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RENDERED: OCTOBER 20, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2015-SC-000177-MR

ARCHIE VIRES, JR. — APPELLANT

V.

ON APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 14-CR-00014

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Almost completely upon the testimony of his niece by marriage, Donna,[1] the Appellant was convicted by the Powell Circuit Court of one count of attempted first-degree rape, one count of first-degree sexual abuse, and two counts of first-degree sodomy. The jury recommended a total sentence of 20 years' imprisonment which the trial court imposed.

Due to his work schedule, Donna's father, Ricky, relied on family members to watch her. In the summer of 2011, nine-year-old Donna was left alone with Appellant on several occasions. The sexual crimes were committed against Donna during that time frame.

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1 A pseudonym is being used to protect the anonymity of the victim.

Appellant now appeals his judgment and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution.

Evidentiary and Constitutional Violations

At trial, defense counsel asked Ricky during cross-examination whether Donna ever lied to him to avoid responsibility. Before the Commonwealth objected, Ricky answered, "Yes." The court sustained the Commonwealth's objection and then directed defense counsel to attack Donna's character for truthfulness through opinion or reputation testimony. The court also admonished the jury not to consider Ricky's answer. Defense counsel then asked Ricky his opinion concerning Donna's character for truthfulness. He responded that he believed she was truthful.

Appellant argues that his initial question concerning whether Donna ever lied to him to avoid responsibility was a proper question concerning opinion and reputation evidence under KRE 608 because it was not a claim about a specific instance of conduct. He urges us to adopt the reasoning advanced in advisory notes of Rule 608 of the Federal Rules of Evidence and supporting case law. *See Stewart v. Commonwealth*, 197 S.W.3d 568, 570-71 (Ky. App. 2006) (citing Weinstein, *Federal Evidence,* Sec 608 App. 01[2]; and *United States v. Lollar,* 606 F.2d 587, 589 (5th Cir. 1979), ("Witnesses may now be asked directly to state their opinion of the principal witness' character for truthfulness and they may answer for example. 'I think X is a liar'")). Appellant further contends that this type of questioning was permissible under KRE 405

because Appellant's defense was that Donna was lying when she made the allegations against him.

KRE 405(c) provides: "In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." It is clear that this case was one of credibility and that Appellant's defense focused substantially on Donna's character for untruthfulness.

Second, Appellant takes issue with the trial court's decision to foreclose Appellant's cross-examination of Ricky concerning Donna's confidential counseling records. During her cross-examination of Ricky, defense counsel asked: "[D]o you remember reporting to Comprehensive Care in February 2012, that [Donna] had a problem with stretching the truth?" The Commonwealth objected. Defense counsel argued that Ricky's statement to Donna's counselor that was documented in the Comprehensive Care records constituted a prior statement that was inconsistent with his trial testimony.

The trial court expressed reservation whether the records were admissible. Defense counsel responded that she did not seek to introduce the records; rather, she wanted to ask Ricky whether he made the prior statement. The court expressed additional concern that Ricky's statement contained in the Comprehensive Care records was hearsay and not able to be subjected to cross-examination. The court also believed that it was improper to introduce medical records to impeach. After additional discussion outside the presence of the jury, the court ultimately sustained the Commonwealth's objection.

Third, defense counsel again moved to introduce the Comprehensive Care records for purposes of cross-examining Donna. Defense counsel requested that she be allowed to ask Donna whether she made the statements concerning her alleged problems with lying. After additional discussion, the court denied the motion. We recently addressed a similar issue in *Sneed v. Hon. Rodney Burress,* —S.W.3d—, 2016 WL 1068623 (March 17, 2016) (to be published and petition for rehearing pending). In that case, we held that defense counsel's statements in opening argument concerning the victim's history of lying were based on evidence that was inadmissible, highly prejudicial, and in direct contradiction to the court's previous admonition not to characterize any witness as a liar. *Id.* at *4.

Although there is a clear distinction between the procedural posture of *Sneed* and the present case, the logic advanced in *Sneed* is applicable here. Like in *Sneed*, the proper application of privilege rules is critical in resolving the present issue. KRE 506(b) is dispositive. That rule provides in pertinent part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling the client, between himself, his counselor, and persons present at the direction of the counselor, including members of the client's family.

It is clear that the communication between Ricky and Donna's therapist was made for the purpose of counseling the client, Donna, and thus inadmissible unless an exception applies. We discussed the issue of privilege in *Sneed* as follows:

> [A]lthough it was not addressed by either party, introduction of the therapist's notes and testimony would have been barred by either the counselor-client privilege or the psychotherapist-patient privilege. KRE 506 and KRE 507. More precisely, that information would have been inadmissible unless [Defendant] satisfied at least one of the exceptions enumerated in either KRE 506(d) or KRE 507(c). *See also Commonwealth v. Barroso,* 122 S.W.3d 554 (Ky. 2003) (providing circumstances in which defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege.). None of the KRE 507 exceptions apply here and the record does not indicate that a *Barroso* hearing was ever conducted. Also, there is no indication that the trial court considered, or was ever asked to consider, the exceptions presented in KRE 506(d). Thus, there was no way that this evidence could have been admissible at trial.
>
> *Sneed,* 2016 WL 1068623, at *3.

Similarly, neither party in the present case has raised the issue of privilege. A *Barroso* hearing was never conducted and the issue of privilege under KRE 506 was never discussed. Without such requisite findings, any evidence concerning the communications made for the purpose of Donna's counseling—whether elicited from Donna or Ricky—is privileged and inadmissible.

Although Ricky and Donna's avowal testimony certainly provides a thorough foundation for preserving Appellant's claim, the fact remains that the trial court never formally analyzed this issue under KRE 506 or *Barroso.* Most critically to this appeal, neither did defense counsel request such a determination. Therefore, without such requisite findings, this evidence is privileged and inadmissible.

Constitutional Claim

Appellant devotes the majority of his argument on appeal to his allegation that the trial court's decision to exclude the aforementioned evidence

deprived Appellant of his right to present a defense and to confront witnesses. In other words, he is arguing that the trial court's misapplication of the rules of evidence violated his constitutional rights. He cites a host of cases in support of his general claim that the Due Process Clause of the Fourteenth Amendment affords a criminal defendant a fundamental right to present a defense. *See, e.g, Crane v. Kentucky*, 476 U.S. 683 (1986); *see also Beaty v. Commonwealth*, 125 S.W.3d 196, 206 (Ky. 2003) ("the United States Supreme Court confirmed that the Sixth Amendment right to confront witnesses includes the right to conduct reasonable cross-examination.").

Unlike his primary argument on appeal, however Appellant's objections at trial were presented as allegations of evidentiary error, not constitutional errors. Therefore, we will review for palpable error. *Walker v. Commonwealth*, 349 S.W.2d 307, 313 (Ky. 2011) ("even alleged constitutional errors, if unpreserved, are subject to palpable error review."); *see also Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010).

In *Crane v. Kentucky*, the trial court excluded testimony concerning the circumstances of the defendant's confession on the ground that the testimony pertained solely to the issue of voluntariness. 476 U.S. 683 (1986). This Court affirmed the trial court's decision. The U.S. Supreme Court reversed and held that "evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility" and that there was no "rational justification for the wholesale exclusion of this body of potentially exculpatory

evidence." *Id.* at 691. The issue in the present case is clearly distinguishable from *Crane* and the other cases cited in support.

For the reasons previously discussed, the trial court's evidentiary rulings did not constitute the "wholesale exclusion" of a "body of potentially exculpatory evidence." Nor can we say that the court's rulings "significantly undermine[d] fundamental elements of [Appellant's] defense." *U.S. v. Scheffer*, 523 U.S. 303, 315 (1998). To the contrary, numerous witnesses testified in a manner that either directly or indirectly challenged the victim's veracity. In further support of his argument, Appellant cites *Yates v. Commonwealth*, 430 S.W.3d 883 (Ky. 2014). In that case, we held in part that whether child rape complainant had denied the alleged sexual assault to anyone while in treatment was an appropriate question during her cross-examination. As such, we determined that the trial court abused its discretion in foreclosing the admission of this evidence and, therefore, reversed the judgment and remanded for further proceedings. *Id.* at 902. Unlike the present case however, we observed in *Yates* that "it appears that the trial court waived or pierced the privilege under the auspices of *Commonwealth v. Barroso,* 122 S.W.3d 554, 563 (Ky. 2003), by turning the records over to the defense." *Id.* at 900. We further stated that:

> [a]fter the *in camera* review of the records, the trial court indicated that several exculpatory statements had been found and offered to make those parts of the records available to the defense.
> ....
> But by finding that the material was exculpatory and making it available to the defense, the trial court had already decided that

> the Appellant's due-process right to make a defense trumped the privilege under *Barroso*.
>
> *Id.*

It is unclear how the counseling records in the present case were made available to the defense. However, it is clear that the trial court was not asked to weigh the victim's privilege against Appellant's rights under the auspices *Barroso*. It also appears that the trial court never actually reviewed the counseling records at all. In further contrast to *Yates*, Appellant in the present case called numerous witnesses who testified in a manner that advanced Appellant's theory of the case, i.e. that Donna was lying. Therefore, there was no due process violation here, and certainly no palpable error requiring reversal of Appellant's conviction.

Finally, on the issue of confrontation, we have previously observed that "the Confrontation Clause is only implicated if the excluded cross-examination concerns a matter giving the witness reason to testify falsely during the trial at hand, *e.g.*, when the witness bears some animus toward, or is biased against, the defendant." *Beaty v. Commonwealth,* 125 S.W.3d 196, 206 (Ky. 2003) (citing *Caudill v. Commonwealth,* 777 S.W.2d 924, 925 (Ky. 1989)) (witness had divorce pending against defendant); *Barrett v. Commonwealth,* 608 S.W.2d 374, 376 (Ky. 1980) (history of hostility between witness's family and defendant's family and friends). Appellant has failed to indicate that either the victim, Donna, or her father, Ricky, harbored any animus towards the Appellant that

would implicate the Sixth Amendment. Therefore, there was no error here, and certainly no palpable error.

Rape Shield Evidence

For his second argument, Appellant contends that the trial court erred when it denied defense counsel the opportunity to cross-examine Donna about prior sexual experiences pursuant to KRE 412. That rule is commonly referred to as a "rape shield" rule and states in pertinent part:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> > (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> >
> > (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions:
>
> > (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
> >
> > > (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> > >
> > > (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> > >
> > > (C) any other evidence directly pertaining to the offense charged.

The excluded evidence at issue here included one instance where Donna observed a 15-year-old boy rub his penis on the back of Donna's female cousin.

Additional evidence indicated that Donna's cousin and the boy were clothed at that time of the incident. Second, the court also excluded evidence of an instance where Donna was staying overnight at her grandmother's house. She testified that an unidentified boy entered her bedroom, took her to another bedroom, and then put his penis between her legs. She began screaming and the boy released her.

On appeal, Appellant argues that defense counsel should have been permitted to introduce this evidence under one of two theories: 1) that it was evidence of specific instances of sexual behavior by Donna offered to prove that a person other than Appellant was the source of her emotional injury; or 2) Donna's prior sexual encounters could have explained her advanced sexual knowledge. On this latter claim, Appellant specifically cites that Donna used the words penis and vagina when describing the sexual encounters with Appellant. Unlike Appellant's argument on appeal, however, defense counsel's motion before the trial court only discussed the "any other evidence" exception articulated under KRE 412(b)(1)(C).

In any event, Appellant's unpreserved argument under KRE 412(b)(1)(A) describing specific instances of sexual conduct is unpersuasive. Appellant has not cited any Kentucky authority permitting the introduction of specific acts evidence under KRE 412 for purposes of proving an emotional injury that resulted from a victim's prior instances of sexual encounters. Rather, KRE 412(b)(1)(A) "has been used to justify a use of evidence showing that someone other than the accused was the source of some *physical* condition alleged to

have been suffered by the alleged victim, such as pregnancy, sexually transmitted diseases, or damage to the hymen." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.35.50[3][c], at 174 (5th ed., 2013) (citations omitted). Therefore, this exception to KRE 412 does not include evidence of emotional injury suffered as a result of prior alleged instances of sexual abuse or sexual observations such as those described by Donna in her avowal testimony. Moreover, none of these instances constitute evidence of "sexual behavior *by* the alleged victim . . . ." KRE 412(b)(1)(A) (emphasis added). Therefore, this evidence is not admissible under KRE 412(b)(1)(A).

We will now address Appellant's remaining preserved argument—that the contested evidence should have been admitted under KRE 412(b)(1)(C). As previously stated, that exception permitted introduction of "any other evidence directly pertaining to the offense charged." This exception is commonly referred to as the residual exception. Professor Lawson summarizes this exception as follows:

> (1) it must be used sparingly and carefully"[]; (2) the offered evidence must *directly* relate to the charged offense and be grounded in more than conjecture and speculation; and (3) the court decisions will be reviewed for abuse of discretion. Lawson, § 2.35[3][d] at 179 (emphasis added and citations omitted).

The evidence at issue here does not directly relate to the charged offenses. Rather, the evidence presented during Donna's avowal testimony indicated a remote instance where Donna observed prurient behavior between her cousin and a young boy (while both were clothed), and one instance where Donna

endured what appears to be most aptly described as an attempted rape by an unidentified boy.

Appellant's primary claim here is that Donna, who was nine-years-old when the sexual crimes at issue in the present case occurred, had obtained an advanced understanding of sexual anatomy and practices that was well-beyond her years. However, Appellant does not point to any specific statements that Donna provided to investigating officers or to any other individual, wherein the then nine-year-old Donna discussed sexual matters in a manner that could reasonably be considered suspiciously uncharacteristic of her age. In fact, it appears that Appellant takes issue with Donna's trial testimony. She was thirteen-years-old at the time. Yet again, Appellant fails to cite any specific testimony provided by Donna that was suspiciously uncharacteristic of a girl her age.

In support of his argument, Appellant cites *Barnett v. Commonwealth*, 828 S.W.2d 361, 363 (Ky. 1992). In that case, the Court held that the defendant's evidence was admissible under the residual exception to KRE 412 and specifically stated that "in the case of a female child who is presumed not to be sexually active, and with whom any sexual contact is prohibited, a medical finding of frequent sexual activity establishes the relevance of evidence that the perpetrator is one other than the person charged." *Id.* at 363. The Court also noted that the victim in *Barnett* experienced "chronic sexual contact." In addition, the evidence included "several handwritten notes by the victim and her brother which suggested the existence of a sexual relationship

between them, and statements by the victim identifying her brother as one with whom she had sexual contact . . . ." *Id.* at 362. Unlike *Barnett*, there is no evidence of "chronic sexual contact" in the present case.

At trial, the Appellant also relied on an unpublished decision supporting the proposition that "[i]n general, courts have allowed evidence of other sexual experiences of the victim when the child is younger than thirteen years of age." *Giancola v. Commonwealth*, No. 2005-SC-000869-MR, 2007 WL 1159628, at *6 (Ky. April 19, 2007) (citations omitted). However, we ultimately determined in that case that the thirteen-year-old victim "was not so young that a jury would assume she could not have had any knowledge of sexual matters unless the allegations against appellant were true." *Id.* Therefore, we affirmed the trial court's determination that evidence of the victim's prior sexual experiences was inadmissible under KRE 412. Unlike the victim in *Giancola,* Donna was nine-years-old when the crimes at issue occurred. Like in *Giancola,* however, "we think the jury was unlikely to draw the inference" that Donna's knowledge of sexual terms and actions was a direct result of the sexual conduct committed by Appellant. *Id.*

In addition, Appellant fails to indicate how Donna's prior sexual experiences caused her to be able to discuss the type of pills that Appellant used to ameliorate his erectile dysfunction. It is likely that the jury determined that her testimony on this matter was particularly damaging to Appellant's defense. In sum, we cannot say that the trial court abused its discretion in

denying Appellant's motion to admit evidence of past sexual incidents under KRE 412.

Juror Selection

For his final argument, Appellant asserts that the trial court erred by excusing potential Juror R for cause, and also by failing to excuse potential Juror H for cause. Both objections are properly preserved.

Juror R informed the court that he worked with Appellant's brother and indicated that it would be difficult to be impartial. Therefore, the court clearly did not abuse its discretion in striking Juror R for cause.

Juror H approached the bench and informed the court and counsel that his nieces were raped by his oldest niece's husband, but that they did not take him to court because of death threats that the rapist made. After extensive questioning, he responded that he "did not believe" that his decision would be impacted but also noted that he was "just human." Appellant argues that this is an indication of equivocation. We disagree.

This was a decision that is similar to an issue we recently addressed in the unpublished case of *Gurley v. Commonwealth*, No. 2014–SC–000378–MR, 2016 WL 672817 (Feb. 18, 2016).

In that DUI case, a potential juror informed the court that her sister was killed in a DUI accident more than thirty years ago. *Id.* at *4. Defense counsel moved to strike the juror for cause, which was denied by the trial court, thus necessitating counsel to exercise a peremptory strike. On appeal, we relied upon our decision in *Little v. Commonwealth,* 422 S.W.3d 238 (Ky. 2013), and

determined that "[t]he totality of responses by Juror 920513 points in only one direction: she would fairly apply the law as presented to her." *Id.* at *4. Like our decision in *Gurley*, the trial court in the present case did not abuse its discretion.

Conclusion

For the foregoing reasons, we hereby affirm the judgment of the Powell Circuit Court.

All Sitting. Minton, C.J.; Cunningham, and Wright, JJ., concur. Keller, J., concurs in result only by separate opinion in which Hughes and Noble, JJ., join. Venters, J., dissents by separate opinion.

KELLER, J., CONCURRING IN RESULT ONLY: I concur with the majority; however, I write separately because I believe that the majority has disposed of evidentiary issues regarding the testimony of Ricky and Donna based on a privilege that no one has ever asserted. Having reviewed the record, I do not believe it is necessary to discuss whether the comprehensive care records were privileged and that doing so further muddies already murky waters. Nonetheless, I believe the majority came to the correct conclusion with regard to the contested evidentiary rulings. I address issues regarding Ricky's and Donna's testimony separately below.

When cross-examining Ricky, counsel for Vires asked Ricky if Donna had ever lied in order to avoid responsibility. The Commonwealth objected and, following a bench conference, the court ruled that Vires's counsel could ask Ricky about Donna's reputation for truthfulness but not about specific

incidents. Vires's counsel then asked Ricky if he had formed an opinion about Donna's reputation for truthfulness, and he stated that he believes Donna is truthful.

Vires's counsel then asked Ricky if he had told a counselor at comprehensive care that Donna had a problem "stretching the truth." The Commonwealth again objected, and Vires's counsel argued that she was simply questioning Ricky about a prior inconsistent statement that was reflected in certified records from comprehensive care. The court stated that Vires's counsel could not cross-examine Ricky based on a statement in the comprehensive care records because the records had not been admitted into evidence and were not admissible. Vires's counsel stated that she was not trying to admit the records, but that she was simply trying to examine Ricky based on a statement in those records. The court then advised Vires's counsel that, if she was going to examine a witness based on a prior inconsistent statement, she first had to lay a foundation before asking the witness about the statement's contents. However, based on the court's finding that Vires could only examine Ricky using a statement contained in an admissible document, Vires's counsel did not question Ricky about the statement in the comprehensive care records.

On appeal, Vires argues that the trial court's ruling with regard to the cross-examination of Ricky violated Kentucky Rules of Evidence (KRE) 608, 613, and 801A. The Commonwealth argues to the contrary. I note that neither

party argues or even mentions anything about privilege, the basis the majority uses to affirm the trial court.

KRE 608 provides that a witness's credibility may be attacked "by evidence in the form of opinion or reputation" regarding truthfulness. Vires's counsel asked Ricky whether he had an opinion about Donna's reputation for truthfulness, and he responded that he believes she is truthful. Therefore, there was no violation of KRE 608.

KRE 613 provides in pertinent part that a witness may be asked about a prior statement; however, before evidence regarding any such statement can be offered the witness must "be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it." Vires's counsel argued that Ricky's statement to the comprehensive care counselor was a prior statement inconsistent with his trial testimony. That may or may not be true; however, Vires's counsel did not lay the proper foundation to question Ricky about that statement. Before questioning Ricky about the contents of the statement, Vires's counsel was required to ask him if he remembered making the statement, the circumstances under which the statement was made, and to then give him a chance to explain the statement. Vires's counsel did none of these; thus, the

trial court properly prohibited Vires from questioning Ricky about his statement in the comprehensive care records, albeit for different reasons.[2]

KRE 801A provides that a prior statement is not excluded by the hearsay rule under certain circumstances. Notably, one of those circumstances is the laying of a foundation under KRE 613. As noted above, Vires did not lay a proper foundation under KRE 613; therefore, KRE 801A is not applicable. Based on the preceding, and not due to any alleged privilege, I discern no error in the trial court's ultimate conclusion regarding Ricky's testimony.

While cross-examining Donna, Vires's counsel moved to admit the comprehensive care records into evidence. The Commonwealth objected and another bench conference ensued. Counsel for Vires explained to the court that she wanted to admit the records because they contained several entries indicating that Donna admitted that she sometimes lied to keep from getting into trouble. The court held that the records were not admissible because they were not relevant, and the person who generated the entries was not available to testify.

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[2] We note that, on cross-examination, Donna testified that she told her best friend about the abuse, but denied doing so in order to get the friend to like her more. Vires's counsel then asked Donna if she had told the woman investigating the abuse allegations about talking to the friend. Donna said that she did not remember doing so. Vires's counsel then properly laid a foundation to question Donna about an inconsistent statement she had made to that investigator and gave Donna the transcript to review. After reviewing the transcript, Donna admitted to making the prior inconsistent statement. Therefore, it is evident that Vires's counsel knew how to lay a proper foundation when questioning a witness about a prior inconsistent statement.

Vires correctly argues that Donna's credibility was the key issue because her testimony was the only evidence of abuse. According to Vires, the trial court's refusal to permit introduction of the comprehensive care records impeded his ability to mount his defense, violating his constitutional right to do so. There are two problems with Vires's argument. First, the records he sought to introduce were, with the possible exception of one or two entries, irrelevant. They dealt with counseling that Donna was undergoing regarding her relationship with her father. They had nothing to do with the charges against Vires and do not even mention the incidents at issue.

Second, the trial court's ruling did not foreclose Vires's ability to attack Donna's credibility. Ricky testified that he told the investigating officer that he was unsure if Donna's accusations were true, testimony the officer confirmed. Vires ably pointed out inconsistencies between Donna's testimony and her statement to an investigator, and he presented evidence from Donna's cousin and her school bus driver that Donna was not truthful. Therefore, any exclusion of the comprehensive care records was harmless.

In conclusion, like the majority, I would affirm the trial court regarding the evidentiary issues raised by Vires on appeal. However, I would do so based on what the parties asserted and argued rather than on an analysis of a privilege that was never asserted or argued.

Hughes and Noble, JJ., join.

VENTERS, J., DISSENTING: I respectfully dissent. The trial court improperly curtailed Appellant's cross-examination of Ricky with respect to his prior inconsistent statements about Donna's lack of credibility. The trial court also improperly curtailed Appellant's cross-examination of Donna about her own previous admissions that she frequently lied. These errors cannot be dismissed as harmless so the conviction should be reversed.

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