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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000422-MR

JEREMY BROWNING

APPELLANT

V. ON APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY D. BURRESS, JUDGE
NO. 10-CR-00478

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury convicted Jeremy Browning (Browning) of first-degree unlawful transaction with a minor, two counts; first-degree sexual abuse, one count; incest; and with being a persistent felony offender in the second degree. As a result of those convictions, the trial court sentenced Browning to seventy years' imprisonment. On appeal, Browning raises the following issues: (1) the trial court should have dismissed all charges rather than granting a mistrial due to a prosecutorial discovery violation; (2) the trial court erred when it denied his motion to suppress a statement he gave to police; (3) the trial court erred when it failed to remove two jurors for cause; (4) the trial court erred when it prevented him from cross-examining his wife about pending criminal charges; (5) the trial court erred when it permitted the Commonwealth to introduce into evidence his jail intake form; and (6) the Commonwealth did not meet its

burden of proof on the persistent felony offender charge. Having reviewed the record and the arguments of the parties, we affirm.

I. FACTS AND PROCEDURAL HISTORY.

Browning and his wife, Nicole, lived with their four children and Nicole's parents in a double-wide trailer. At some point in 2010, Nicole became suspicious that the relationship between Browning and their pre-teenage daughter, G.B., had become inappropriate. To determine if anything inappropriate was taking place, Nicole purchased a digital audio recorder, which she placed under the couple's bed.

On October 19, 2010, Nicole left the house with three of the couple's children, leaving Browning and G.B. behind. Before leaving, Nicole turned on the audio recorder. At some point after she returned home, Nicole retrieved the recorder and listened to what had been recorded.

On October 22, 2010, Nicole took the recording, which she believed contained evidence of Browning's inappropriate behavior, and G.B. to the Bullitt County Sheriff's office. Officers listened to the recording and two social workers interviewed G.B. During the course of the interview, G.B. stated that she and Browning had engaged in oral sex on a number of occasions and that Browning had unsuccessfully tried to penetrate her vagina twice. Based on this information, sheriff's deputies arrested Browning and a grand jury indicted him for first-degree sexual abuse; unlawful transaction with a minor; incest; and, based on a prior felony child support conviction, for being a persistent felony offender in the second degree.

The court appointed counsel for Browning, and the parties conducted discovery. On May 31, 2011, Browning filed a motion for additional discovery, which the court granted in early June. On July 20, 2011, Browning filed a motion asking the court to either dismiss the charges or to exclude all evidence from G.B., including her statement. In support of his motion, Browning argued that the Commonwealth had not complied with the court's June order and that he had been unduly prejudiced by that noncompliance. The Commonwealth stated that it was gathering the requested discovery materials and that it would supply them as soon as practicable. The court entered a second order requiring the Commonwealth to provide the requested materials.

On September 21, 2011, Browning filed a second motion to dismiss and/or to exclude evidence, again arguing that the Commonwealth had not provided the requested material. The Commonwealth stated that it believed it had provided the requested material and had filed it for the court's review. The court reviewed its file, discovered the material, made necessary redactions, and supplied a copy to Browning. Browning asked the court to re-schedule the trial, which was set to begin on October 6, 2011. The court refused to re-schedule the trial, indicating that Browning had sufficient time to review the material.

It appears that the Commonwealth continued to provide Browning with discovery in the week before trial. Because of the late receipt of that discovery, Browning again asked the court to re-schedule the trial. The court refused and trial began as scheduled on October 6, 2011.

After the Commonwealth closed its case on October 7, 2011, Browning made a motion to continue the trial. In support of his motion, Browning noted that one of the Commonwealth's witnesses had testified about G.B.'s counseling and that the Commonwealth had not provided those counseling records. The Commonwealth indicated that it had not been aware that G.B. had been undergoing counseling. The court noted that Browning had not specifically requested counseling records; therefore, the court denied the motion, and the trial resumed.

During its rebuttal, the Commonwealth called an investigator from the Cabinet for Health and Family Services (the Cabinet). During the investigator's testimony, Browning discovered that documents in the Cabinet's file had not been provided. Browning moved for a mistrial. Instead of granting Browning's motion, the court recessed the trial to give Browning time to review the documents.

On October 12, 2011, the court held a hearing, and Browning amended his motion to ask for dismissal of all charges as an alternative to a mistrial. In support of his motion, Browning noted that he had requested the Cabinet's records, the Commonwealth had been ordered to provide them, and the Commonwealth had not complied with the court's order. The court determined that, if any records had not been provided to Browning, it was through no fault of the Commonwealth. Therefore, the court refused to dismiss the charges. However, because there did appear to be some records that had not been provided, the court declared a mistrial.

The parties re-tried the case from March 13 through 15, 2012, and the jury returned a guilty verdict on all counts. We set forth testimony from both trials as necessary below.

II. STANDARD OF REVIEW.

The various issues raised by Browning have different standards of review. Therefore, we set forth the appropriate standard of review as we analyze each issue.

III. ANALYSIS.

1. Whether the Trial Court Should Have Dismissed All Charges Due to Discovery Violations.

As noted above, Browning sought dismissal of all charges and/or a mistrial after the second day of the first trial. The court granted his motion for a mistrial but refused to dismiss the charges. Although somewhat confusing, it appears that Browning is arguing that the court's failure to grant his motion to dismiss the charges violated his right to be free from being placed in jeopardy twice. We disagree.

"A party seeking to prevent his retrial upon double jeopardy grounds must show that the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court." *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989). The trial court determined that it appeared Browning had not received all of the discovery material he had requested. However, the court also determined that Browning had not asked for all of the records that he claimed were missing. Furthermore, it appears that some of the requested records had been filed with

the court by the Commonwealth so the court could make and/or approve any redactions, and the court did not provide the records to Browning. Based on the record, the court made a factual determination that there was no misconduct by the prosecutor. We cannot state that the court's determination was clearly erroneous or an abuse of discretion; therefore, we affirm the court's denial of Browning's motion to dismiss.

2. Whether the Trial Court Erred When It Failed to Suppress Browning's Statement.

Following his arrest, Browning made a recorded statement during which he admitted to engaging in oral sex with G.B. on a number of occasions; that he had fondled her; and that he attempted to penetrate her vagina with his penis. The trial court permitted the Commonwealth to play Browning's statement for the jury. Browning argues that his statement should have been suppressed for three reasons: (1) the court did not hold a hearing as required by Kentucky Rule of Criminal Procedure (RCr) 9.78; (2) he made the statement as a result of police coercion; and (3) police continued to question him after he asked for an attorney. We address each argument separately below; however, before doing so, we summarize the relevant evidence.

a. Browning's Testimony.

Browning testified at both trials that he was arrested at approximately 2:30 p.m. Following his arrest, Browning was transported to the sheriff's office where he was handcuffed to a chair in a holding cell. After what seemed like several hours, Browning was questioned by Detective Cook and Deputy Fowler. During the questioning, Deputy Fowler stood behind Browning and choked him

whenever he denied having any inappropriate contact with G.B. Several times Deputy Fowler choked Browning to the point of unconsciousness. In order to stop this abuse, Browning signed a waiver of his *Miranda* rights and agreed to give a videotaped statement. Prior to the statement, Detective Cook coached Browning about what he should say.

After he gave his statement, Browning was taken to the jail. Before he was taken to a cell, he signed a jail intake form, indicating that he had not recently fainted or been unconscious and that he did not have any injuries. Browning testified that he did not read the document, that no one explained it to him, and that he was not aware of its contents when he signed it. Finally, Browning testified that he did not have any visible bruises or marks when he was admitted to the jail.

b. Deputy Jailer Farmer.

During both trials, Deputy Jailer Farmer testified that he handled the intake procedure the night Browning was admitted to the jail. As part of the intake procedure, Deputy Jailer Farmer reviewed several forms with Browning and obtained his signature. Deputy Jailer Farmer did not notice any physical injuries on Browning; however, Deputy Jailer Farmer could not recall if Browning said whether he needed to see a physician. The intake form, which the court admitted into evidence, indicates that Browning denied having any head injuries or having fainted.

c. Former Sheriff Tinnel.

Sheriff Tinnel, the former Bullitt County Sheriff, testified at the first trial that he and Detective Cook conducted a brief interview of Browning in the sheriff's office. The purpose of that interview, which was not recorded, was to get Browning "comfortable" and to explain his rights to him. Browning signed a waiver of his rights in Sheriff Tinnel's office.

d. Deputy Fowler.

Deputy Fowler, a deputy in the sheriff's department, testified at both trials that he arrested Browning and took him to the sheriff's department. Deputy Fowler stayed with Browning until Detective Cook and/or Sheriff Tinnel took control of Browning. Deputy Fowler denied choking or otherwise assaulting Browning. Furthermore, Deputy Fowler testified that he did not place Browning in a holding cell and that he had not been in a holding cell with Browning.

e. Detective Cook.

Detective Cook testified at the second trial that he interviewed Browning in Sheriff Tinnel's office and that he later obtained a videotaped statement from Browning. Detective Cook did not choke or direct anyone to choke Browning. Furthermore, he stated that he did not tell Browning what to say during the recorded statement.

i. RCr 9.78 Hearing.

Prior to the second trial, Browning made a motion to suppress his statement, arguing that the statement had been coerced. As support for his argument, Browning cited to his testimony from the first trial that he had been

choked by Deputy Fowler. In response, the Commonwealth cited to the testimony of the officers to the contrary. The court asked if either Browning or the Commonwealth had any other evidence to offer regarding the suppression motion. Both parties agreed that they had no additional evidence. The trial judge stated that he had the exhibits from the first trial and that he had heard the testimony. Based on that evidence, he concluded that Browning's statement was knowing, voluntary, and intelligent; therefore, he denied Browning's motion to suppress.

Browning now argues that the court should have conducted a separate hearing and made findings of fact pursuant to RCr 9.78, which provides that:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

Browning's argument is unpersuasive for four reasons. First, Browning's counsel indicated that Browning did not have any evidence other than what had been offered during the first trial. Second, while the evidence presented at the first trial was taken in the presence of that jury, it was taken outside the presence of the jury in the second trial, and that is the jury that mattered. Third, Browning's argument to the contrary notwithstanding, the judge did

make findings of fact when he stated on the record that Browning made his statement knowingly, voluntarily, and intelligently. Finally, the judge's factual findings are supported by the evidence presented during the first trial.

Therefore, the court fulfilled the requirements of RCr 9.78, and the decision to refrain from holding a separate hearing prior to the second trial was not erroneous.

ii. Coercion.

Browning argues that his statement was involuntary and should have been suppressed because it was the result of police coercion. The voluntariness of a confession is assessed based on the totality of the circumstances surrounding the making of the confession. *Mills v. Commonwealth*, 996 S.W.2d 473, 481 (Ky. 1999). "When the trial court is faced with conflicting testimony regarding the voluntariness of a confession, its determination, including its evaluation of credibility, if supported by substantial evidence, is conclusive." *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999).

In support of this argument, Browning points to his testimony that "he had been choked unconscious so many times that he admitted to having done whatever the deputies said he had done." If that were the only evidence available, Browning might be correct that his statement should have been suppressed. However, there was substantial evidence to the contrary from the police officers involved in Browning's arrest and interrogation. The trial court's

factual finding that Browning's statement was voluntary is supported by substantial evidence; therefore, it is conclusive and not erroneous.

iii. Assertion of Right to Counsel.

At the beginning of the recorded statement, and after he had already signed a waiver of his right to counsel, Browning said, "I'd rather do this with an attorney present." In response, Detective Cook said, "We're just going to go over the statement you give [sic] us earlier, okay? That's what I told you, right?" Browning said, "Yeah," and Detective Cook proceeded to take Browning's statement.

Browning argues that the trial court should have excluded his statement because the officers should have stopped all questioning when Browning said he would rather have an attorney present. Browning did not raise this issue in support of his motion to suppress before the trial court. Recognizing that this may have created a preservation problem, Browning asks us to review the right to counsel issue for palpable error if we hold that he did not adequately preserve it before the trial court.

The Commonwealth argues that Browning did not raise this issue before the trial court, and it is not preserved. Furthermore, the Commonwealth argues that, because Browning was "mumbling" and "covering his mouth," it is unclear from the videotape if Detective Cook heard or could have understood what Browning said. We first address the preservation issue.

When an appellant raises an issue before us that he failed to argue before the trial court, we can only review it for palpable error. *Henson*, 20

S.W.3d at 470-71 and RCr 10.26. We note Browning's argument that *Buster v. Commonwealth*, 364 S.W.3d 157, 162 (Ky. 2012) stands for the proposition that a motion to suppress is sufficient to cover issues regarding coercion and failure to provide counsel even if both are not presented to the trial court. We disagree.

In *Buster*, the defendant argued that police violated her right to remain silent by sending a social worker to question her after she had asked for an attorney. The Commonwealth objected arguing that *Buster* did not raise that issue before the trial court, focusing instead on the impact her deficient mental capacity had on her confession. We held that *Buster* did present evidence on the issue and argued it, if only generally, to the trial court. Here, Browning, like the defendant in *Henson*, did not raise the issue, did not specifically or even generally argue the issue, and did not point to any evidence regarding the issue. Thus, *Buster* is neither controlling nor persuasive. Because Browning did not raise and thereby properly preserve this issue, we must determine if admission of the statement was palpable error.

"A palpable error is one that 'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court. [T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Biyad v. Commonwealth*, 392 S.W.3d 380, 382 (Ky. 2013) (citations omitted).

Prior to the videotaped statement, Browning had signed a waiver of his rights, spoken with police officers at length, and confessed. Browning has not

shown how, in light of the preceding facts, the exclusion of his videotaped statement would have altered the result. Thus, there was no palpable error in the admission of Browning's videotaped statement.

3. Whether the Trial Court Should Have Removed Two Jurors for Cause.

During *voir dire*, Browning asked if the potential jurors could consider the full range of possible penalties or if, because of the nature of the crime, they would be predisposed to imposing the maximum penalty. One juror indicated that, given the nature of the offense, he would be more likely to impose the higher penalty. Three other jurors agreed with him and the court dismissed two of the four for cause. After questioning the other two jurors at the bench, the court denied Browning's motion to dismiss them. Those two jurors, Clark and Newton, are the ones at issue herein.

At the bench, the judge asked Clark, several different ways, if he could consider the full range of punishment. Clark indicated that he could do so. The judge also questioned Newton. It appears from the questioning and Newton's responses that initially he was somewhat confused about the difference between finding guilt and imposing punishment. However, he ultimately indicated that he could make a fair decision and could consider the full range of punishment. Based on their responses, the court denied Browning's motion to remove Clark and Newton for cause, which Browning argues was error.

Long-standing Kentucky law has held that a trial court's decision on whether to strike a juror for cause must be reviewed for abuse of discretion. *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003); *Pendleton*

v. Commonwealth, 83 S.W.3d 522 (Ky. 2002). The court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor. There is no "magic question" that can rehabilitate a juror as impartiality is not a technical question but a state of mind. *United States v. Wood*, 299 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78 (1936); *Pennington v. Commonwealth*, 316 S.W.2d 221 (Ky. 1958). When the question is analyzed as to whether the trial court judge abused his discretion, a reviewing court must determine if the trial court had a sound legal basis for his ruling. If a judge errs on a finding of fact, he must be clearly erroneous or there is no error; if error is premised on incorrect application of the law, a judge abuses his discretion when the legal error is so clear that there is no room for the judge to have ruled any differently. RCr 9.36 requires a judge to excuse a juror if there is a reasonable basis to believe the juror cannot be fair and impartial.

Shane v. Commonwealth, 243 S.W.3d 336, 338 (Ky. 2007).

Having reviewed the record, we cannot say that the trial court abused its discretion when it denied Browning's motions to strike jurors Clark and Newton. If we looked only at those jurors' initial indications that they might be disposed to imposing the maximum sentence, we might conclude otherwise. However, upon further questioning by the court, both jurors indicated that, after hearing all of the evidence, they could choose an appropriate penalty from within the given range. Furthermore, although Browning implies that the court asked Clark and Newton "magic questions," our review of the record belies that implication. The court asked both Clark and Newton a number of questions in order to determine if they could be fair. It appears to us that those questions, rather than being "magical," were designed to determine if the responses from Clark and Newton were consistent and whether their responses indicated they

could be fair. Based on the individual *voir dire* at the bench we cannot say that the court abused its discretion in denying Browning's motion to remove Clark and Newton.

4. Whether the Court Should Have Permitted Browning to Cross-Examine His Wife Regarding Pending Criminal Charges.

At the time of the second trial, Browning's wife, Nicole, had charges pending in Bullitt County. During cross-examination, Browning's counsel asked Nicole about those pending charges and the Commonwealth objected. At the bench conference, Browning's counsel argued that the fact Nicole had charges pending went to her credibility. The court asked if counsel had any evidence that Nicole had been offered any consideration by the Commonwealth with regard to those charges in exchange for her testimony against Browning. Counsel said that she did not have any evidence of any offer by the Commonwealth to Nicole. The court then granted the Commonwealth's objection and admonished the jury to disregard the question.

On appeal, Browning argues that the court's ruling hampered his ability to effectively cross-examine Nicole. The Commonwealth concedes that, ordinarily, Browning should have been permitted to cross-examine Nicole about the charges. However, the Commonwealth also argues that any error was harmless.

Before we address the substance of Browning's argument, we must determine whether the issue was properly preserved. "A trial court ruling excluding evidence must be preserved for appellate review by an avowal of the witness. Otherwise, the reviewing court has no way of knowing exactly what

testimony was excluded and whether the exclusion was prejudicial to the offering party." *Caldwell v. Commonwealth*, 133 S.W.3d 445, 450 (Ky. 2004) (citations omitted).

Browning asked Nicole if she was under indictment in Bullitt County and she answered, "Yes," before the Commonwealth could object. Browning did not seek to ask any further questions by avowal. Browning now argues that Nicole's indictment was evidence of her bias against him. However, without more, we cannot determine if that is the case. The simple fact that Nicole had been indicted does not show bias one way or the other. Furthermore, without some evidence that the Commonwealth offered Nicole something in exchange for her testimony, we cannot determine whether Browning was prejudiced by the exclusion of any testimony Nicole might have given. Therefore, this issue was not properly preserved, and we need not address it.

However, for the sake of completeness, we will review this issue using the palpable error standard. Browning argues that his inability to impeach Nicole's credibility "had a material effect on [his] defense in this case," which was that he did not abuse G.B. In support of his argument, Browning cites to the overall weakness of the Commonwealth's case and to G.B.'s inconsistent statements. He does not set forth what portion of Nicole's testimony was false or even questionable. And he does not set forth how attacking her credibility would have done anything to further his claim that he did not abuse G.B. As the Commonwealth notes, Nicole primarily testified about placing and retrieving the audio recorder and taking the recorder and G.B. to the sheriff's

office. Those facts were not in dispute and impeaching Nicole's credibility would not have changed them. Therefore, we cannot say that the trial court's exclusion of questions regarding Nicole's pending criminal charges was palpable error.

5. Whether It Was Error for the Trial Court to Admit the Jail Intake Form.

As set forth above, Browning testified that he lost consciousness several times while being choked by Deputy Fowler. During cross-examination, Browning admitted that he had signed the jail intake form and that the form indicated he had not suffered any injuries, did not have any medical problems, and did not have a recent history of fainting. However, Browning stated that he was not aware of the form's contents when he signed it. As rebuttal, the Commonwealth called Deputy Jailer Farmer who testified that he remembered reviewing the form with Browning and that he completed the form based on what Browning told him. The Commonwealth then moved to introduce the form into evidence. Browning objected because Deputy Jailer Farmer was not the records' custodian. The court overruled that objection.

On appeal, Browning argues that the intake form was not admissible because Deputy Jailer Farmer was not the records' custodian and the intake form was not properly authenticated. He also argues, for the first time, that the form should have been excluded as unduly prejudicial under Kentucky Rule of Evidence (KRE) 403. We first address Browning's KRE 403 argument.

As we have stated above, we are not required to address an argument that an appellant makes for the first time on appeal. *Henson*, 20 S.W.3d at

470. Although we are not required to address this argument, we briefly do so. KRE 403 provides that relevant evidence may be excluded if it: is unduly prejudicial; confuses the issues; misleads the jury; causes undue delay; or is needlessly cumulative. Browning argues that:

The introduction of the evidence at issue here was certainly cumulative to the questioning that had been done during the prosecutor's cross-examination of Jeremy Browning, and, hence, caused delay. In addition, by harping on a collateral issue, the prosecutor's evidence had an undeniable tendency to confuse the jury concerning the real issues in the case as well as mislead the jury concerning the issues and even the probative weight that should be assigned to the statements Jeremy Browning was required to make at the time of booking in the jail.

We disagree. The introduction of the intake form, which is what Browning objected to, took very little time. Furthermore, introduction of the form would have clarified any confusion the jury might have had about its contents. Finally, Browning's defense was that he did not act inappropriately with G.B. He could not sustain that defense unless he could convince the jury that his confession was not credible. Therefore, issues regarding his confession, including whether he had made it simply to avoid being choked, were not collateral, and the trial court's admission of the intake form did not violate KRE 403.

We next address whether the form should have been excluded because Deputy Jailer Farmer was not the records' custodian. KRE 803(6), which Browning cites as support for his argument, is an exception to the hearsay rule. We first address whether the contents of the form constitute hearsay.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). The statements in the intake form were offered to prove the truth of the matter asserted - that Browning had not been choked during his interrogation. Therefore, those statements should have been excluded unless they fall within one of the hearsay exceptions. KRE 803(6) provides that:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Deputy Jailer Farmer testified that he regularly completes intake forms and that he completed the form for Browning. Furthermore, he testified that he remembered completing the form in question. Therefore, although not the "records custodian" Deputy Jailer Farmer falls within the category of "other qualified witness" and admission of the intake form falls within the hearsay exception provided for in KRE 803(6). Finally, Deputy Jailer Farmer, as the preparer of the form, had knowledge that the form was what it purported to be and he was qualified to authenticate it. *See* KRE 901(b)(1). For the foregoing

reasons, we hold that the court's admission of the intake form was not erroneous.¹

6. Whether the Commonwealth Met Its Burden of Proving that Browning Is a Second-Degree Persistent Felony Offender.

Browning argues that the Commonwealth failed to prove the elements necessary to support his conviction of being a persistent felony offender in the second degree. He admits that this issue is not properly preserved. Therefore, we review it for palpable error.

During the penalty phase of Browning's trial, the Commonwealth introduced into evidence Bullitt Circuit Court records regarding Browning's guilty plea and judgment on a charge of flagrant non-support and a certified parole calculation form from the Kentucky Department of Corrections. Neither the Commonwealth nor Browning presented any witnesses.

The Bullitt Circuit Court judgment, entered on December 2, 2005, reads as follows:

The Court finds the Defendant guilty of FLAGRANT NON-SUPPORT, a Class D. Felony in violation of KRS 530.050, and fixes the Defendant's sentence at Two (2) Years.

IT IS HEREBY ORDERED that imposition of judgment imposing imprisonment is hereby withheld with stipulations as follows:

1. The probation shall be for Five (5) Years or until the arrears are paid in full, **whichever shall be later.** Arrears for the period of indictment (9/5/01 to 9/5/94) are Five Thousand Seven Hundred Eighty

¹ We note that the intake form would also have been admissible as an admission under KRE 801A(b).

(\$5,780) Dollars to be repaid at the rate of Twenty (\$20) Dollars per week in addition to current child support in the amount of One Hundred Sixty (\$160) Dollars per month.

2. The Defendant shall pay court costs of \$125 and a court facility fee of \$25 on or before March 1, 2006. A show cause hearing will be held on March 6, 2006 for payment of fees.

(Emphasis added.)

The trial court instructed the jury, in pertinent part, as follows:

You will find the Defendant, Jeremy W. Browning, guilty of being a Second-Degree Persistent Felony offender under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That prior to the 5th day of April 2010 through and including the 18th day of October, 2012 [sic] the Defendant was convicted of Flagrant Nonsupport by final judgment of the Bullitt Circuit Court on December [sic] 2005:

B. That he was eighteen years of age or older when he committed the offense of which he was so convicted;

C. That pursuant to said prior conviction, he was sentenced to a term of imprisonment of one year or more;

D. That he was on probation, parole, conditional discharge, conditional release, or furlough or appeal bond, from said prior conviction at the time he committed the offense of which you have found him guilty in this case.

AND

E. That the Defendant is now Twenty One (21) Years of age or older.

Browning argues that the jury could not have convicted him of being a second-degree persistent felony offender because "[t]here was no testimony or evidence that the probation was never revoked, or that Mr. Browning was on probation, parole, conditional discharge, conditional release, or furlough or appeal bond at the time of the offenses for which the jury convicted him."

However, that argument is factually incorrect. As set forth above, Browning was on probation for the felony non-support conviction for a period of not less than five years. That five-year period began on December 2, 2005, and ended on December 2, 2010. The crimes for which Browning was convicted occurred within the year 2010 between April and October. Browning was on probation at the time he committed those crimes; therefore, the Commonwealth met its burden of proof that Browning is a second-degree persistent felony offender.

IV. CONCLUSION.

Having reviewed the record and having discerned no error, we affirm.

All sitting. All concur.

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