erred by denying his motion for a directed verdict because pursuant to the unlawful imprisonment exemption of KRS 509.050, the two counts of unlawful

imprisonment should have merged with the two counts of robbery; (3) the judgment must be vacated and remanded because the judgment reflects a twenty year sentence for each count of unlawful imprisonment, to run concurrently, despite the fact that the jury was never instructed on sentencing Appellant for the unlawful imprisonment convictions; and (4) the trial court erred by denying Appellant's motion for a mistrial after a detective referred to Appellant's criminal history while testifying. For the reasons set forth herein, we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

Gene Saing and Toynelia King claimed that they were robbed at gunpoint by Appellant and another individual. According to evidence presented at trial, Saing and King made plans to meet Appellant at an apartment to smoke marijuana and drink, and to create an opportunity for Saing to sell prescription medications. When they arrived at the apartment complex Saing called Appellant's cell phone. Appellant arrived and led King and Saing to the apartment.[1] They entered the apartment, which was not well lit. Another man then entered the apartment. Appellant referred to him as "Twiz."[2]

King testified that Appellant grabbed her arm and put a gun to her neck. Appellant told King to remain quiet and not make any sudden movements.

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[1] The apartment was at the time rented to an individual who was incarcerated, and who otherwise has no involvement in this case.

[2] Testimony established that the second perpetrator, who was never identified, went by the name "Twiz", "Tweezy", "Weesy" or "Easy". In this opinion we will refer to him as "Twiz" for consistency.

Appellant then took her into another room and told her to take off all of her clothes and lie on the floor. King removed her clothes and her bracelet but she refused to lie on the floor. Appellant then told her to get into a closet, and that he would not hurt her if she remained quiet. This incident allegedly took place over a span of approximately two minutes.

According to Saing's testimony, while Appellant was accosting King, Twiz pointed a gun in Saing's face and said, "You know what it is."[3] Saing, understanding that he was being robbed, then took off his jewelry. Appellant, after placing King in the closet, joined Twiz. Appellant then put his arm around Saing in a choke hold and held a gun to his head, as Twiz searched through Saing's pockets. Twiz removed a cell phone, car keys, a wallet, and prescription medicine from Saing's person. At some point during this interaction, Twiz hit Saing's head with the gun, which caused an injury that bled.[4] Then, after putting Saing into the closet with King, Twiz and Appellant blocked the closet door with a table, and left the apartment.

Saing and King waited in the closet for several minutes, until they felt that it was safe to leave. They were easily able to push the table out of their way to get out of the closet. King put on a t-shirt and the two went to the parking lot to see if their car had been taken. It had not. They walked down the road to a friend's house to obtain a cell phone, and Saing called 911. He

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[3] King testified that she heard Twiz tell Saing, "you know what time it is," which she, too, understood to mean that Saing was being robbed.

[4] Saing testified, inconsistently, that Twiz hit him with his gun after Appellant joined Twiz and Twiz searched his pockets. Saing later testified that Appellant was not present when Twiz hit him with his gun.

did not identify Appellant as one of the perpetrators until several minutes into the telephone call. According to phone records, Saing's telephone call to 911 was made twenty-one minutes after his call to Appellant upon arrival at the apartment complex.

The police officer that arrived in response to the 911 call observed that Saing was bleeding from a head injury; however, Saing refused any medical treatment other than bandages. The officer testified that Saing told him that he went to the apartment complex to visit someone but was approached outside by a person with a gun and forced into the apartment. He stated that the person holding the gun was "Aaron" who worked at Motel 6. Appellant worked at Motel 6 at the time of the incident, however he was not working that particular night.

The officer observed blood on the floor of the apartment, but no samples or pictures were taken. When police officers returned several days later to follow up on the investigation, the landlord had cleaned and repossessed the apartment, so no further evidence was obtained.

At trial, Appellant testified that he was a convicted felon and sold drugs to make extra money. Pursuant to his version of events, the day of the incident he set up a drug deal for Saing. He gave Saing a telephone number to call for the drug deal. Appellant denied inviting Saing to meet him at an apartment and he also denied going to the apartment, meeting Saing, knowing anyone who goes by the name Twiz, or robbing Saing and King.

Appellant was found guilty of two counts of first-degree robbery against Saing and King and two counts of second-degree unlawful imprisonment of Saing and King. Additionally, the jury found that he was a first-degree persistent felony offender. Appellant was sentenced to ten years' imprisonment on each robbery charge, each of which was then enhanced by the PFO conviction to a sentence of twenty years, with all sentences to run concurrently. Significantly, during the penalty phase of the trial, no mention was made of the unlawful imprisonment verdict and the jury was given no instruction on the penalty for those crimes. Accordingly, it returned no verdict on a penalty for unlawful imprisonment. The judgment, however, purported to impose a sentence of twenty years' imprisonment for each count of unlawful imprisonment, to be served concurrently with the robbery sentence.[5]

II. THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING APPELLANT FROM CROSS-EXAMINING A KEY WITNESS ABOUT HIS MOTIVE OR BIAS

Appellant alleges that the trial court abused its discretion when it prohibited him from cross-examining Saing about his status as a confidential informant and the potential revocation of his probation. Appellant contends that this examination would show the jury Saing's motive or bias to curry favor

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[5] Under KRS 509.030, Second-degree Unlawful Imprisonment is a class A misdemeanor, and is therefore punishable by imprisonment of not more than twelve months in jail, and a fine not to exceed $500.00. Most likely, this anomaly in the judgment was a clerical error. Not only were these two sentences entered without a supporting jury verdict, they were manifestly well outside of the statutorily authorized sentencing range.

from the Commonwealth and such prohibition violated his Sixth Amendment right to confront a witness against him.

"An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses." *Davenport v. Commonwealth*, 177 S.W.3d 763, 767 (Ky. 2005) (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)). Accordingly, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Davenport*, 177 S.W.3d at 767. However, the right to cross-examination is not absolute and the trial court retains the discretion to set limitations on the scope and subject of the examination. *Davenport*, 177 S.W.3d at 767-68. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (emphasis in original).

Trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.*, *Davenport*, 177 S.W.3d at 768 A trial court's decision to limit the scope of cross-examination is reviewed for abuse of discretion. *Davenport*, 177 S.W.3d at 771. "The test for abuse of discretion is whether the trial judge's

decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). This Court has recognized that:

> a defendant has a right to expose the fact that a testifying witness who has criminal charges pending "thereby [may possess] a motive to lie in order to curry favorable treatment from the prosecution." Such a showing of bias can be important because, "unlike evidence of prior inconsistent statements—which might indicate that the witness is lying—evidence of bias suggests *why* the witness might be lying."

Star v. Commonwealth, 313 S.W.3d 30, 38 (Ky. 2010) (citations omitted) (emphasis in original).

Here, as Saing testified on avowal, he was facing revocation of his felony probation as a result of a pending charge of third-degree possession of a controlled substance, which occurred just six weeks before he identified Appellant as the perpetrator of the robbery. With a possible revocation of his probation on the horizon, Saing inquired about becoming a confidential informant. At the time Saing identified Appellant, his application to work as an informant was still pending, as was the Commonwealth's motion to revoke his probation. However, after he began working as an informant for the Commonwealth, the motion to revoke his probation was dismissed. As of the date of Appellant's trial, a new motion had not been filed.

Based on this avowal testimony, we are persuaded that the trial court abused its discretion by prohibiting Appellant from cross-examining Saing about his motive or bias to curry favor from the Commonwealth because such a determination is unsupported by sound legal principles. This Court has recognized that:

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'

Davenport, 177 S.W.3d at 768 (quoting *Van Arsdall*, 475 U.S. at 680). A defendant has satisfied this burden if "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination." *Id.*

Accordingly, it is our determination that Appellant has met his burden. From Saing's testimony, the jury could have reasonably inferred that he was motivated to avoid revocation of his probation, and a subsequent prison sentence, by being a dependable confidential informant, and a useful, but perhaps dishonest witness for the prosecution. This possible inference had the potential to sway the jury's impression of Saing's credibility in making his accusations against Appellant.[6]

However, like other Confrontation Clause errors, a trial court's ruling improperly prohibiting a defendant from cross-examining a witness about his

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[6] We acknowledge the Commonwealth's KRE 608 and 609 arguments, but do not consider them to be a key factor on the point we address. The issue is whether the prohibition of testimony concerning a key witness's bias or motive on cross-examination violates the Confrontation Clause. Thus the character and prior conviction evidence are incident to the showing of bias. *See Davis*, 415 U.S. at 316 ("The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'") (citations omitted).

bias is subject to harmless error analysis. *Van Arsdall*, 475 U.S. at 684; *Star*, 313 S.W.3d at 38. Because the error is of constitutional significance, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Star*, 313 S.W.3d at 38 (quoting *Van Arsdall*, 475 U.S. at 684); *see also Winstead v. Commonwealth*, 283 S.W.3d 678 n. 1 (Ky. 2009) ("[T]he 'no reasonable possibility' test is the harmless-error standard applicable to constitutional errors and is the equivalent of the 'harmless beyond a reasonable doubt' standard announced by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)."). In this case, we cannot say that the error was harmless beyond a reasonable doubt.

Indeed, we have previously determined that reversible error, based on a violation of the Confrontation Clause, occurs when a defendant is prohibited from questioning a key witness about his pending indictment in the same county as where the trial was taking place, *Spears v. Commonwealth*, 558 S.W.2d 641, 642 (Ky. 1977), or a potential deal with the Commonwealth, *Williams v. Commonwealth*, 569 S.W.2d 139, 143-46 (Ky. 1978).

We certainly cannot conclude that Saing's (and King's) version of the incident was the only credible alternative to the far-fetched scenario conjured up by the dissent. Less dramatic, but equally exculpatory inferences might have been drawn by the jury had it been permitted to fairly judge Saing's credibility, not the least of which would be the obvious possibility that Saing's

injury was the result of his involvement in a drug deal gone awry. We cannot conclude that the jury's assessment of Saing's credibility was not affected by the excluded evidence.

Saing's testimony was a crucial part of the Commonwealth's case,[7] and therefore, based upon the foregoing authorities, any inferences the jury may have reasonably drawn about his credibility may have been influential in the verdict reached by the jury. Therefore, we conclude that the trial court abused its discretion in limiting the scope of Appellant's cross-examination of Saing, and because this error cannot be deemed harmless beyond a reasonable doubt, the judgment is accordingly reversed.

III. UPON RE-TRIAL THE UNLAWFUL IMPRISONMENT EXEMPTION OF KRS 509.050 IS APPLICABLE

Appellant argues that the trial court erred in denying his motion for a directed verdict because the kidnapping and unlawful imprisonment exemption of KRS 509.050 merges the unlawful imprisonment charges into the robbery charges. Before granting a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it

[7] King was the only other witness to the crime. At the time of the incident, King was Saing's girlfriend, and so it can hardly be argued that she was an independent voice to corroborate Saing's version of the events. She was potentially motivated by the substantial desire to keep her significant other out of prison, just as Saing was motivated to keep himself out of prison.

would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id.*

However, this argument is not properly preserved for our review because Appellant's motions for directed verdict lacked the requisite specificity to properly present the asserted grounds to the trial court. In accordance with CR 50.01, "[a] motion for a directed verdict shall state the specific grounds therefor." Appellant did not expressly or implicitly present an argument for the application of the KRS 509.050 exemption. Instead, Appellant's trial counsel merely argued in a general fashion that there was insufficient evidence to support an unlawful imprisonment conviction. "The purpose of [CR 50.01] is to apprise fairly the trial judge as to the movant's position and also to afford opposing counsel an opportunity to argue each ground before the judge makes his ruling." *Gulf Oil Corp. v. Vance*, 431 S.W.2d 864, 865 (Ky. 1968). Arguing the insufficiency of the evidence did not fairly apprise the trial court that Appellant's real reason for requesting a directed verdict was KRS 509.050. Accordingly, Appellant failed to preserve this issue for appellate review. *See Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004).

Ordinarily we subject unpreserved arguments to a palpable error review, pursuant to RCr 10.26. However, because we are reversing this matter on other grounds we need not engage in palpable error review. Nevertheless, since upon retrial the issue is likely to arise again, as guidance, we address the merits of Appellant's argument.

The unlawful imprisonment exemption states:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

KRS 509.050. We have previously interpreted this provision to require that the defendant meet three prongs before the exemption applies:

> First, the underlying criminal purpose must be the commission of a crime defined outside of KRS [Chapter] 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime . . . . All three prongs must be satisfied in order for the exemption to apply.

Stinnett v. Commonwealth, 364 S.W.3d 70, 76-77 (Ky. 2011) (quoting *Hatfield v. Commonwealth*, 250 S.W.3d 590, 599 (Ky. 2008)). The purpose of the exemption is to prevent the prosecution from securing greater punitive sanctions for the commission of crimes that inherently involve some interference with the victim's liberty by misusing the kidnapping and unlawful imprisonment statutes. *Id.* at 76. Crimes that may fall under the exemption include "both 'offenses . . . defined in such a way as to always involve physical restraint,' and '[o]ther offenses [that] may involve a restriction of someone's liberty because of the manner in which they are committed.'" *Id.* (quoting KRS 509.050 Ky. Crime Comm'n/LRC cmt. (1974)).

The first prong of this analysis is easily ascertained – the underlying crime must be the commission of an offense defined outside of KRS chapter

509. Here the underlying crime is first-degree robbery, which is codified in KRS 515.020.

The second prong is also met — "the interference with the victim's liberty must have occurred immediately with or incidental to the [robbery]." *Stinnett*, 364 S.W.3d at 77. While restraint is not an element of robbery, and a robbery may be committed without any restraint at all, restraint may still be, and often is, a part of the specific factual scenario of the case. Here, both victims were restrained while the robbery took place. King was forced to move from the living room to an adjoining room at gunpoint. She was then forced to remove all her clothes and bracelet and was placed in the closet for the remainder of the robbery. Saing was held at gunpoint; placed in a choke hold; his wallet, chain, car keys, and prescription pills were removed from him; he was hit in the head with a gun; and forced into the closet while the perpetrators fled the crime scene. They were in the closet for approximately five to ten minutes, and this timing was largely a product of the victims' assessment of how long to wait before it was safe to emerge from the closet. Therefore, from the facts it appears that the restraint of both King and Saing occurred immediately with and incidental to the robbery of their belongings.

Finally, the third prong of our test is also satisfied — the interference with the victims' liberty *did not exceed* that which is ordinarily incident to the commission of robbery. Pursuant to our test, the exemption "will not apply if the restraint exceeds that which is 'ordinarily incident to' the non-kidnapping offense." *Id.* at 76. Thus, "if a defendant exceeds the level of restraint

necessary for the other offense, he cannot take advantage of the [] exemption." *Id.* at 78. The critical question is whether the degree of restraint used exceeded that which is ordinarily incident to the underlying offense, in this case first-degree robbery.

In ascertaining whether the third prong is met we have stated, "if the victim of a crime is going to be restrained of his liberty in order to facilitate its commission, the restraint will have to be *close in distance and brief in time* in order for the exemption to apply." *Timmons v. Commonwealth*, 555 S.W.2d 234, 241 (Ky. 1977) (emphasis added). In this vein we have held that restraint is excessive when a victim is transported to a different location or held for an extended period of time. *See id.* ("If the victim is restrained and transported any substantial distance to or from the place at which the crime is committed or to be committed, the offender will be guilty of an unlawful imprisonment offense as well."); *Brown v. Commonwealth*, 892 S.W.2d 289 (Ky. 1995) (The exemption did not apply to a robbery in which the Appellant transported three victims at gun point in a car and then locked them in the trunk for over one-half hour.); *Murphy v. Commonwealth*, 50 S.W.3d 173 (Ky. 2001) (Restraining the victim of a burglary for ten and one-half hours exceeded that which is reasonably necessary.); *Duncan v. Commonwealth*, 322 S.W.3d 81, 95 (Ky. 2010) ("[T]he additional restraint [Defendant] imposed when he forced SM to walk for five to ten minutes through several blocks to the area behind the school was neither brief in time nor short in distance, for the purposes of the exemption statute, and exceeded what was merely incidental to the alleged

sexual offenses."); *Griffin v. Commonwealth*, 576 S.W.2d 514, 516 (Ky. 1978) (Appellant failed to meet prong three of the exemption because moving a victim one-half block and restraining him for one and one-half hours exceeded the restraint ordinarily necessary to commit sodomy.); *cf. Hatfield v. Commonwealth*, 250 S.W.3d 590, 600 (Ky. 2008) (Moving an assault victim from the front of a church to behind the church to attempt to murder her was not excessive restraint and the exemption was applied.); and *Smith v. Commonwealth*, 610 S.W.2d 602, 604 (Ky. 1980) ("The process of tying [the victim's] hands and forcing her into an adjoining room was incidental to the commission of the assaults and did not exceed the force necessary to accomplish these [] acts.").

Here, as the robbery transpired, King and Saing were not physically bound but, rather, were held at gun point and Saing was hit in the head with the gun, an act which involved no restraint. The only arguable restraint occurred when they were placed in the closet and an ineffective and inconsequential barricade was placed in front of the door. Appellant and Twiz left the scene immediately after concluding the robbery. King and Saing remained in the closet for only a few minutes before exiting. They did not remain, even for that short time because of an effective restraint being applied by Appellant, but, rather, because of their subjective judgment that it was safer

to do so. The restraint applied by Appellant did not exceed that which may be ordinarily incident to the commission of robbery.[8]

The Commonwealth argues that by placing the table in front of the door, Appellant intended to detain the victims indefinitely. We think it more likely from the circumstances that Appellant intended to detain his victims for no longer than it took for him to complete the robbery and get out of the apartment. However, "[i]n analyzing application of the exemption, a defendant's actions will define whether the exemption applies, not his intentions." *Stinnett*, 364 S.W.3d at 79. Therefore, as explained, there is insufficient evidence that Appellant's actions detained King and Saing in the closet for any extended length of time beyond the commission of the robbery. Therefore, we are persuaded that the unlawful imprisonment exemption is applicable under the circumstances of this case and, upon retrial, no unlawful imprisonment instruction should be submitted to the jury.

IV. THE ISSUE REGARDING THE CLERICAL ERROR IN THE JUDGMENT IS MOOT

Appellant next argues that the judgment of the trial court must be vacated and remanded because the jury was not instructed to determine his sentence for the two counts of second-degree unlawful imprisonment but the

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[8] It is worth noting that the dissent's characterization of the restraint that occurred during the robbery is not accurate. King was not forced to lie on the floor. In fact, she refused the demand that she do so. As the Commonwealth argued at trial, the removal of King's clothing was simply to discourage her from going out for help. Similarly, it seems the only reason for the placement of King and Saing in the closet was to enable the robbers to make a clean getaway from the apartment.

judgment sentences him to twenty years' imprisonment for each count to run concurrently. Appellant claims this is a clerical error and the Commonwealth concedes it should be corrected. However, because we have previously found reversible error, this issue is moot, and need not be discussed upon the merits.

V. APPELLANT'S ARGUMENT REGARDING PREJUDICIAL TESTIMONY IS MOOT

Finally, Appellant argues that the trial court abused its discretion when it denied his motion for a mistrial after the detective testified about printing out Appellant's prior criminal history and mug shot for the victims to use for identification purposes. Upon Appellant's motion for a mistrial, the trial court noted the prejudicial nature of the testimony and admonished the detective to make no further reference to Appellant's prior criminal history. Additionally, the trial judge admonished the jury the following day. Appellant contends that the admonishment was not sufficient to cure the error.

We agree with Appellant that "[t]he general rule is that evidence of crimes committed 'other than the one that is the subject of a charge is not admissible to prove that an accused is a person of criminal disposition.'" *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.20(a) (2d ed. 1984)). However, since this issue is moot, because we reverse this matter on other grounds, we do not address it except to say that such prejudicial testimony should be excluded upon re-trial.

VI. CONCLUSION

Due to the violation of Appellant's Sixth Amendment right to confront witnesses against him about potential bias or motive, his conviction must be reversed. Accordingly, the judgment of the Jefferson Circuit Court is reversed and remanded for a new trial consistent with this decision.

Minton, C.J., Keller, Noble, Scott and Venters, JJ., concur. Abramson, J., concurs in result only. Cunningham, J., dissents in part by separate opinion.

CUNNINGHAM, J., DISSENTING IN PART: I respectfully dissent.

We are reversing the robbery charge because Appellant was not allowed to cross-examine victim Saing concerning the latter's request to the Commonwealth to act as a confidential informant in lieu of having his probation revoked. The majority holds that the relationship between Saing and the Commonwealth is relevant to show bias in order to curry favor with the Commonwealth. We reverse both counts of robbery on that ground alone.

However, we totally ignore the fact that there was another victim named King. King's testimony corroborated and confirmed the testimony of Saing. Most importantly, Saing was not just a witness in this case. He was one of the victims. The basis of the impeachment theory is a huge stretch. For it to be any more than harmless error, the jury would have to buy into what is an incredible scenario. That would be that Saing and his girlfriend King made the whole story up; that they staged a robbery in an abandoned apartment; that Saing inflicted a bloody head wound to himself and smeared blood on the floor;

that the pair disposed of their cell phones, jewelry and car keys; that King left her clothes behind and the two victims then ran to another house and called 911; and that together they take it all the way to trial and testify under oath.

It would seem that the victims were masochists if they created these crimes in order to curry favor with the Commonwealth. In essence, the Commonwealth gains nothing by the victims concocting such a story. The witnesses are not helping the Commonwealth close out an existing case. They would be creating one in which they are the victims. Neither is there any evidence that Appellant was a target of the Commonwealth. It doesn't make sense. Therefore, I think any error in not allowing Appellant to pursue this line of questioning on cross-examination of Saing is harmless beyond a reasonable doubt.

I furthermore dissent in the holding of the majority that the unlawful imprisonment exemption should have applied. KRS 509.050, the exemption statute for unlawful imprisonment, does not allow a conviction if the defendant's main purpose is the commission of another crime, such as robbery, if such limitation "occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose."

Appellant took King at gunpoint from one room to another and made her disrobe and lie on the floor. Appellant then made her get in a closet. The same imprisonment was inflicted upon Saing. A table was pushed against the closet

door, ostensibly to keep both victims from quickly exiting their place of confinement. I respectfully submit that these limitations imposed upon the two victims were not "incidental" to the commission of the robbery and far exceeded that which is ordinary in the commission of this crime. People are not usually moved from one room to another, disrobed, and placed in a closet while being robbed.

I do agree that the sentence for the second-degree unlawful imprisonment was reversible error as to that sentence. As noted by the majority, there was no jury sentence for the amount shown in the judgment and such sentence far exceeds that which is allowed by KRS 509.030. I would remand for re-sentencing on those counts.

Otherwise, I respectfully dissent.

COUNSEL FOR APPELLANT:

Daniel T. Goyette
Executive Director/Chief Public Defender

Cicely Jaracz Lambert
Assistant Appellate Defender

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Heather Michelle Fryman
Assistant Attorney General