COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2022-SC-0181-MR

ERIC ANTHONY BERRY — **APPELLANT**

v. **APPEAL FROM JEFFERSON CIRCUIT COURT**
HON. ANGELA McCORMICK BISIG, JUDGE
INDICTMENT NO. 18-CR-00276

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLANT, ERIC ANTHONY BERRY

Submitted by:

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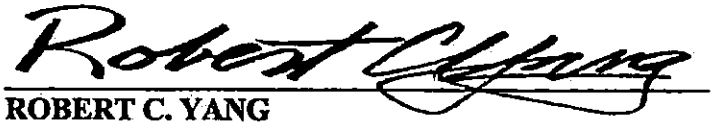
CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to; Hon. Angela McCormick Bisig, Circuit Judge, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, KY 40202; Hon. Andrew Reinhart, Commonwealth's Attorney, 514 West Liberty, Louisville, KY 40202-2887; Hon. Thomas Scott Abell, Abell Rose LLC, 108 S. Madison Avenue, Louisville, KY 40243; and to be served by state messenger mail to Hon. Daniel Jay Cameron, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 28, 2022. The record on appeal has been returned to the Clerk of this Court on this date.



ROBERT C. YANG

INTRODUCTION

Appellant, Eric Berry, was convicted of first-degree burglary, first-degree sexual abuse, two counts of third-degree assault, first-degree fleeing or evading police, two counts of fourth-degree assault, violation of EPO/DVO, resisting arrest and being a first-degree persistent felony offender. He received a total sentence of 25 years.

STATEMENT REGARDING ORAL ARGUMENT

Eric requests oral argument to answer any questions this Court may have to render a fair and just opinion in this case.

STATEMENT CONCERNING CITATION TO THE RECORD

The three-volume transcript of record will be cited as "TR" with the volume and page number directly following (e.g., TR II, 151). The court proceedings, contained on two compact discs, will be cited in conformance with CR 98(4)(a).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellant, Eric Berry ("Eric"), was convicted of: (April 2017 incident) first-degree sexual abuse; and (December 2017 incident) first-degree burglary, two counts of third-degree assault, first-degree fleeing or evading police, two counts of fourth-degree assault, violation of EPO/DVO, resisting arrest and being a first-degree persistent felony offender. He was acquitted of: (December 2017 incident) attempted first-degree sexual abuse and one count of fourth-degree assault.

Kimberly Alford ("Kim") admitted she was a convicted felon, with a substance abuse history she was not proud of. (VR: 2/9/22; 10:17). Her addiction to alcohol and cocaine led to convictions for fraudulent use of credit cards, making false statements to receive benefits, giving an officer a false name or address, receiving goods by fraud over $100, keeping or intending to use a credit card known to be lost, and criminal possession of a forged instrument. (VR: 2/9/22; 10:17-10:18, 12:46-12:47). Kim attributed those crimes to her addiction and said they predated her sobriety date of October 30, 2014. (VR: 2/9/22; 10:17).

The April 2017 incident

Kim and Eric dated each other on and off, starting in 2012, and ending in 2016. (VR: 2/9/22; 10:18-10:19). On April 6, 2017, she drove back home, either after dinner or a Bible study. (VR: 2/9/22; 10:21). As soon as she pulled into her driveway, Eric drove in behind her, making her think he had been

waiting nearby and watching her. (VR: 2/9/22; 10:22). She cracked her car window, and he stuck his hand in and pushed the button to roll the window all the way down. (VR: 2/9/22; 10:22). She did not want to deal with him, but "he would just stay on [her] until [she] would finally give in." (VR: 2/9/22; 10:23). She did not invite him in her house, but she got out of her car, and he followed her in. (VR: 2/9/22; 10:22). He told her, "he was in a bad place" and "needed to stay all night." (VR: 2/9/22; 10:22). Kim told Eric he could stay the night, but she was sleeping in her daughter's room while he could sleep in Kim's room. (VR: 2/9/22; 10:23).

Sometime during the night, Kim got up to use the bathroom and saw Eric standing in the doorway of her daughter's bedroom. (VR: 2/9/22; 10:23). Eric went back to Kim's room and Kim went back to bed. (VR: 2/9/22; 10:23). Kim testified on direct that she woke up a second time to Eric raising her shirt up and kissing her on her back. (VR: 2/9/22; 10:23). On cross, Kim admitted she made a statement to a detective that Eric raised her shirt up and started kissing on her back and left the first time he was in the room. (VR: 2/9/22; 12:11).

Eric ignored her demands to leave, got into bed with Kim, and started to lift her shirt as Kim struggled to hold her shirt down. (VR: 2/9/22; 10:23). Kim claimed he ripped her shirt and bra and bit her on her breast. (VR: 2/9/22; 10:24). Then he ripped her pants off and her underwear and "forced his hands in her [vagina] and [sexually] assaulted her with his fingers." (VR:

2/9/22; 10:24, 10:30). When he threatened her that "he would cut her head off if he ever caught her with anybody else," she "laid there and went numb." (VR: 2/9/22; 10:24). She became frightened and too scared to call the police, staying awake the rest of the night. (VR: 2/9/22; 10:24).

The next morning, Eric got up like nothing had happened, made some coffee, and left for work. (VR: 2/9/22; 10:24). Kim decided to go to work and go to downtown Louisville after work to file a complaint at the domestic violence office. (VR: 2/9/22; 10:25). Kim underwent a rape exam. (VR: 2/9/22; 10:25). She is 5'3" and Eric is about 6'1" or 6'2". (VR: 2/9/22; 10:26). He is much bigger than her and went to the gym every day. (VR: 2/9/22; 10:26). She applied for, and was granted, an emergency protective order ("EPO") where Eric was supposed to stay away from her and her house. (VR: 2/9/22; 10:27-10:28). After getting the no contact order, she decided not to proceed with criminal charges. (VR: 2/9/22; 10:31).

Det. Lisa Livers investigated the April incident. (VR: 2/10/22; 10:12, 10:15). She met with Kim, who wanted to take out an EPO and had been sexually assaulted. (VR: 2/10/22; 10:17). Det. Livers sent Kim to the Center for Women and Families for a sexual assault exam. (VR: 2/10/22; 10:18). Det. Livers confirmed that the SANE report from the exam was consistent with Kim's statement. (VR: 2/10/22; 10:19-10:20). Det. Livers confirmed Kim did not want to go forward with the case until after the December incident. (VR:

2/10/22; 10:23). Det. Livers reiterated that Kim's statement corroborated the SANE report from the sex abuse exam. (VR: 2/10/22; 10:39-10:40).

Briana Sheahan was the SANE RN who examined Kim at the Center for Women and Families on April 7, 2017, at 12:30 A.M. (VR: 2/9/22; 10:57, 11:02). Kim reported that she was assaulted by an "ex-intimate partner," who "jammed his fingers in [her vagina]." (VR: 2/10/22; 11:03).

A few weeks later, on May 21, Eric came to Kim's house, which caused her to call the police. (VR: 2/9/22; 10:33). It was early morning and Eric knocked on every door, but Kim did not answer. (VR: 2/9/22; 10:38). Eric went to a nearby gas station to call and text Kim. (VR: 2/9/22; 10:38). Kim called police and he was arrested. (VR: 2/9/22; 10:38).

Sometime after that, Eric's mom reached out to Kim, telling her that Eric had his own substance abuse issues and was "not in a good place," so Kim reached out to Eric and other mutual friends to persuade Eric to get back on track or seek help. (VR: 2/9/22; 10:40, 10:42, 11:54).

The December 2017 incident

At some point after that, Kim was introduced to Johnathan Bielefeld ("Jonathan") at church. (VR: 2/9/22; 10:44). They started dating around November 2017. (VR: 2/9/22; 10:45). After Jonathan and Kim started dating, Eric called her, asking if she was seeing someone, and she replied yes. (VR: 2/9/22; 10:46). Eric, after a moment of silence, told her she had broken his heart. (VR: 2/9/22; 10:46). Eric sent her two emails on November 28, 2017,

alluding to her new relationship. (VR: 2/9/22; 10:50-10:52); *see also* Commonwealth Exhibits 1-2.

On December 3, 2017, Kim, Jonathan, and Kim's daughter, Kahlaa, spent the day together, getting and putting up a Christmas tree. (VR: 2/9/22; 10:54). As they all fell asleep, Kim was awoken to a bunch of loud booms. (VR: 2/9/22; 10:54-10:55). Kim got up immediately, grabbed her phone, ran into Kahlaa's room, and told Kahlaa to "call 911, it's him." (VR: 2/9/22; 10:55). Kim got Kahlaa's phone and hid in Kahlaa's closet. (VR: 2/9/22; 10:55). Kim heard Eric go to her bedroom and scream, "Where's she at? Where's she at?" before he "started beating the hell out of Jonathan." (VR: 2/9/22; 10:55-10:56).

Eric came into Kahlaa's room and asked Kahlaa where Kim was. (VR: 2/9/22; 10:57). Eric looked around and left Kahlaa's room. (VR: 2/9/22; 10:57). Kim heard Eric go into her room a second time and heard scuffling, things hitting the wall, and furniture and mirrors getting knocked to the floor. (VR: 2/9/22; 10:57). Eric came back to Kahlaa's room a second time and found Kim in the closet, dragged her out by her hair, pinned her down, and began "beating the hell out of her." (VR: 2/9/22; 10:57). Kahlaa told Eric, "You promised you would never hit my mom again," and Eric "blasted [or punched Kahlaa]," and went back to punching Kim. (VR: 2/9/22; 10:58). The jury would acquit Eric of fourth-degree assault on Kahlaa. (VR: 2/11/22; 4:55). There was blood everywhere and Kim thought she was going to die from the punches. (VR: 2/9/22; 10:58). Eric then reached down and ripped off her

pajama pants and underwear. (VR: 2/9/22; 10:58). The jury would also acquit Eric of attempted first-degree sexual assault. (VR: 2/11/22; 4:53).

Kim heard police officers yell and believed Eric did too as Eric got up off her and went down the hallway. (VR: 2/9/22; 10:58-10:59). On this night, Kim "had never seen Eric like this before." (VR: 2/9/22; 11:58). She thought Eric "reeked of alcohol." (VR: 2/9/22; 11:58).

Jonathan, at the time of the incident, told someone at the hospital that Eric was intoxicated. (VR: 2/9/22; 2:53-2:54). Jonathan's testimony was like Kim's. On the night of December 3, 2017, he was asleep with Kim when he heard Kim yell, "Call the police," dogs barking, and a big, banging noise. (VR: 2/9/22; 2:35). Jonathan saw Kim run out of the room. (VR: 2/9/22; 2:36). Jonathan grabbed his phone and the light from the phone blinded him, when, suddenly, someone came into the bedroom and started punching him as he laid in the bed. (VR: 2/9/22; 2:36). Jonathan would later learn the person was Eric. (VR: 2/9/22; 2:36). After several punches, Eric left and Jonathan was wiping off the blood from his face with a t-shirt, when Eric came back. (VR: 2/9/22; 2:37). Eric then choked Jonathan with that bloody t-shirt where Jonathan almost passed out. (VR: 2/9/22; 2:37). Eric left for a moment and came back a third time, this time, biting Jonathan's ear. (VR: 2/9/22; 2:38). Eric left again and Jonathan heard Kim screaming, someone getting hit, and some commotion. (VR: 2/9/22; 2:39). Jonathan looked out the window and saw police cruisers, so he rushed out the back door to show them in. (VR: 2/9/22;

2:39). As an officer entered the rear of the house, Jonathan saw Eric approach the officer and either elbow or punch the officer to the ground. (VR: 2/9/22; 2:40). Eric went out the back door and ran around to the front of the house, headbutting another officer, which slowed him down enough that other officers tackled him to the ground and eventually arrested him. (VR: 2/9/22; 2:41).

Kahlaa, Kim's daughter, has known Eric since she was about 7 to when she was 12, at the time of the December incident. (VR: 2/9/22; 2:58-2:59). On the early morning hours of December 3, 2017, Kahlaa awoke to the sound of loud banging. (VR: 2/9/22; 3:01). Kim rushed into her room and said she needed to hide and that "you know who" was here. (VR: 2/9/22; 3:01-3:02). Kahlaa knew it was Eric and suggested Kim hide in the closet or under her covers. (VR: 2/9/22; 3:02). Kahlaa heard Jonathan being punched and screaming. (VR: 2/9/22; 3:03). Next, Eric came into her room and looked around for Kim. (VR: 2/9/22; 3:04). Eric did not find Kim, so he left the room and came back about five minutes later to look for Kim again. (VR: 2/9/22; 3:05). Kahlaa saw Eric open the closet door and find Kim, dragging her out by her hair, and repeatedly punching her. (VR: 2/9/22; 3:05). Kahlaa threw a pillow down, trying to do something. (VR: 2/9/22; 3:06). Eric stared at Kahlaa for a second, reached up, and hit Kahlaa's face once, either on her left or right cheek. (VR: 2/9/22; 3:06). Kahlaa heard, but did not see, Eric rip Kim's pants off, and heard a storm door open. (VR: 2/9/22; 3:07). Kahlaa assumed Eric

heard the police officer come in because he got up and ran to the kitchen. (VR: 2/9/22; 3:07). The prosecutor asked Kahlaa, "Did [Eric] appear, in your observation, to know what he was doing that night?" (VR: 2/9/22; :). 3:13. Kahlaa answered, "No." (VR: 2/9/22; 3:13). The prosecutor asked again, "He didn't appear to know what he was doing?" Again, she answered, "No." (VR: 2/9/22; 3:13). Kahlaa did agree Eric was at their house looking for Kim that night. (VR: 2/9/22; 3:13-3:14).

Detective James Marcum was one of the first officers on the scene that night. (VR: 2/9/22; 3:34, 3:39). He went to the back of the house and saw Jonathan, who led him to the back door. (VR: 2/9/22; 3:40). As Det. Marcum entered, he saw Eric, who approached Det. Marcum and punched him, knocking Det. Marcum down. (VR: 2/9/22; 3:41). Eric ran out the back door and Det. Marcum saw Eric try to run through Sergeant Jonathan Williams, which slowed Eric down enough that Det. Marcum was able to get Eric on the ground. (VR: 2/9/22; 3:43). Eric put his hands under his body and would not let the officers put handcuffs on him until the officers got him to comply. (VR: 2/9/22; 3:43-3:44).

Sgt. Jonathan Williams was the acting sergeant that night and was riding with Det. Marcum when they arrived at Kim's house. (VR: 2/9/22; 4:30, 4:32, 4:35). Sgt. Williams was at the front door of the house trying to kick it in because he could see Det. Marcum struggling with Eric. (VR: 2/9/22; 4:36). He could not kick in the door, so he ran toward the back of the house, where

he saw Eric run at him. (VR: 2/9/22; 4:37). As Sgt. Williams prepared to take Eric down, Eric headbutted Sgt. Williams. (VR: 2/9/22; 4:37). Two other officers were there and the three of them were able to subdue and arrest Eric. (VR: 2/9/22; 4:38).

Defense counsel unsuccessfully sought to introduce Eric's testimony at Kim's DVO/EPO hearing where he denied the April allegations as rebuttal to Det. Livers's testimony:

> **Eric:** Lies and manipulation. This has been going on. The last EPO, she came down here and made similar sexual type, uh, things. And then came into court and testified that it didn't happen, that it wasn't true. The only thing true in that statement. The whole thing she wrote was I left at 7 o'clock in the morning. She called. We already planned to meet that night. Nobody had blocked her in. I pulled into her driveway, parked where I always parked, walked up to her window. She had a car full of stuff, asked me to help carry some stuff in. I carried some stuff in. We sit on the couch. I rubbed her feet like we always do. We went to bed. If there was some big sexual assault or whatever. I'm 6'1", 220 lbs. and she talks about this struggle. How come there's no ripped panties. No mark on her. There's nothing because it didn't happen. We got up. Here's the kicker. Just like last year, like you said last March when she found out that I was dating someone else, she went crazy and did the whole EPO thing again and we were sitting there that morning. We had coffee, we ate breakfast. I said, 'You know what, I just don't really think this, this probably isn't going to work out. Maybe we should consider seeing other people." And then after that, she just went, crazy. And, you know, started cussing and yelling and this, that, and the other. And then we calm down for a second. We talk for a second. I thought everything was good and I went on to work. I went on about my business. I

> didn't, and then she calls me crying the next morning and says, 'Oh, I've done it again.' I was like, 'Done what again?' 'Uh, the sheriff will probably be there to serve you with another EPO.' So I mean, it didn't happen. It plain did not happen.

(VR: 2/10/22; 12:16, *et seq.*).

The jury found Eric guilty of first-degree burglary, first-degree sexual abuse (April incident), two counts of third-degree assault (Det. Marcum and Sgt Williams), first-degree fleeing or evading police, two counts of fourth-degree assault (Kim and Jonathan), violation of EPO/DVO, resisting arrest and being a first-degree persistent felony offender. (VR: 2/11/22; 4:52-4:56, 20:22). From the December incident, he was acquitted of attempted first-degree sexual abuse and one count of fourth-degree assault (Kahlaa). (VR: 2/11/22; 4:53, 4:55).

The jury recommended 20 years for first-degree burglary, five years for first-degree sexual abuse (April incident), two years for each of the two counts of third-degree assault (Det. Marcum and Sgt Williams), and two years for first-degree fleeing or evading police, all to run concurrently. (VR: 2/11/22; 20:19-8:22). The PFO enhanced the sentence to 25 years for first-degree burglary, 10 years for first-degree sexual abuse (April incident), 10 years for each of the two counts of third-degree assault (Det. Marcum and Sgt Williams), and 10 years for first-degree fleeing or evading police, all to run concurrently for a total of 25 years. (VR: 2/11/22; 20:23-20:25). The trial court sentenced Eric accordingly. TR III, 452-455; attached as Appendix, Tab 1.

He now appeals as a matter of right. Ky. Const. § 115.

Additional facts will be recited in the argument below as needed.

ARGUMENT

I.
The trial court erred in not dismissing this case for a speedy trial violation.

Preservation.

This issue is preserved by the defense motion to dismiss (TR II, 202-209; attached as Appendix, Tab 4) and the trial court's order denying the motion to dismiss. TR II, 213-214; attached as Appendix, Tab 2.

Facts.

Some of the key facts from the defense motion to dismiss included:

- Arrest and citation: 12/3/2017
- Indictment: 1/25/2018
- Motion for speedy trial: 4/3/2020
- Motion for speedy trial noted: 6/12/2020
- Motion for speedy trial: 6/18/2020
- Trial Date: 7/18/2020
- Multiple trial dates passed: 5/1/2021 and 8/3/2021
- Trial: 2/8/2022

TR II, 202-206.

Defense counsel reviewing the four factors under *Barker v. Wingo*, 407 U.S. 514, 530 (1972), TR II, 206-208. First, the defense motion argued there

was a presumptively prejudicial delay of over four years. TR II, 206-207. Second, the delay "is not acceptable in this case[,]" involving jail lockdowns, delays in discovery, court issues, changes in counsel and counsel scheduling. TR II, 207. Third, Eric "demanded a speedy trial at least three times during the pendency of this case." TR II, 208. Finally, for the last *Barker* factor, there was prejudice to the defendant, including "prolonged incarceration," and "the risk of impaired memories of witnesses and lost evidence." TR II, 208.

The Commonwealth argued "none of the delay in trial of this case is the fault of the Commonwealth." TR II, 213. Further, "much of the early delay was for competency evaluation issues." TR II, 213-214. "Next, the...delay throughout the year of 2020 and early 2021 [was] because of the Covid-19 pandemic." TR II, 214. Finally, "the Commonwealth argues that the Defendant waived his motion for a speedy trial by requesting a continuance for a previously scheduled trial in July of 2021." TR II, 214.

The trial court agreed with the Commonwealth that "[t]his trial date six months ago was continued specifically at the request of Defendant Berry." TR II, 214. Further, the trial court found "that while Berry had twice made a motion for a speedy trial, he cannot request dismissal when he was responsible for the continuance." TR II, 214. The trial court denied the motion to dismiss. TR II, 214.

Law and Analysis.

The Sixth Amendment to the U.S. Constitution provides an accused "...the right to a speedy and public trial...." Similarly, § 11 of the Kentucky Constitution guarantees that "[i]n all criminal prosecutions the accused...shall have a speedy public trial...."

Under federal and state law, there are four factors to evaluate when considering a violation of this speedy trial right. *Barker*, 407 U.S. at 530. They include (1) the length of the delay, (2) reasons for the delay, (3) the defendant's assertion of the right, and (4) any prejudice to the defendant as a result of the delay. *Id.* This is a case-by-case analysis; no single factor is dispositive of the issue. *Id.* at 533. Kentucky views all four *Barker* factors as relevant: "No single one of these factors is ultimately determinative by itself." *Gabow v. Commonwealth*, 34 S.W.3d 63, 70 (Ky. 2000) (*overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 60-61 (2004)). Eric argued all four factors favored dismissal. TR II, 202-209.

Further, even if the trial court is correct that Eric "cannot request dismissal when he was responsible for the continuance[,]" for hiring private counsel, the time delay of over a year from him asserting his speedy trial rights and then asking for a continuance cannot be attributed to him. TR II, 214. Eric was incarcerated from his December 3, 2017, arrest until seeking a continuance on July 28, 2021. While a portion of that delay could be

attributed to the COVID-19 pandemic, Eric was still prejudiced by such a long delay.

Accordingly, Eric suffered from the approximately 42 months he had to spend in jail. Further, the long delay diminished the memories of the witnesses in this case. Thus, based on *Barker* factors and the violation of his speedy trial rights, a reversal is appropriate. Sixth Amend., U.S. Constitution; § 11 Kentucky Constitution.

II.
The trial court erred in not severing the April incident from the December incident.

Preservation.

This issue is preserved by the defense motion to sever the April incident from the December incident. TR I, 130-135; attached as Appendix, Tab 5. The trial court denied that motion. TR II, 176-180; attached as Appendix, Tab 3.

Facts.

The trial court did not find that "a separate trial of Count Five for Sexual Abuse in the First Degree [was] warranted." TR II, 178. "The April and December incidents both involve allegations that Berry entered [Kim's] home uninvited and forcibly removed her underwear." In addition, the trial court found both incidents "involve allegations of Berry stalking [Kim]." TR

II, 178-179. Further, the trial court credited the Commonwealth's argument "that Berry threatened [Kim] during the April incident and made good on that threat during the December incident." TR II, 179. Based on the above findings, the trial court "conclude[d] there is a sufficient nexus between the alleged offenses and that they are of the same or similar character that joinder is appropriate." TR II, 179. The trial court also concluded evidence from the April incident was "relevant to show motive, intent, and modus operandi for the December incident, and is therefore admissible under KRE[1] 404(b)." TR II, 179. Lastly, the trial court concluded Eric would not "be prejudiced by the joinder of these allegations for a single trial." TR II, 179.

Law and analysis.

This Court reviews the trial court's denial of a motion to sever for abuse of discretion. *Quisenberry v. Commonwealth,* 336 S.W.3d 19, 26 (Ky. 2011). Further, the trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). The burden is on the appellant to show the denial was in fact unfairly prejudicial. *Id.*

RCr[2] 6.18 states, "Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or

[1] Kentucky Rules of Evidence.
[2] Kentucky Rules of Criminal Procedure.

both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 9.12 provides, "The court may order two (2) or more indictments, informations, complaints or uniform citations to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment, information, complaint or uniform citation. The procedure shall be the same as if the prosecution were under a single indictment, information, complaint or uniform citation." The interaction of RCr 9.12 and RCr 6.18 allows the charges brought in separate indictments to be joined for trial only when the offenses are "of the same or similar character" or are "based on the same acts or transactions connected together or constituting parts of a common scheme or plan." *Garrett v. Commonwealth*, 534 S.W.3d 217, 223 (Ky. 2017), as modified (Dec. 20, 2017).

This Court has upheld joinder where "the crimes are closely related in character, circumstance, and time." *Seay v. Commonwealth*, 609 S.W.2d 128, 131 (Ky. 1980). The joinder of separate offenses in a single trial must arise from a sufficient nexus. *Peacher v. Commonwealth*, 391 S.W.3d 821, 837 (Ky. 2013). That nexus must arise from a logical relationship, an indication the crimes occurred together, a single transaction or occurrence, or be part of a common scheme or plan. *Cherry v. Commonwealth*, 458 S.W.3d 787, 794 (Ky. 2015). The offenses must be "so strikingly similar as to meet the

requirements for admission under KRE 404(b)...." *Hammond v. Commonwealth*, 366 S.W.3d 425, 429 (Ky. 2012).

Cherry involved a defendant who committed a string of crimes over a very short period of time while on a bender. 458 S.W.3d at 789. Joinder was appropriate in *Cherry* because the defendant had a continuing course of conduct over five hours where "each poor decision inexorably [led] to the next." *Id.* at 794. This Court found there was "a clear nexus and [a] logical relationship ... between these events." *Id.* In *Murray v. Commonwealth*, this Court upheld joinder of two murders where knives stolen from one murder were used in the next murder a week later. 399 S.W.3d 398, 401, 405-407 (Ky. 2013).

This case is distinguishable from *Cherry* and *Murray*. Unlike *Cherry*, the crimes joined together were not close in time. The sex abuse allegedly occurred in April 2017, while the break-in, assaults, attempted sex abuse, fleeing/evading, etc., did not occur until December 2017. This is much longer than the five hours this Court previously deemed close in time. *Cherry*, 458 S.W.3d at 794. Further, in contrast with *Murray* where this Court upheld joinder for crimes a week apart, there was no probative physical evidence to tie each crime together to show a continuing course of conduct. *Murray*, 399 S.W.3d at 401.

The offenses also are not so strikingly similar that they meet the requirements of KRE 404(b). *Hammond*, 366 S.W.3d at 429. KRE 404(b)

outlines, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule then goes on to outline two exceptions to this rule: "(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or (2) If so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party." Neither exception applies here.

As to KRE 404(b)(1), "the two acts must show 'striking similarity' in factual details, such that 'if the act occurred, then the defendant almost certainly was the perpetrator[.]' That is, the facts underlying the prior bad act and the current offense must be 'simultaneously similar and so peculiar or distinct,' that they almost assuredly were committed by the same person." *Graves v. Commonwealth*, 384 S.W.3d 144, 149 (Ky. 2012).

For example, in the April incident, Eric followed Kim into her home. While Kim claimed he was not invited in, she did say she did give in and let him spend the night. (VR: 2/9/22; 10:23). In contrast, Eric busted the back door to gain entry during the December incident. The trial court's use of Eric entering the home "uninvited" for both incidents ignored what really happened as neither incident constituted a "signature crime." Further, Kim was alone in the April incident, no punches were thrown, and the alleged sex abuse happened in her bed. In contrast, in December, Eric dragged Kim out

of Kahlaa's closet by her hair and punched Kim repeatedly as she laid on the floor, and Kahlaa was in the room. The only commonality was ripping off the underwear, which is neither peculiar, nor distinct for sexual abuse allegations. Finally, the jury acquitted Eric of the attempted first-degree sexual abuse for the December incident. The crimes did not occur close in time, was not a single transaction or occurrence, and was not part of the same motive, intent, or modus operandi. The two incidents were not so "strikingly similar."

While the jury correctly acquitted Eric of the December allegation of attempted sexual abuse, the joinder of the April incident with the unrelated December incident prejudiced Eric so much that he was not able to have a fair trial for each incident. The evidence from the April incident was not essential to the December incident other than to paint Eric in a poor light. For example, the testimonies of Det. Livers and SANE nurse Sheahan would not have been otherwise allowed in a separate trial for the December incident.

While RCr 6.18 provides for liberal joinder of offenses, counts permitted to be joined are still subject to an analysis for prejudice. *Peacher*, 391 S.W.3d at 837. Since Eric was prejudiced by the act of being tried generally, he must now show he was "unfairly prejudiced" by the joinder. *Parker v. Commonwealth*, 291 S.W.3d 647, 656-57 (Ky. 2009).

In *Peacher*, this Court held that the abuse of two infants was not part of a "common scheme or plan," but ruled that joinder was nevertheless permissible because the commonality abuse both victims suffered made it unlikely that any prejudice ensued. 391 S.W.3d at 840. Joinder was permissible and no prejudice existed in *Parker* where the string of underlying crimes was involved in a criminal syndicate. 291 S.W.3d at 656-57. This Court found "severing the underlying crimes from the syndication charge would seem to defeat the entire purpose of the charge of criminal syndication and would not promote justice or efficiency." *Id.* On the other hand, joinder was improper and prejudicial in *Hammond* where three murders, joined into a single trial, were not related by a common scheme or plan nor were they of the same or similar character. 366 S.W.3d at 428.

Eric's case is more akin to *Hammond* where trial counsel argued against the joinder of a murder charge with two other murder charges. 366 S.W.3d at 428 (Ky. 2012). This Court held "that joinder of offenses with no more than a general similarity in character created 'a substantial likelihood that the inadmissible 'other crimes' evidence tainted the jury's belief as to each of the crimes charged.'" *Id.* at 430-431 (quoting *Rearick v. Commonwealth*, 858 S.W.2d 185 (Ky. 1993)). Further, "each additional unrelated charge took on a weight by virtue of being joined with the others whereby the whole exceeded the sum of its parts." *Id.* at 431 (quoting *Rearick*, 858 S.W.2d at 188).

As in *Hammond*, the "general similarity" in the separate charges is Eric entering the house "uninvited" and ripping off Kim's underwear. That is not enough. Allowing the joinder of the April sexual assault unduly prejudiced Eric in the eyes of the jury. If the charges had been properly severed, there is a real possibility the jury would have acquitted Eric of the April sex abuse too. Even Kim testified that she had been told that the chances of getting a conviction for the April incident would be "scarce" due to the lack of physical evidence. (VR: 2/9/22; 12:44).

The trial court abused its discretion in allowing the April incident to be tried with the December incident, which caused actual prejudice to Eric. This error denied Eric his rights to due process and a fair trial. 6th, 14th Amends, U.S. Constitution; §§ 2, 3, 7, 11, Ky. Constitution. Eric respectfully requests the same relief granted in *Hammond* – reversal for a new trial where the unrelated charges may be tried separately.

III.
Det. Livers and the SANE nurse improperly bolstered Kim's testimony.

Preservation.

This issue is unpreserved. The Appellant requests review under RCr 10.26.

Facts.

Detective Livers testified that she investigated "a case in April of 2017 involving Kimberly A[.] and Eric Berry." (VR: 2/10/22; 10:15). On April 6, Det. Livers met with the victim who "wanted to take out an EPO and she had been sexually assaulted." (VR: 2/10/22; 10:16-10-17). Det. Livers also stated the SANE exam revealed that Kim "did have, I believe, some redness, maybe some irritation around her vagina...." (VR: 2/10/22; 10:19). Next, the SANE report also noted an injury to her chest. (VR: 2/10/22; 10:19). Further, the injuries to her vagina and chest "was consistent with the statement that [Kim] gave [Det. Livers]." (VR: 2/10/22; 10:19-10:20).

After the December break-in, a prosecutor contacted Det. Livers about "another incident involving [Kim] and the offender...," and they decided to prosecute the April case. (VR: 2/10/22; 10:25).

On redirect, the prosecutor asked Det. Livers about Kim's credibility:

> **Prosecutor:** And as far as your investigation goes, as far as credibility, I think we touched on this already, the statement that you got from [Kim], and then reviewing the SANE exams, there was some corroboration there, right?
>
> **Det. Livers:** Yes, correct.

(VR: 2/10/22; 10:39-10:40).

The SANE nurse testified that there was "a struggle with an ex-intimate partner, and digital penetration sexual assault." (VR: 2/10/22; 11:03). Further, the SANE nurse confirmed a sexual assault occurred:

Prosecutor: And, this sexual assault occurred, four a.m. the previous morning?

Briana Sheahan: Correct. About 20 hrs later.

VR: 2/9/22; 11:38)

During closing, the prosecutor argued that Det. Livers's "review of the SANE exam was the findings were consistent with Kim's statement." (VR: 2/11/22; 12:49). Further, the prosecutor told the jury about the SANE nurse corroborating Kim's story, that "Again, everything in her findings, she says, 'would be consistent with [Kim's] statements.' So we have evidence that corroborates that." (VR: 2/11/22; 12:50-12:51).

Law and analysis.

It is well-settled that a witness cannot vouch for the truthfulness of another witness. *Hoff v. Commonwealth*, 394 S.W.3d 368, 376 (Ky. 2011) (*citing Stringer v. Commonwealth*, 956 S.W.2d 883, 888 (Ky. 1997) and *Bell v. Commonwealth*, 245 S.W.3d 738, 745 (Ky. 2008) (*overruled on other grounds by Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008))). "In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.'" *Alford v. Commonwealth*, 338 S.W.3d 240, 246 (Ky. 2011) (quoting *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006))).

In *Alford*, this Court found palpable error necessitating a new trial when the trial court admitted "an egregious amount of inadmissible hearsay." *Id.* at 245. First, a detective who took a statement from the alleged victim of sexual abuse corroborated the victim's statement, e.g., that he recalled the victim's statements concerning her abuse. *Id.* at 245-46. There was no hearsay exception to the detective's testimony, and it was "highly prejudicial, and unfairly bolster[ed] the credibility of the alleged victim." *Id.* at 246. In *Alford*, the victim's in-court and out-of-court statements were the only evidence linking Appellant to the evidence of sexual contact. There was also improper testimony by a doctor who examined the victim and who repeated the victim's claims regarding her alleged abuse and identified Appellant as the abuser. *Id.* at 247-48. This Court also found this testimony to be highly prejudicial and unfairly bolstered the victim's credibility. *Id.* at 248.

In this case, Det. Livers testified that Kim "had been sexually assaulted." In addition to an improper comment on the ultimate issue, Det. Livers improperly bolstered Kim's allegations of sex abuse. *Bell*, 245 S.W.3d at 743 ("When the province of the jury has been invaded, the validity of the verdict is completely undermined and such error cannot be deemed harmless."); *Hoff*, 394 S.W.3d at 376 ("this Court has repeatedly held that no expert, including a medical doctor, can vouch for the truth of the victim's out-of-court statements.") (internal citations omitted). Further, Det. Livers noted the review of the SANE exam's report "was consistent with the statement

that [Kim] gave [Det. Livers]." (VR: 2/10/22; 10:19-10:20). Similarly, the SANE nurse testified the April incident involved a "digital penetration sexual assault." (VR: 2/10/22; 11:03). She repeated the conclusion that a sexual assault occurred. (VR: 2/10/22; 11:38). Accordingly, each vouched to the truth of Kim's statements that she was sexually abused by Eric, so each of their testimony invaded the province of the jury and "was impermissible bolstering." *Hoff*, 394 S.W.3d at 376 (citing *Bell*, 245 S.W.3d at 745 n. 1).

The improper vouching is bad enough on their own, but the prosecutor reinforced these improper statements during closing. First, the prosecutor stated that Det. Livers's "review of the SANE exam was the findings were consistent with Kim's statement." (VR: 2/11/22; 12:49). Then, the prosecuted said the SANE nurse corroborated Kim's story, that "Again, everything in her findings, she says, 'would be consistent with [Kim's] statements.' So we have evidence that corroborates that." (VR: 2/11/22; 12:50-12:51). But, as noted above, even Kim thought the chances of getting a conviction was "scarce." Regardless, without this improper vouching/bolstering, there is a great chance the jury would have acquitted on the April sexual abuse charge too.

These palpable errors violated Eric's right to due process of law. 5th, 6th, and 14th Amends., U.S. Constitution; §§ 2, 11; Ky. Constitution. Reversal is required.

IV.
The trial court erred in not giving an intoxication instruction.

Preservation.

This issue is preserved by the defense request for an intoxication instruction, the argument over the instruction, and the trial court declining to give the instruction. (VR: 2/10/22; 1:24, *et seq.*); (VR: 2/11/22; 9:37, *et seq.*); Defense tendered instruction, TR III, 313-314; attached as Appendix, Tab 6.

Facts.

Defense counsel tendered an intoxication instruction for the first-degree burglary instruction. TR III, 313-314. It provided a definition of intoxication – "a disturbance of mental or physical capacities resulting from the introduction of substances into the body." TR III, 314. Further, the instruction stated, "[Y]ou shall find him NOT GUILTY if he was so intoxicated that he lacked the ability to form the necessary intent to commit the offense." TR III, 314.

The trial court believed "there is some evidence," but there was not enough evidence required for the intoxication instruction, so it did not give that instruction. (VR: 2/11/22; 9:50).

Law and analysis.

This Court reviews a trial court's decision to give or decline to give jury instructions for abuse of discretion. *Downs v. Commonwealth*, 620 S.W.3d 604, 613 (Ky. 2020). This deference to the trial court's decisions regarding instructions arises from the "complete familiarity with the factual and evidentiary subtleties of the case that are best understood by the judge overseeing the trial from the bench in the courtroom." *Id.* (quoting *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015), overruled on other grounds by *University Medical Center, Inc. v. Shwab*, 628 S.W.3d 112, 129 (Ky. 2021)). A trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 613. The substantive content of the jury instructions is reviewed *de novo*. *Hargroves v. Commonwealth*, 615 S.W.3d 1, 6 (Ky. 2021) (citing *Sargent*, 467 S.W.3d at 204). In addition, the trial court has "a duty to instruct the jury on the whole law of the case." *Daniel v. Commonwealth*, 607 S.W.3d 626, 644 (Ky. 2020).

Further, a trial court must "instruct the jury on affirmative defenses and lesser-included offenses if the evidence would permit a juror reasonably to conclude that the defense exists or that the defendant was not guilty of the charged offense but was guilty of the lesser one." *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010) (*citing Fredline v. Commonwealth*, 241 S.W.3d 793 (Ky. 2007); *Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007)).

On a claim of error in failing to give a requested jury instruction, an appellate court reviews the evidence in the light most favorable to the party requesting the instruction. *Thomas v. Commonwealth*, 170 S.W.3d 343, 347 (Ky. 2005) (*citing Ruehl v. Houchin*, 387 S.W.2d 597, 599 (Ky. 1965)).

Under KRS 501.080, as proposed by defense counsel, intoxication is a defense if it "negatives the existence of an element of the offense...."

As the trial court acknowledged, "there is some evidence" of intoxication. (VR: 2/11/22; 9:50). That evidence included Kahlaa twice telling the prosecutor that Eric did not know what he was doing that December night. (VR: 2/9/22; 3:13-3:14). That included Kim testifying that Eric "reeked of alcohol," and that she "had never seen Eric like this before." (VR: 2/9/22; 11:58). That also included Jonathan telling someone at the hospital that Eric was intoxicated that night. (VR: 2/9/22; 2:53-2:54).

The question for the trial court was, did the intoxication negate the intent to commit the offense? Once the trial court answered there was enough evidence of some intoxication, the trial court should have let the jury decide that issue. *Brafman v. Commonwealth*, 612 S.W.3d 850, 858 FN 15 (Ky. 2020) ("KRS 501.080; *id.* There must be evidence that the intoxication was so severe that the defendant did not know what she was doing, not that she was merely drunk. *King v. Commonwealth*, 513 S.W.3d 919, 923 (Ky. 2017)"). The three Commonwealth witnesses observed that Eric "reeked of alcohol," was intoxicated, and did not know what he was doing that night. That was

enough to allow the jury to decide whether Eric's intoxication "negatives" his intent. *Brafman*, 612 S.W.3d at 858 ("a trial court must be especially inclined to give instructions that go to the defendant's state of mind, such as mistake or intoxication.")

Thus, the trial court's denial of Eric's request for an intoxication instruction denied him due process of law, a fair trial, and reliable sentencing. 5th, 6th, 8th, and 14th Amends., U.S. Constitution; §§ 2, 3, 7, and 11, Ky. Constitution; RCr 9.54(1). Reversal for a new trial is required.

V.
The trial court erred in not allowing Eric's former testimony.

Preservation.

This issue is preserved by defense counsel's request to introduce this evidence, the proffered testimony, and the trial court's denial to allow the jury to hear the evidence. (VR: 2/10/22; 12:01, 12:07, 12:11, 12:16).

Facts.

Defense counsel sought to introduce Eric's sworn statement at Kim's DVO/EPO hearing as former testimony under KRE 804. (VR: 2/10/22; 12:03). This was to rebut Det. Livers's testimony that she sought to get Eric's statement in response to Kim's allegations. (VR: 2/10/22; 12:02). The trial

court ruled against defense counsel, holding that the prosecutor did not have a similar motive to cross-examine Eric and the standard of proof in a DVO/EPO hearing was not the same as a criminal case. (VR: 2/10/22; 12:11).

Law and analysis.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). An exclusion of evidence will almost invariably be declared unconstitutional when it "significantly undermine[s] fundamental elements of the defendant's defense." *United States v. Scheffer*, 523 U.S. 303, 315 (1998). In Kentucky, "[t]he Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the opportunity to present a full defense..." and that guarantee includes the right to introduce evidence that would rebut Det. Livers's testimony that she sought Eric for a statement regarding Kim's allegations. (VR: 2/10/22; 10:31). If she had, she would have learned he denied the allegations and accused Kim of once again making up the allegations. (VR: 2/10/22; 12:16).

This Court has recognized the importance of impeachment and rebuttal evidence – "[a]s the traditional truth testing devices of the adversarial process, impeachment and rebuttal are vital to a just and fair trial...." *Coulthard v. Commonwealth*, 230 S.W.3d 572, 583 (Ky. 2007). The

standard of review of a trial court's evidentiary ruling is abuse of discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

In this case, the trial court erred in excluding evidence that Eric made a statement about the April incident as rebuttal evidence that Det. Livers thoroughly investigated this case, and repeatedly sought Eric out for a statement. Such exclusion was not "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The trial court abused its discretion in preventing the jury from hearing Eric's former testimony. Eric's constitutional right to present a defense and to fundamental fairness at trial was denied. 5th, 6th, and 14th amends., U.S. Constitution; §§ 2, 11, Ky. Constitution. He requests this Court reverse and remand for a new trial.

VI.
This Court should reverse for cumulative error.

In the event this Court determines the errors detailed in the arguments above are not individually reversible, Appellant requests reversal for a new trial under cumulative error. Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010).

Respectfully submitted,

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