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Supreme Court of Kentucky

2016-SC-000099-DG

AUSLANDER PROPERTIES, LLC — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2014-CA-000022
NELSON CIRCUIT COURT NO. 10-CI-00688

JOSEPH HERMAN NALLEY; MARY NALLEY; STEPHANIE NALLEY; JEWISH HOSPITAL; ST. MARY'S HEALTHCARE INC., D/B/A FRAZIER REHAB INSTITUTE; AND UNIVERSITY MEDICAL CENTER, INC., D/B/A UNIVERSITY OF LOUISVILLE HOSPITAL — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Auslander Properties, LLC (the LLC), appeals from a Court of Appeals' decision affirming a judgment of the Nelson Circuit Court in favor of Appellee, Joseph Herman Nalley (Nalley).[1] Nalley was awarded compensatory damages for serious personal injuries he sustained while working on a roof at property owned by the LLC. Consistent with the rulings of the trial court, the Court of Appeals determined that the LLC was an "employer" and was, therefore, subject to certain employee safety regulations promulgated pursuant

[1] Stephanie Nalley; Mary Nalley; University Medical Center, Inc. D/B/A University of Louisville Hospital; Jewish Hospital; and St. Mary's Healthcare, Inc. D/B/A Frazier Rehab Institute are also appellees.

to KRS Chapter 338, the Kentucky Occupational Safety and Health Act (KOSHA), and the federal Occupational Safety and Health Act (OSHA); and that the LLC had violated duties owed to Nalley under KOSHA. Upon discretionary review, for reasons stated below, we reverse the Court of Appeals and remand the case to the Nelson Circuit Court for dismissal of Nalley's claim.

I. FACTUAL AND PROCEDURAL BACKGROUND.

At the time of Nalley's injury, the LLC owned three residential properties and a two-tenant commercial building in Bardstown, Kentucky, and one residential property in Louisville. Steve Auslander (Auslander), a retired dentist, and his wife were the sole members of the LLC and they had no employees. Auslander managed the business, performing the ordinary tasks of a landlord such as keeping the books, collecting rent, paying bills, communicating with tenants, and negotiating leases. He performed some basic maintenance and repair work on the LLC's properties, and he arranged for others to perform more demanding tasks.

When one of the LLC's Bardstown tenants complained that tree limbs overhanging the building were causing a problem, Auslander contacted Nalley. Nalley was an experienced handyman who had occasionally performed maintenance and repair work for the LLC. His experience included trimming trees for other property owners, and he had done so while working from a rooftop. He had also built porches and additions on homes, including building a garage and porch on his own home. Additionally, he had painted houses working from ladders. So, Auslander hired Nalley to remove the offending branches from three trees.

After viewing the job to be done, Nalley determined that the roof of the building provided the best approach to the branches he needed to cut. He brought his own ladder and his own tools. Nalley climbed to the roof with his saw. He tied a rope to the limb he intended to cut and dropped the end of the rope to the ground. As Nalley sawed the limb, Auslander assisted by pulling the rope to guide the limb's fall. No problem was encountered with the first tree. However, while working on the second tree, Nalley stepped from the roof's solid shingled surface onto a section of decorative wooden rafters that was not designed to support his weight. Consequently, he fell eleven feet onto a concrete surface and sustained severely disabling injuries, including fractures to his spine and traumatic brain injury.

Nalley filed suit alleging the LLC was negligent in breaching the common law duties owed by a landowner to invitees on the property. He also alleged that the LLC was negligent per se because it failed to comply with KOSHA regulations requiring employers to provide safety equipment for employees working at heights above 10 feet.[2] The trial court overruled the parties' competing motions for summary judgment on the negligence per se claim. The case was ultimately submitted to the jury on both theories of liability.

With respect to the common law negligence claim, the jury answered special interrogatory instructions determining that: 1) the cosmetic nature of the exposed decorative rafters was either obvious to, or was known by, Nalley; and 2) in the exercise of ordinary care, the LLC should not have anticipated

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[2] Nalley asserted violations of KOSHA regulation 803 KAR 2:015 Section 3 and OSHA regulation 29 C.F.R. 1910.23.

that Nalley might rely upon the load-bearing capability of the decorative rafters and fall as a result thereof.

The jury also determined by special interrogatory instructions the largely uncontested material facts pertaining to Nalley's KOSHA claim. Specifically, the jury found that Nalley was working at a height of more than 10 feet when he fell; that the LLC had not provided safety equipment that would have prevented his fall; and that the lack of such equipment was a substantial factor in causing Nalley's injuries. Consistent with those findings, the trial court entered judgment for Nalley.

The Court of Appeals affirmed the trial court's conclusion that the LLC was an "employer" as defined by KOSHA, and was, therefore, subject to KOSHA regulations, and that Nalley was within the scope of persons protected by the KOSHA regulations applicable to the LLC. The Court of Appeals relied primarily upon *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), and *Pennington v. MeadWestvaco Corp.*, 238 S.W.3d 667 (Ky. App. 2007).

While the appeal was pending, this Court decided *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224 (Ky. 2015). In a footnote, the Court of Appeals factually distinguished *McCarty* from the instant case and noted that *McCarty* did not implicate KOSHA.

Nalley argued in the Court of Appeals that the LLC had not effectively preserved its argument against the applicability of the KOSHA regulations. Because that court decided and rejected the LLC's argument on the merits, it declined to address the preservation issue. On discretionary review, Nalley

reasserts his preservation argument. Since it is potentially dispositive, we address it first.

II. THE LLC PROPERLY APPEALED THE DENIAL OF SUMMARY JUDGMENT SEEKING REVERSAL OF THE TRIAL COURT JUDGMENT.

Nalley raises a number of procedural grounds upon which he contends this Court should dismiss the LLC's appeal. He notes that the LLC fails to specify whether its appeal was taken from the trial court's order denying summary judgment or the trial court's failure to grant its motion for a directed verdict. With respect to the former, Nalley argues that the order denying the LLC's motion for summary judgment is not appealable. With respect to the latter, Nalley argues that because the LLC failed to follow up its directed verdict motion with a post-trial motion for judgment notwithstanding the verdict (JNOV), the only appellate relief available is a new trial.

We are persuaded by neither of those arguments. The LLC's notice of appeal following entry of judgment in the trial court plainly shows that it appealed from the final judgment and the trial court's orders denying the LLC's motions for summary judgment and directed verdict.

In support of its claim that the LLC is improperly attempting to appeal the denial of a summary judgment motion, Nalley cites a familiar line of cases following *Gumm v. Combs*, 302 S.W.2d 616 (Ky. 1957). "An order denying a motion for summary judgment is not *appealable*. Nor is such a denial *reviewable* on an appeal from a final order or judgment where the question considered is whether or not there exists a genuine issue of a material fact."

Id. at 616-617 (internal citations omitted). *Gumm* and its progeny further explain the exception to that general rule:

> [T]here is an exception to the general rule found in [*Gumm*] and subsequently approved in *Loy v. Whitney*[3] and *Beatty v. Root*[4]. The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom. Then, and only then, is the motion for summary judgment properly reviewable on appeal under *Gumm*.

Transportation Cabinet, Bureau of Highways v. Leneave, 751 S.W.2d 36, 37 (Ky. App. 1988); *see also Abbott v. Chesley*, 413 S.W.3d 589, 602 (Ky. 2013).

The four elements comprising the exception are clearly met here. First, the facts material to Nalley's negligence per se claim are not in genuine dispute and, although they were submitted to the jury, the findings were never in doubt. Nalley was working more than 10 feet off the ground and he was not provided safety equipment to prevent his fall. Second, Nalley's status as an employee or an independent contractor was clearly a matter of law. The LLC's only basis for summary judgment was that the KOSHA regulations pertaining to employees working from heights did not apply because the LLC was not an "employer" and Nalley was an independent contractor. Third, the trial court denied the LLC's motion. And fourth, the LLC appealed from a final judgment.

A fair synthesis of the *Gumm* rule provides that when the material facts were not genuinely disputed and summary judgment was denied purely as a matter of law, an order denying summary judgment is properly reviewable on

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[3] 339 S.W.2d 164 (Ky. 1960).

[4] 415 S.W.2d 384 (Ky. 1967).

an appeal from an adverse final judgment, the same as any other interlocutory ruling by the trial court on a question of law. 302 S.W.2d at 617. Thus, we conclude that the denial of the summary judgment motion was a proper basis for the LLC's appeal.

Nalley also contends that the LLC cannot seek appellate relief from the trial court's failure to grant its motion for a directed verdict because the LLC failed to state grounds for the motion with sufficient specificity to present the issue to the trial court. Upon review of the record, we are satisfied that the LLC's motion for directed verdict was plainly understood to be based, among other things, upon the same rationale as its motion for summary judgment. The trial court was fully apprised of the issue being raised.

Next, citing *Eades v. Stephens*[5] and *Flynn v. Songer*,[6] Nalley asserts that by failing to move for judgment notwithstanding the verdict (JNOV) under CR 50.02, the LLC waived its right to any appellate relief other than a retrial. We do not disagree with the principle for which those cases are cited but they are not applicable here. The limiting principle described in *Eades* and *Songer* does not constrain the appellate court to ordering a retrial when other procedural avenues properly before it authorize more complete relief, such as dismissal of the underlying claim.

Like its earlier motion for summary judgment, the LLC's motion for a directed verdict, with respect to the negligence per se claim, was not based upon disputed evidentiary issues to be resolved by the jury. It, too, was purely

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[5] 302 S.W.2d 117, 120 (Ky. 1957).

[6] 399 S.W.2d 491, 493 (Ky. 1966).

based upon an argument of law pertaining to the applicability of KOSHA regulations with which the LLC admittedly did not comply. If the LLC was entitled to the dismissal of Nalley's negligence per se claim due to the inapplicability of the KOSHA regulations, it is not subsequently deprived of that remedy because it failed to move for JNOV. The LLC's summary judgment motion arguing for dismissal based upon a matter of law rather than the non-existence of disputed material facts properly preserved the right on appeal to demand dismissal of the negligence per se claim. A motion for judgment notwithstanding the verdict was not necessary for the preservation of a remedy otherwise available through another issue on appeal. *See Gumm*, 302 S.W.2d 616.

Nalley raises other procedural points as grounds for dismissing the LLC's appeal, including the LLC's failure to secure an express ruling of the trial court denying its directed verdict motion and presenting arguments for reversal on appeal not pressed at an earlier stage in the litigation. We need not address the intricacies of these procedural arguments. It is clear that the LLC preserved its right to appeal the trial court's application of KOSHA regulations and its judgment of liability based thereon.

III. AUSLANDER PROPERTIES, LLC IS ENTITLED TO DISMISSAL OF THE NEGLIGENCE PER SE CLAIM.

KOSHA was enacted for the purpose of "preventing any detriment to the safety and health of all employees, both public and private, covered by this chapter, arising out of exposure to harmful conditions and practices at places of work." KRS 338.011. KRS 338.031(1)(a) imposes a duty on "each employer" to furnish "his employees with employment and a place of employment which

are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Subsection (b) of that statute requires employers to "comply with occupational safety and health standards promulgated under this chapter." The same duties are imposed verbatim under OSHA, 29 U.S.C. Section 654(a). As defined by KRS 338.015(1), "employer" means "any entity for whom a person is employed."

The LLC asserts that the Court of Appeals' opinion must be reversed because, having no employees, Auslander Properties, LLC could not be an "employer" as defined by KRS 338.015(1). The LLC further asserts that even if it is an "employer" generally subject to KOSHA, it is subject only to the specific regulations applicable to its function as a landlord and property owner, which does not include the regulations cited by Nalley for the protection of independent contractors working on rooftops or other high places. All grounds for reversal cited by the LLC involve matters of law which we review de novo. *Penix v. Delong*, 473 S.W.3d 609, 612 (Ky. 2015).

Nalley acknowledged at trial that he was an independent contractor rather than an employee of the LLC, and the relevant facts in the record all confirm that point. He argues, as the trial court concluded, that the LLC was an employer for KOSHA purposes because Auslander was an "employee" personally performing the work needed to conduct the LLC's property rental business.

We do not accept Nalley's characterization of Auslander's status. Nothing in the record suggests that Auslander was an employee of his own LLC. The employer-employee relationship is a familiar and well-established

species of agency relationship. It carries with it a wide range of specific legal obligations applicable in circumstances far beyond the KOSHA regulations now before us. We decline to stretch the traditional conception of that relationship so that Auslander may be deemed an employee of the LLC. A member of an LLC conducting business and performing work as an agent of the LLC does not automatically become an employee of the LLC.[7]

This determination alone does not resolve the issue before the Court. We allow that circumstances could arise in which an LLC with no employees is, nevertheless, bound to comply with certain KOSHA regulations inherently applicable to the core function of the LLC's business. We make no attempt to define those circumstances, but we remain open to the possibility that they exist.

Correspondingly, Nalley's status as an independent contractor rather than an employee of the LLC does not automatically defeat his claim. We recognized in *Hargis v. Baize* that an employer subject to KOSHA regulations for the protection of its own employees is also bound to comply with the same regulations for the benefit of an independent contractor performing on the employer's premises the same work as the employer's employees. 168 S.W.3d at 43. Consequently, in *Hargis*, a lumber mill operator was negligent per se for failing to provide KOSHA protections to an independent contractor performing the same job of hauling and unloading logs as its own employees. *Hargis* rests largely upon the rationale expressed by the Sixth Circuit Court of Appeals in

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[7] *See* KRS 275.135(1). We also note that a member of an LLC may elect whether to be classified as an employee for workers' compensation purposes but need not do so. KRS 342.012(1).

Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799 (6th Cir. 1984), holding that the OSHA (or KOSHA) regulations applicable to an employer's own employees are equally applicable to employees of independent contractors working on the premises doing the same kind of work. *Hargis* added that protections owed to employees of an independent contractor under *Teal* are also owed to the independent contractor himself.

In *Teal*, an employee of an independent contractor fell from a ladder at a DuPont plant. The ladder was affixed to the structure for use by DuPont employees. The *Teal* court held that the injured worker was within the class of workers that the OSHA ladder regulations were intended to protect, and that DuPont was already subject to those regulations for its employees using ladders at that workplace. *Id* at 805.

Together, *Teal* and *Hargis* make it clear that an employer's KOSHA responsibility can extend beyond its own employees to include others, such as independent contractors and their employees. The *Teal/Hargis* extension, however, is governed by a limiting rule explained in *Ellis v. Chase Communications, Inc.*, 63 F.3d 473 (6th Cir. 1995), and further addressed by this Court in *McCarty v. Covol Fuels No. 2, LLC.*

In *Ellis*, an independent contractor's employee fell to his death while painting a television tower owned by Chase Communications. Unlike the worker in *Teal*, who was entitled to the same workplace protections that DuPont already owed to its employees on that site, there was no evidence in *Ellis* that climbing the television tower for any purpose was a function ever performed by any employees of Chase Communications. 63 F.3d at 478.

The Court of Appeals addressed a similar issue in *Pennington v. MeadWestvaco Corp.*: whether the owner of a manufacturing plant was responsible for complying with specific KOSHA regulations applicable to the work of a subcontractor's employee performing renovation work at the plant. The *Pennington* court applied the analysis of *Ellis v. Chase Communications*, noting that Chase Communications "was not considered an 'employer' with respect to the tower site so as to render it subject to OSHA requirements. The particular safety violation at issue was not one for which Chase Communications would normally be responsible in the usual course of its operations." 238 S.W.3d at 671.

In *McCarty*, an employee of a commercial garage door contractor was killed while installing a heavy garage door at a building under construction at the site of a coal mine. The worker's estate brought a wrongful death action claiming that the mine operator was negligent per se because it permitted the garage door installation to proceed despite a lack of compliance with regulations generally applicable to large garage door installations and regulations pertaining to coal mine safety.

We explained in *McCarty* that it was unreasonable to expect a coal mine operator to inspect the safety habits of independent contractors installing a garage door and be otherwise knowledgeable about "the special techniques, requirements, and hazards of the various construction trades" such as commercial garage door installations. 476 S.W.3d at 232-233. Indeed, we noted that an employer's unfamiliarity with the hazards and regulations of

work activities beyond its core function was "a major reason for using specialized outside contractors instead of in-house laborers." *Id.* at 232.

We agree that when an employer sends its own employees into harm's way to perform *any* task regardless of the nature of the business, the employer must apprise itself of, and comply with, any safety regulation applicable to that task. The law requires such compliance. But when the employer engages the services of an independent contractor for a task alien to the core function of the employer's business, the employer is relying upon the special expertise and ability of the contractor to know and obey the applicable safety standards of that activity.

In *Hargis*, the independent contractor was injured at the employer's workplace, performing work that was an ordinary part of the employer's sawmill operation and was regularly performed by the employer's own workers. In contrast, the injured workers in *Ellis* and *McCarty*, respectively, were engaged in work not ordinarily associated with Chase Communications' television communications services or Covol Fuels' coal mining operation. Like the workers in *Ellis* and *McCarty*, Nalley was an independent contractor performing a specialized service not typically associated with the routine functions of the LLC's property rental business.

The Court of Appeals accepted Nalley's argument that cutting away high branches from the tops of trees was an ordinary component of the LLC's business as an owner and manager of rental property. We disagree. Certainly, some basic aspects of routine landscape maintenance fall within the core functions of managing and renting real estate, but specialized work like

climbing rooftops and ladders, or climbing into the tree itself, to cut branches requires specialized knowledge and skills beyond what is reasonably expected of an ordinary property rental business.

An employer who uses a specialized independent contractor rather than his own employees to perform those activities properly relies upon the contractor's skill and superior knowledge of the risks inherent in the work and the safety equipment and techniques required by applicable regulations for minimizing those risks. The LLC was not in the tree trimming business and it was not an employer of tree trimmers, rooftop workers, or workers using ladders for whom it must comply with KOSHA's standards designed to prevent falls from ladders and rooftops. As succinctly stated in *Pennington v. MeadWestvaco Corp.*: "If an independent contractor undertakes duties unrelated to the normal operations of an employer, the responsibility for violation of safety standards associated with those separate functions falls upon the independent contractor." 238 S.W.3d at 672 (citing *Ellis*, 63 F.3d 473).

The Court of Appeals distinguished *Pennington* based upon what it perceived as Auslander's control and supervision of the work being done by Nalley. Its characterization of Auslander's involvement in Nalley's work is not supported by the record. Auslander assisted Nalley by providing an extra set of hands to handle the detached branches, but Nalley decided how, when, and where he would cut the branches and where he would stand while doing so. Auslander did not control the manner and method of Nalley's work.

At the time of his injury, Nalley was an independent contractor rather than an employee of the LLC, and he was performing specialized work unrelated to the normal operations of the LLC's property rental business. The responsibility for complying with safety laws applicable to that specialized work was upon Nalley. Since the LLC had no duty of compliance, Nalley's negligence per se claim fails as a matter of law.

Finally, the LLC argues that the trial verdict should be reversed because of the improper admission of testimony by Nalley's expert witness. Based upon our disposition of the other issues, we need not address the merits of this argument.

IV. NALLEY WAS NOT ENTITLED TO A DIRECTED VERDICT ON HIS COMMON LAW NEGLIGENCE CLAIM.

Nalley also argues that the trial court judgment should be affirmed based upon his alternative common law negligence claim. Specifically, Nalley contends that he was entitled to a directed verdict on that claim because "undisputed testimony reveal[ed] that the condition of the roof presented an unreasonable risk of harm" and that "Auslander knew about the danger and admitted he did not at least warn of it, and [Nalley] fell as a result."

A motion for a directed verdict should be granted only if "there is a complete absence of proof on a material issue or if no disputed issue of fact exists upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18–19 (Ky. 1998). In determining whether the trial court erred in failing to grant a motion for a directed verdict, the reviewing court "must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and

reasonable intendment that the evidence can justify." *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991). "The decision of the trial court will stand unless it is determined that 'the verdict rendered is palpably or fragrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice.'" *Indiana Insurance Company v. Demetre*, 527 S.W.3d 12, 25 (Ky. 2017) (quoting *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990)). In addition, "the considerations governing a proper decision on a motion for judgment notwithstanding the verdict are exactly the same as those . . . on a motion for a directed verdict." *Cassinelli v. Begley*, 433 S.W.2d 651-52 (Ky. 1968).

With those standards in mind, we reject Nalley's characterization of the evidence and conclude that the trial court did not err in denying Nalley's motion for a directed verdict. In the context of a premises liability claim, a landowner is not liable to an independent contractor for injuries sustained from defects or dangers that the independent contractor knows or ought to know of. *Owens v. Clary*, 75 S.W.2d 536, 537 (Ky. 1934).[8] Only when "the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know," is the landowner liable for the contractor's injuries absent a warning. *Id.* at 537.

Contrary to Nalley's claim, the evidence presented at trial does not conclusively establish that the roof presented any hidden danger or an unreasonable risk of harm. Instead, the jury heard Auslander testify that,

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[8] In *Brewster v. Colgate-Palmolive Co.*, this Court reaffirmed the rule stated in *Owens* concerning the duty owed by landowners to independent contractors. 279 S.W.3d 142, 143 n.1, 144 (Ky. 2009).

although the portion of the roof at issue was not designed to be weight-bearing, he did not think he "would ever mistake that for a roof." In addition, when asked whether she believed the roof was dangerous or misleading, the LLC's expert engineer explained that "It's an arbor. It's this open area at the roof. No, I don't think that it's misleading at all. It's these two by six boards on their ends, two foot apart . . . ." She further testified that "anyone with any type of construction knowledge would hesitate to—to step on it just because it's these little one and a half inch boards up in the air out there."

This testimony cannot reasonably be construed as "undisputed testimony" that the portion of the roof at issue "presented an unreasonable risk of harm," or that Auslander knew about any hidden danger that the roof allegedly posed. Rather, at a minimum, this testimony would allow reasonable minds to differ as to whether the roof constituted a defect or hidden danger or whether Nalley ought to have known of the alleged hidden danger. Because this testimony places issues of material fact in dispute, Nalley's motion for a directed verdict was properly denied.

Similarly, this testimony provided a sufficient basis for the jury's findings that "the cosmetic (i.e. not weight-bearing) nature of the exposed roof rafters" was either known or obvious to Nalley; Auslander should not have anticipated that Nalley might rely on the load-bearing capabilities of the cosmetic rafters and fall from the roof; the work area upon which Nalley stood was in a reasonably safe condition; and Steve Auslander did not fail to exercise ordinary care for the safety of Nalley.

In sum, the LLC presented sufficient evidence at trial to create disputed issues of material fact upon which reasonable minds could differ. Likewise, the jury's special verdict findings were fully supported by that evidence. Accordingly, the trial court did not err in denying a directed verdict on Nalley's common law negligence claim.

V. THE TRIAL COURT'S INSTRUCTIONS ON NALLEY'S COMMON LAW NEGLIGENCE THEORY WERE CORRECT.

Nalley also argues that even if this Court concludes that a directed verdict was not appropriate, a new trial is nonetheless warranted because the trial court's jury instructions on the common law negligence claim were flawed. Nalley claims that the trial court's instructions misstated the law applicable to premises-liability claims between a landowner and invitee and that he is entitled to bare bones instructions instead.

Specifically, Nalley takes issue with instruction number 5. That instruction, in part, provided:

Instruction No. 5
(Negligence)

State whether you are satisfied from the evidence as follows:

A. Because of the nature of the activity and the potential for distraction, in the exercise of ordinary care Auslander Properties, LLC should have anticipated that Herman Nalley might fall from the roof during the course of his work.

B. Because of the nature of the work being performed and the potential for distraction, the work area upon which Herman Nalley stood was not in a reasonably safe condition for use by him.

Nalley argues that "the jury found that the LLC had breached its duty because it answered in the affirmative [to instruction 5A] that the nature of [Nalley's] work on the roof created the 'potential for distraction' and 'Auslander

Properties, LLC should have anticipated that Herman Nalley might fall from the roof during the course of his work." Thus, Nalley contends, the additional inquiry in 5B—asking whether the work area in question was in a reasonably safe condition—was unnecessary and only served to confuse the jury. Essentially, Nalley argues that the inquiry should have stopped after 5A, because the jury's affirmative answer to that instruction would necessarily mean a breach of duty had occurred.

"Whether a jury instruction misrepresents the applicable law is purely a question of law, which [this Court] review[s] de novo." *Maupin v. Tankersley*, 540 S.W.3d 357, 360 (Ky. 2018) (citing *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015)). While Kentucky law encourages the use of bare-bones instructions, they are not required.[9] Rather, "the question herein is whether the instructions misstated the law by failing to sufficiently advise the jury 'what it [had to] believe from the evidence in order to return a verdict in favor of the party who [had] the burden of proof.'" *Office, Inc. v. Wilkey*, 173 S.W.3d 228, 229 (Ky. 2005) (quoting *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 824 (Ky. 1992) (alterations in original)). It is within the trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of discretion." *Id.* (citing *King v. Ford Motor Co.*, 209 F.3d 886, 897 (6th Cir. 2000)).

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[9] *See CSX Transp., Inc. v. Moody*, 313 S.W.3d 72, 82 (Ky. 2010) (citing *Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky.2005); *Young v. J.B. Hunt Transportation, Inc.*, 781 S.W.2d 503, 506 (Ky.1989); *Drury v. Spalding* 812 S.W.2d 713, 718 (Ky. 1991)) (explaining that "Kentucky state courts take a 'bare bones' approach to jury instructions, . . . leaving it to counsel to assure in closing arguments that the jury understands what the instructions do and do not mean," but, "regardless of what form jury instructions take, they must state the applicable law correctly and neither confuse nor mislead the jurors.").

We think Nalley's argument misstates the law applicable to premises liability claims between landowners and invitees and that the trial court's instructions were sufficient. Nalley relies on a long line of cases in which this Court discusses the difference between duty and breach as it relates to foreseeability. The most applicable of these cases, and the one on which Nalley most heavily relies, is *Shelton v. Kentucky Easter Seals Soc,. Inc.* 413 S.W.3d 901 (2013).[10]

In *Shelton*, this Court held that, contrary to the traditional approach, the open-and-obvious nature of a hazardous condition does not eliminate a landowner's general duty of ordinary care. *Id.* at 911–12. "Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required." *Id.* at 911. It follows, we explained, that "[t]he obviousness of a condition is a 'circumstance' to be factored under the standard of care." *Id.*

Thus, despite the obvious nature of a hazardous condition, a landowner may still be liable to an invitee in certain circumstances. Notably, liability may result where the landowner "ha[d] reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious or will forget what he has discovered . . . ." *Id.* at 907.

Nalley points to this language to support his argument that the jury, by answering in the affirmative to instruction 5A, necessarily found that

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[10] Nalley also cites, as a part of this line of cases, *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015); *Dick's Sporting Goods*, Inc. v Webb, 413 S.W.3d at 891 (Ky. 2013); and *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (2010). We similarly find the trial court's instructions to be consistent with those opinions.

Auslander breached the standard of care and that a second instruction asking whether the work area was in a reasonably safe condition for use was unnecessary and confusing to the jury.

Shelton, however, did not dictate that liability will *automatically* result simply because it is foreseeable that the invitee may be harmed because a distraction would cause him to forget about the danger. Rather, the court specifically noted that "when a defendant 'should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger'"—when, for example, the invitee is likely to not discover or forget about the dangerous condition because of a distraction—"liability may be imposed on the defendant as a breach of the requisite duty to the invitee depending on the circumstances." *Id.* at 915 (quoting *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 389 (2010)). That is, liability may still be imposed in this situation "*if reasonable care is not exercised.*" *Id.*

Therefore, although the jury answered in the affirmative to instruction 5A, the jury could still conclude, based on the circumstances, that Auslander did not breach its duty owed to Nalley. Put another way, the liability inquiry could not simply end with instruction 5A; the instruction in 5B was needed.

In sum, we conclude that the jury instructions did not misstate Kentucky law, and the trial court did not abuse its discretion in failing to grant Nalley's request to substitute his own proposed jury instructions. Therefore, the trial court did not err in using its own jury instructions.

IV. CONCLUSION.

For the reasons set forth above, we reverse the opinion of the Court of Appeals and remand this case to the Nelson Circuit Court for entry of a final judgment dismissing Nalley's claim.

All sitting. All concur.

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RENDERED: SEPTEMBER 27, 2018
TO BE PUBLISHED

Supreme Court of Kentucky

2017-SC-000602-DG

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2016-CA-000709
KENTON CIRCUIT COURT NO. 14-CR-00088

TERRANCE ARMSTRONG — APPELLEE

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

REVERSING AND REMANDING

We accepted discretionary review of this criminal case to determine whether a witness's status as a parolee is admissible on cross-examination as impeachment pursuant to Kentucky Rule of Evidence (KRE) 611 despite the provision of KRE 609(b) that would render as presumptively too remote in time evidence of the more than thirty-year-old conviction upon which the witness's parole was based. We hold that even though evidence of a conviction may be prohibited to allow a general attack on the witness's credibility under KRE 609(b), evidence of the witness's lifetime parole status stemming from the conviction may still be admissible to allow a more specific attack on the witness's credibility by showing bias or motive to lie under the broader scope of

KRE 611. That said, we further hold that the trial court's error was harmless beyond a reasonable doubt, and therefore reverse the Court of Appeals and reinstate the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY.

The police responded to a call reporting an assault with injuries and found Harry Stewart lying in the road, unconscious and severely injured. Stewart was transported to a hospital where he was ultimately diagnosed with a fractured jaw, a swollen and lacerated tongue, and swelling of the face. Stewart spent about a month in a coma and remained hospitalized for several months following the incident. He is no longer able to work or care for himself.

After interviewing bystanders, police identified and arrested Terrence Armstrong for assaulting Stewart. The grand jury indicted Armstrong for second-degree assault, but the charges were later amended to first-degree assault. At trial, Armstrong admitted to the elements of assault by admitting to punching Stewart, but disputed virtually every detail leading up to the assault. The jury found Armstrong guilty of assault in the fourth-degree, a misdemeanor.

The defense put forth a self-defense theory, and Armstrong testified in his own defense that he and his two friends, all of whom were African-American, were headed to their friend Spencer's apartment when the incident began. Armstrong testified that on their walk, the friends stopped to pet a dog, but he continued to Spencer's apartment. After no one answered the door, Armstrong waited outside on the curb, listening to music. He testified that he

noticed a few men standing beside him, and one of them said "get the fuck out of here, nigger, before we stab you up." He explained that the men approached him, and that one of them had a knife. He "punched at the same time, with no pause, one hand and then the other" at the one closest to him, and the man fell to the ground. The two other men backed up, spread out, and pulled out knives. Armstrong testified that they continued to say things like "I'm going to fuck you up" and "get out of here."

The Commonwealth's key eyewitness, John Flynn, gave a different account of the events leading to the assault. Flynn testified that he grew up with Harry's brother, Richard Stewart, and that he had driven to Richard Stewart's apartment building—where Harry Stewart also lived—to go with Richard Stewart to a nearby shelter for supper. After supper, Flynn and Richard returned to the apartment building, and Harry came outside. Flynn testified that three men were talking outside of the apartment building when "a black fella and a woman" showed up. He said the man—Terrance Armstrong—then approached the three men and said, "we got a problem." Flynn testified that Richard Spencer backed up, reached into his front pocket, and said "I'll cut your fucking heart out," but that Richard did not actually pull out a knife. Flynn testified that Armstrong hit Harry in the face, causing Harry to fall to the ground, and, when Armstrong got back up, hit Harry in the face with a full pop can by throwing it at him. According to Flynn, Armstrong then hit Harry in the face again, causing him to fall to the ground, and struck Harry with at least 15

more kicks and punches. Flynn himself denied having a knife or threatening anyone with a knife during the incident.

During cross-examination of Flynn, defense counsel sought to impeach Flynn's credibility by asking him "Are you on parole for life for murdering a black man?" The Commonwealth objected and, after hearing arguments and reviewing case law, the trial court allowed the defense to ask whether Flynn was a convicted felon but held that KRE 609 disallowed any questions about the details of the crime or whether Flynn was on lifetime parole. The trial court admonished the jury regarding the defense counsel's question.

By avowal, Flynn testified that, in 1983, he and three others had robbed two black victims and stabbed one of them to death. He testified that he was sentenced to life imprisonment and was currently out on lifetime parole. He admitted that threatening someone with a knife or possessing a knife would be a violation of his parole and would likely send him back to prison.

The jury convicted Armstrong of fourth-degree assault and fixed punishment at twelve months' confinement and a $500 fine. On appeal of the resulting judgment to the Court of Appeals, Armstrong argued that the trial court erred in refusing to allow defense counsel to cross-examine Flynn about his lifetime parole status because that testimony was permissible evidence of Flynn's motive to lie about having threatened Armstrong with a knife. The Court of Appeals agreed, holding that evidence of Flynn's lifetime parole status was admissible under KRE 611, and that excluding such evidence amounted to a Confrontation Clause violation and an abuse of discretion. Accordingly, the

Court of Appeals reversed the judgment. The Commonwealth sought discretionary review, which we granted.[1]

II. ANALYSIS.

The issue before this Court is whether the trial court violated Armstrong's Sixth and Fourteenth Amendment rights when it limited the scope of his cross-examination of Flynn. Armstrong argues both that he should have been permitted to ask Flynn whether he was on lifetime parole because his parole status would have provided a motive to testify in a manner helpful to the Commonwealth, and that it would have provided a motive to lie about threatening Armstrong with a knife or possessing a knife at the time of the incident.

To determine whether Armstrong's constitutional rights have been violated, it is first necessary to give guidance on an issue that has caused some confusion in the courts below: whether a witness's lifetime parole status is admissible for impeachment purposes under KRE 611, despite evidence of the underlying crime itself being presumptively inadmissible as too remote in time under KRE 609(b).

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[1] In its brief, the Commonwealth focuses on the argument that the trial court properly excluded both evidence that Flynn was on lifetime parole and the details of the underlying crime giving rise to the parole—specifically, that Flynn had pleaded guilty to murdering an African American male in 1983. Worth noting is that the issue of whether the details of the underlying crime were admissible at trial is not before this Court because that argument was waived by Armstrong in his brief to the Court of Appeals. Further, the Court of Appeals explicitly declined to consider the issue in its opinion, from which the Commonwealth appealed. Accordingly, this Court addresses only the issue concerning the admissibility of Flynn's lifetime parole status.

a. Evidence of Flynn's lifetime parole status is admissible for impeachment purposes under KRE 611, despite KRE 609 rendering details of the underlying crime inadmissible.

KRE 611(b) defines the general scope of cross-examination. Under that rule, "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility."[2] Therefore, KRE 611(b) embodies the "wide open" rule of cross-examination, "permitting the inquiry on cross to extend to the full limits of the dispute . . . unaffected by the content of the direct testimony of the witness under cross-examination."[3]

Even without the broad scope of KRE 611, it is undisputed that the cross-examiner is allowed to discredit the witness's testimony "subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation."[4] Two important methods by which the impeaching party may discredit a witness's testimony on cross-examination are by introducing the fact that the witness has a prior felony conviction and by "revealing possible biases, prejudices, or ulterior motives of the witness as they may relate to issues . . . in the case at hand."[5]

By introducing evidence of a prior felony conviction, "the cross-examiner intends to afford the jury a basis to infer that the witness's character is such that he would be less likely than the average trustworthy citizen to be truthful

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[2] KRE 611(b).

[3] Lawson, The Kentucky Evidence Law Handbook § 3.20[2][c] (5th ed. 2013).

[4] *Davis v. Alaska*, 415 U.S. 308 (1974).

[5] *Id.*

in his testimony."[6] This type of evidence provides a general attack on the witness's credibility.[7] KRE 609 governs the use of criminal convictions to impeach the credibility of a witness. Under that rule, a criminal conviction can be used to impeach only if the crime underlying the conviction "was punishable by death or imprisonment for one . . . year or more"[8] and the conviction is not more than ten years old, unless the court determines the probative value of the conviction substantially outweighs its prejudicial effect.[9] Even still, the nature of the felony underlying the conviction cannot be disclosed unless the witness denies having been convicted.[10]

While no specific provision of the Kentucky Rules of Evidence provide for impeachment of a witness by bias, prejudice, or ulterior motives,[11] we have always recognized that impeachment is permissible on cross-examination.[12]

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[6] *Id.*

[7] *Id.*

[8] KRE 609(a).

[9] KRE 609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.").

[10] KRE 609(a) ("The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction.").

[11] There is, likewise, no specific provision in the Federal Rules of Evidence. Lawson, The Kentucky Evidence Law Handbook § 4.10[2][a] (5th ed. 2013).

[12] *See Baker v. Kammerer*, 187 S.W.3d 292, 295 (Ky. 2006) (stating that "exposing the bias of an opposing witness" is "one of the most crucial goals of cross-examination").

Exposing a witness's bias or motivation to testify is "a proper and important function of the constitutionally protected right of cross-examination."[13]

In this case, the trial court prohibited Armstrong from asking a key prosecution witness whether he was currently on lifetime parole, finding that such evidence was inadmissible under KRE 609's prohibition of evidence of criminal convictions more than ten years old.[14] While KRE 609 undoubtedly bars for impeachment purposes evidence of the underlying crime itself—in this case, a murder conviction from 1983—we have previously held that the fact that a witness's credibility may not be impeached by proof of a prior conviction does not deny the defendant the right to show potential bias of a witness that a juror might infer from the fact that the witness was on parole for that conviction.[15] As argued in this case, evidence that a witness is on parole may, in some cases, support an inference that the witness was biased. In these cases, bias may result either because the witness's parole status creates a relationship with the prosecution that motivates that witness to testify in a

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[13] *Davis*, 415 U.S. at 316.

[14] There is no suggestion in the trial record that the trial court was asked, or undertook on its own, a consideration of whether probativeness of the 1983 conviction substantially outweighed the possibility of prejudice.

[15] In *Adcock v. Commonwealth*, 702 S.W.2d 440, 441 (Ky. 1986), the trial court determined that evidence of a witness's parole status stemming from an inadmissible criminal conviction was also inadmissible for impeachment purposes, as such evidence "would accomplish indirectly what could not be accomplished directly." *Id.* But in reversing the trial court's ruling, this court explained that the fact that the witness could not be impeached by evidence of a certain crime was "not a sufficient reason to deny a defendant the right to show potential bias of a witness which a juror might infer from the fact that the witness was on parole under active supervision." *Id.*

manner favorable to the prosecution, or because it creates a penal interest in the subject matter of the testimony on the part of the witness.[16]

Put more succinctly, while evidence of a conviction may be prohibited to launch a general attack on the witness's credibility under KRE 609, evidence of the witness's parole status stemming from the conviction may still be admissible as a more specific attack on the witness's credibility by showing bias or motive to lie under the broader scope of KRE 611.

Thus, while the trial court may not have abused its discretion in excluding for impeachment purposes evidence of Flynn's 1983 murder conviction under KRE 609—as that crime was more than ten years old—it incorrectly determined that evidence of Flynn's lifetime parole status was also barred by that rule. Instead, Flynn's lifetime parole status could have been admitted as a more specific attack on his credibility—namely, to show potential bias of Flynn that a juror might infer from the fact that he was on lifetime parole. While the trial court could ultimately have barred defense counsel from asking Flynn about his lifetime parole status under its broad discretion to limit cross-examination under KRE 611, the point is that KRE 609 does not automatically bar such evidence.

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[16] *See* Lawson, The Kentucky Evidence Law Handbook § 4.10[2][a] n. 3 (5th ed. 2013) ("'There are two broad categories of bias. First, a relationship between a witness and one of the parties may be evidence of bias. The relationship may be a favorable one . . . or it may be a hostile relationship . . . . Second, a relationship between a witness and the litigation also may be evidence of bias—such as a financial interest in the case at bar, or in a related case.'") (quoting Paul C. Gianneli, Understanding Evidence 271–72 (3d ed. 2009)).

b. The trial court abused its discretion by prohibiting Armstrong from cross-examining a key witness about his motive or bias.

Armstrong alleges that the trial court abused its discretion when it prohibited him from cross-examining Flynn about his status as a lifetime parolee and the potential revocation of his parole if he were to testify that he threatened or possessed a knife at the time of the incident. Armstrong contends that this examination would allow an inference that Flynn was motivated to testify in a manner that would curry favor from the Commonwealth and an inference that Flynn was motivated to lie about threatening or possessing a knife during the incident. Armstrong argues that this prohibition violated his Sixth Amendment right to confront witnesses against him.

"An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses," and "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[17] Accordingly, the Sixth Amendment right to confrontation must be analyzed whenever the accused is prohibited from cross-examining a witness about his motive or bias.

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[17] *Davenport v. Commonwealth*, 177 S.W.3d 763, 767 (Ky. 2005). This Court has recognized that a showing of bias can be particularly important in cross-examination because, unlike other forms of impeachment "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) (quoting *Stephens v. Hall*, 294 F.3d 210, 224 (1st Cir. 2002)) (emphasis in original).

However, "the right to cross-examination is not absolute and the trial court retains the discretion to set limitations on the scope and subject."[18] "The 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."[19] Instead, 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."[20]

"Therefore, a limitation placed on the cross-examination of an adverse witness does not automatically require reversal."[21] Instead, "a reviewing court must first determine if the Confrontation Clause has been violated."[22] The Sixth Amendment "does not prevent[] a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness."[23] Rather, "[s]o long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries."[24]

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[18] *Id.* at 767–78.

[19] *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (emphasis in original).

[20] *Id.*

[21] *Davenport*, 177 S.W.3d at 768.

[22] *Id.*

[23] *Van Arsdall*, 475 U.S. at 679.

[24] *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997).

To state a violation of the Confrontation Clause, the defendant must show 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.'"[25] A defendant has satisfied this burden if "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [the defense's] counsel been permitted to pursue his proposed line of cross-examination."[26]

Reviewing courts have found this burden to be met "when the excluded evidence clearly supports an inference that the witness was biased, and when the potential for bias exceeds mere speculation."[27] A violation does not occur where the excluded evidence supports an inference of bias based on mere speculation.[28] In *Davenport v. Commonwealth*, for example, the appellant challenged the trial court's refusal to allow defense counsel to ask a prosecution witness on cross-examination about his probationary status in an adjacent county, as well as his pending misdemeanor charges in the venue county.[29] The appellant argued that the proposed line of cross-examination

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[25] *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318.

[26] *Van Arsdall*, 475 U.S. at 680.

[27] *Davenport*, 177 S.W.3d at 769.

[28] *See id.* at 771.

[29] *Id.* at 767.

would have established "the possibility that the witness may have cooperated with [police] in anticipation of leniency regarding his probation" and to "establish that an even greater potential for bias existed where [the witness] was facing two misdemeanor charges . . . at the time of trial."[30] The appellant claimed that the exclusion of that testimony violated his Sixth Amendment right to cross-examine the prosecution's witnesses.[31]

In upholding the trial court's limitation on the appellant's cross-examination, this Court explained that "[w]hile a witness's pending charges or probationary status alone may, in some cases, be a satisfactory basis upon which to infer bias, the facts in evidence here were simply insufficient to support the inference of [the witness's] bias."[32] "Other than the plain fact of [the witness's] probationary status, defense counsel offered no evidence whatsoever to support the claim that he was motivated to testify in order to curry favor with authorities."[33] Importantly, this Court noted that the witness lacked an implicit motivation to divert suspicion away from himself by cooperating with police, as no attempt was made to implicate him in the crime and he was never identified as a potential perpetrator.[34] Further, the witness's testimony was corroborated in nearly every material aspect. Therefore, this

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 771.

[33] *Id.*

[34] *Id.*

Court stated, an inference that the witness was biased based solely on his probationary status would be "purely speculative."[35]

Here, as Flynn testified on avowal, he was not only on lifetime parole at the time of the incident and trial, but he acknowledged that possessing or threatening Armstrong with a knife—a fact alleged by Armstrong and which formed a part of his self-defense theory—would result in revocation of his parole status. Further, Flynn's account of the incident was not corroborated by any other witness, as he was the Commonwealth's only witness to provide testimony about the facts leading up to the assault, and his testimony conflicted with that of the defense. Therefore, unlike the witness at issue in *Davenport*, Flynn's testimony was not only uncorroborated, but he possessed an implicit motivation to provide testimony that he was not an aggressor during the incident.

Accordingly, our determination is that Armstrong met the burden for stating a Confrontation Clause violation. Flynn's avowal testimony would not merely provide a speculative inference that he was motivated to testify to curry favor from the Commonwealth. Instead, the jury could have reasonably inferred from the avowal testimony that Flynn was motivated to avoid revocation of his parole status, and a return to prison, by providing testimony that he neither threatened Armstrong nor possessed a knife at the time of the incident. These facts would support an inference of bias that exceeds mere speculation, and

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[35] *Id.*

without them being available for the jury to consider, we cannot say that "a reasonably complete picture of the witness' veracity, bias and motivation" was developed.

"In Kentucky, the trial court's rulings concerning limits on cross-examination are reviewed for abuse of discretion."[36] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[37] Because the trial court's refusal to allow Armstrong's counsel to ask Flynn about his lifetime parole status violated Armstrong's Sixth Amendment right to confront this witness, we are persuaded that the trial court abused its discretion.

C. The trial court's error was harmless beyond a reasonable doubt.

A trial court's improper denial of the defendant's opportunity to impeach a witness for bias is subject to harmless error analysis.[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."[39] Therefore, the error is harmless beyond a reasonable doubt if there is

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[36] *Id.*

[37] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

[38] *Star v. Commonwealth*, 313 S.W.3d 30, 38 (Ky. 2010) (quoting *Van Arsdall,* 475 U.S. at 684).

[39] *Star v. Commonwealth*, 313 S.W.3d 30, 38 (Ky. 2010) (quoting *Van Arsdall,* 475 U.S. at 684).

no "reasonable possibility that exclusion of the evidence complained of might have contributed to the conviction."[40]

We are persuaded that this standard has been met. At trial, jurors heard uncontradicted testimony from Flynn that at least one of the three men involved in the incident—Richard Stewart—threatened Armstrong with a knife, said "I will cut your fucking heart out," and reached into his pocket just before Armstrong assaulted Stewart. Armstrong himself testified that not until after the assault did he believe a second knife—presumably Flynn's—was pulled out. They also heard testimony from the defendant and two other defense witnesses to the effect that Harry Stewart, Richard Stewart, and John Flynn were the initial aggressors in the incident.

Faced with this testimony, the jury rejected Armstrong's self-defense theory and found him guilty of assault in the fourth-degree. Had the trial court admitted evidence that Flynn was on lifetime parole, the jury could have inferred Flynn had a motive to lie about not threatening Armstrong with a knife and about himself, Richard Stewart, and Harry Stewart not being the initial aggressors.

Even if the jury had outright rejected Flynn's version of events based on any inferred bias, we cannot say that a reasonable possibility exists that the jury would have found either that Armstrong did not assault Harry Stewart—given that he admitted the elements of assault during his own testimony—or

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[40] *Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky. 1998) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

that he acted in self-defense. In short, we are not convinced the absence of any evidence supporting an inference that Flynn was biased contributed to the guilty verdict reached by the jury. Therefore, we find the trial court's error to be harmless beyond a reasonable doubt.

III. CONCLUSION.

Armstrong's Sixth Amendment right to confrontation was violated when his defense counsel was prohibited from asking a key prosecution witness about his parole status on cross-examination. Because we find there is not a reasonable possibility that lack of this evidence might have contributed to the jury's verdict, the error was harmless beyond a reasonable doubt. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's judgment.

All sitting. All concur.

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Supreme Court of Kentucky

2016-SC-000099-DG

AUSLANDER PROPERTIES, LLC — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2014-CA-000022
NELSON CIRCUIT COURT NO. 10-CI-00688

JOSEPH HERMAN NALLEY; MARY NALLEY; STEPHANIE NALLEY; JEWISH HOSPITAL; ST. MARY'S HEALTHCARE INC., D/B/A FRAZIER REHAB INSTITUTE; AND UNIVERSITY MEDICAL CENTER, INC., D/B/A UNIVERSITY OF LOUISVILLE HOSPITAL — APPELLEES

ORDER GRANTING PETITION FOR REHEARING AND WITHDRAWING AND REISSUING OPINION

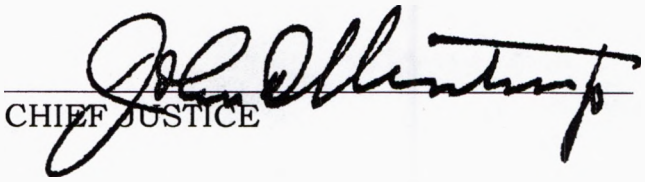
The Court, being fully and sufficiently advised, ORDERS that:

1. Appellant's Petition for Rehearing is GRANTED; and,
2. The Opinion of the Court rendered herein on June 14, 2018, is hereby withdrawn, and the attached Opinion is reissued in lieu thereof.
3. The Opinion of the Court rendered herein on June 14, 2018, incorrectly identifies Appellees Jewish Hospital, St. Mary's Healthcare, Inc. d/b/a Frazier Rehab Institute, and University Medical Center, d/b/a University of Louisville Hospital as sharing

counsel in common with the Nalleys. The new Opinion corrects the alignment of counsel.

All sitting. All concur.

ENTERED: September 27, 2018



CHIEF JUSTICE