RENDERED: November 19, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-002734-MR

JOEY DEAN HERNDON — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 00-CR-00048

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** ** ** **

BEFORE: McANULTY AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.[1]

SCHRODER, JUDGE: A male teacher at a day care was targeted as a child abuser by an inexperienced and unqualified detective. Without any physical evidence, eyewitnesses, or corroborative evidence, the detective went so far as to manufacture evidence

[1] Senior Judge Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to ensure a conviction. The teacher was convicted of one count of first-degree sexual abuse[2] (a class D felony) and four counts of (non-sexual) third-degree criminal abuse[3] (class A misdemeanors). The felony conviction was built on a foundation of incompetent, unreliable, and even manufactured evidence, and, thus, cannot stand. The record includes a videotape of all four misdemeanor incidents, which exonerates the appellant. Therefore, we reverse and remand.

The Lighthouse day care[4] was a child day care located in Richmond, Kentucky, run by the United Apostolic Lighthouse Church. The day care was set up as a ministry of the church, and catered to underprivileged children. Reverend Anthony Portis ("Brother Portis") was the church pastor, and his wife Anatole Portis ("Sister Portis") was the director of the day care. The day care enrolled children ranging in age from infants to school-age. The day care provided childcare, including meals and activities for the children, in a Christian atmosphere. A high percentage of these children came from families who were under the supervision of social services, and unfortunately, many had prior case files for abuse and neglect.

[2] KRS 510.110.
[3] KRS 508.120.
[4] The day care at issue is referred to in the record in several ways, including "Lighthouse Child Care Center" and "Lighthouse Day Care Center". We shall refer to it as the "Lighthouse" day care.

The day care also had a van for children whose families could not provide transportation.

The Lighthouse day care was located in a building at 1417 East Main Street, in Richmond.[5] The physical layout of this building is important for an understanding of this case. The building had two stories. The first floor, where the day care was located, included a large room, an infant room, a small kitchen, and bathrooms. The children played, ate, and took naps in the large room. The day care had a videotaping system which recorded the activities in the large room, as part of the day care's normal operating procedure. There was a door to a stairway leading up to a second floor landing which had a copy machine and a storage area. There were two doors off the landing: one to Brother Portis's office and one to an apartment. The office and apartment were separate units, and the office was not accessible from the apartment. Children were not allowed to go upstairs, unless they were being taken up to the office for a conference with Brother Portis because of their misbehavior.

The Lighthouse day care was open Monday through Friday, from 6:00 a.m. to 5:30 or 6:00 p.m. There were full-time, part-time, and "drop-in" children. There were a number of

[5] In January of 1999, the Lighthouse day care moved out of the East Main Street building, to a new location at 219 Moberly Avenue, also in Richmond. The Moberly Avenue location is not relevant to this case.

caregivers, teachers, and teacher's assistants assigned to the different age groups. The daily routine included hand washing, breakfast, lunch, and snacks, activities, naptime, and playtime. Many of the children had behavior problems (including violence and foul language). Discipline was handled in several ways. There were "timeouts" and "criss-cross applesauce," which was when a teacher would sit on the floor and hold an unruly child until the child calmed down. Another form of discipline was for a misbehaving child to be taken upstairs to the office to be lectured by the church pastor, Brother Portis. The day care contacted parents about serious misbehavior and parents would sometimes be required to come to the day care for a conference about their child's behavior.

Also important for an understanding of this case, is the manner in which the accused teacher, Joey Herndon, became associated with the Lighthouse day care. Joey graduated from high school in 1986, and entered the University of Kentucky that fall, majoring in electrical engineering. After two years at UK, Joey transferred to the computer science program at Eastern Kentucky University. In the spring of 1990, Joey met Jesse Bailey on the EKU campus where Jesse was involved with the Lighthouse church's campus ministry. Joey was impressed by Jesse's knowledge of the Bible and accepted Jesse's invitation to the Lighthouse church. Thereafter, Joey, began attending the

Lighthouse church regularly, and was "born again" into the church.

Joey became very active in the church, and, in the fall of 1991, Sister Portis asked Joey to work at the Lighthouse day care. Joey was still a student at EKU and also working at Kroger's, so initially he worked at the day care part-time when his school and Kroger schedule permitted. At first, he helped Sister Portis with things such as tying shoes, serving food, and cleaning up, basically whatever Sister Portis asked him to do. Joey learned about child care from Sister Portis, and in the spring of 1992, began working full-time at the day care. In December of 1992, Joey graduated from EKU, with a teaching degree in computer science and math for the high school level. Joey considered the church to be his "life," and continued in his job at the day care. In 1994, Joey and Jesse moved into the aforementioned apartment on the second floor of the East Main Street building.

In the course of his employment at the day care, Joey performed a variety of duties, including teaching, helping with activities and meals, and driving the van, as well as administrative work, such as keeping track of attendance and the food program.[6] Joey received annual child care training (per state requirements) in subjects such as art, discipline, and

[6] The state regulated free-meal program.

guidance, and also completed a one-year correspondence course in child development. He also moved into a supervisory role. In early 1997, Sister Portis opened a branch of the Lighthouse day care in Lancaster, Kentucky. In October, 1997, Joey was certified by the state as the Richmond Lighthouse day care director. Brother Portis, as pastor of the Lighthouse Church, was Joey's supervisor.

Detective Ellen Alexander started out as an undercover narcotics officer for the Richmond Police Department. Her formal education consists of a GED. In 1994, she completed basic training at the Criminal Justice Bureau of Training and worked as a uniformed road patrol officer before becoming a detective in January, 1999, when she was placed in charge of sex abuse investigations for the Department. For detective training, she completed the "Reid Interview Interrogation School."[7] In March of 1999, she went to a sixteen-hour "child abuse school."

This case began on March 19, 1999, when Detective Alexander received a phone call from the mother of a fourteen-month-old girl, who had recently been enrolled in the Lighthouse day care. The mother was upset that the day care van had been an hour late bringing her child home on March 1. Joey Herndon

[7] The United States Supreme Court is very aware of, and critical of, this method. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

was the van driver, and had explained to the mother that no one answered when he first tried to drop off the child. He therefore took some other children home, and returned. Prior to calling Detective Alexander, the mother had complained about the matter to social services. Social services had looked into the matter, found nothing of concern, and dismissed it. The inexperienced Detective Alexander, however, took a different approach. Although there was no evidence that this child had been abused by anyone, Detective Alexander, fresh from her sixteen-hour child abuse class, concluded she had uncovered widespread sex abuse at the day care, and that Joey, the van driver, was the perpetrator.

I. THE INVESTIGATION

Detective Alexander launched an investigation which was flawed procedurally from the beginning. Instead of looking at the evidence to see if a crime was committed, she concluded sex crimes were committed and then launched an investigation seeking evidence (even fabricated evidence) to prove her conclusion, disregarding all evidence to the contrary. Day care parents quickly became aware of her investigation. Detective Alexander appeared on television and was interviewed by the local newspaper, the Richmond Register, where she urged people who had their children in the day care from 1991 (the year Joey was hired) to the present to contact her to see if their

children were sexually abused. The Lexington Herald Leader quoted Detective Alexander to say she expected more victims. There was extensive media coverage of Joey's arrest (by Detective Alexander without a warrant at the beginning of the investigation). The day care was closed. Outrage and hysteria swept through the community. Upset and angry parents and grandparents of children who had attended the day care formed a group called the "Madison County Petitioners for Child Safety." The group met to discuss the investigation, and held protests at the Madison County jail where Joey was being held, and at the courthouse. Within weeks of Joey's arrest, the group had collected thousands of signatures on a petition to keep the day care closed.[8]

Amidst the hysteria, parents and children were being interviewed for the investigation. Ultimately, approximately 300 children and their parents or guardians were interviewed. Parents were warned that their children's misbehavior, such as acting out or temper tantrums, could be a sign that they had been sexually abused by Joey. Interviews with the children sought to elicit "disclosures" that Joey had sexually abused them in some way.[9] Many of these children were very young, or had not even attended the Lighthouse day care for years.

[8] Many parents, including J.B.'s, filed civil suits.
[9] Add to the scenario, Detective Alexander's interrogation training. She was trained in the "Reid" interrogation method which is notorious for producing

The case against Joey Herndon was built entirely on interviews. The entire investigation resulted in no witnesses, no physical evidence, or corroborative evidence of sexual abuse of any child at the Lighthouse day care. Nevertheless, Detective Alexander was able to secure fifteen felony indictments for various sexual offenses involving eight boys and three girls. To say the evidence was weak requires a leap of faith that there was any evidence of sex abuse at all. It is actually alarming to this Court that an individual could be indicted, much less tried, on the facts and shenanigans in this case.

According to Detective Alexander's notes, a mother told her that her twenty-one-month-old son said "Dasha" (another child) did something inappropriate at the day care. For her affidavit for a search warrant, Detective Alexander substituted "Joey" for "Dasha." Neither Detective Alexander nor the examining doctor could understand the child's speech. The felony indictment was for "Joey."

---

false confessions. The Reid approach assumes something happened and the interview is not supposed to end until a confession or disclosure is made.

Our United States Supreme Court reviewed this interrogation method in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and was so appalled that it created the Miranda warnings which are required to be given before each interrogation of a suspect (but not witnesses). The Supreme Court described the mechanics or methodology of a "Reid" interrogation, which include: to display an air of confidence in knowing what happened and appear to only be interested in confirming certain details; dismissing and discouraging explanations to the contrary; to put the subject in a psychological state where his story is merely an elaboration of what the police purport to already know; interrogating steadily and without relent; and using trickery. Miranda, 384 U.S. at 448-455, 86 S. Ct. at 1614-1618.

Another felony indictment involved a twenty-four-month old (who had been in the day care for two months in late 1998), whose mother remembered he had said “bubby hurt” when he was 18-20 months old and recently said “mean man.” Because of the investigation, the mother now believed the child must have been referring to “Joey.” Joey was indicted. Neither Detective Alexander nor the investigating doctor could get anything out of the child.

An older child, T.G., age eight, had attended the Lighthouse day care when he was five and six. Detective Alexander was not able to get any “disclosures” out of T.G., but Cindy Maggard, a social worker working with Detective Alexander, was able to “substantiate” sexual abuse and fingered “Joey” as the perpetrator based on behavior for which T.G.’s family had been investigated for before he ever attended the Lighthouse day care. It gets better. “Joey” was indicted, and at the competency hearing, T.G. did not recognize Joey. When asked what Joey “did” he could only remember “watch us.” When pressed for something bad that Joey did, T.G. could only say “I can’t remember what granny told me. I keep forgetting.”

T.G. was not the only child told to make a disclosure. Another eight-year old, T.R., when questioned by her parents, originally denied any abuse and told them she could not even remember Joey. She had not attended the day care since she was

four years old, and had been out of the day care for four years, with no concerns. Nevertheless, Detective Alexander and Missy Jo Wilson (another social worker) still wanted to interview T.R. and amazingly got T.R. to "disclose" and Joey received another count to the felony indictment. At the June 29, 2000, competency hearing, when asked about Joey, T.R. made no statements involving sexual abuse. She was asked if anyone had told her what to say and she revealed that two ladies had come to pick her up for court, and one lady had told her what to say but she forgot. At trial, T.R. was asked about the Lighthouse day care and she did not remember going there. Nevertheless, through leading questions, the prosecutor did get T.R. to "disclose" one incident - that "Joey" had "touched" her at the Lighthouse day care. The defense asked T.R. if anyone told her to say that Joey had touched her and she readily admitted someone had, but she couldn't remember their name. No matter how hard the prosecutor tried after that, T.R. would not say that the touching "really" happened.

Another eight-year-old, E.J., had an interesting story. He had not been at the day care for several years when the investigation started, and in his first interview, did not remember Joey doing anything bad to him.[10] Subsequently, he remembered an amazing story. Joey had attempted to touch him

[10] E.J.'s grandmother had even worked at the Lighthouse day care for a time, with no concerns.

"inappropriate" but he fought Joey off and ran away. Joey's response was to start shooting at him but E.J. zig-zagged and the bullets all missed. Of course, Joey was indicted (without Detective Alexander finding any bullet holes).

S.B. was not quite five years old when the investigation started, and had attended the day care on and off. (S.B. was off for a time because her mother had inflicted a serious head injury upon her. The mother was serving time for the incident and when S.B. recovered she returned to the day care.) S.B. had expressed no concerns with the day care until interviewed by Detective Alexander who racked up two more felony indictments. However, at the competency hearing, she could not identify Joey or remember why she did not like him.

The charges on the other children included in the indictment were equally lacking in substance. To say the Commonwealth's case was weak is an understatement. The Commonwealth stipulated that no physician had ever reported any suspicion of sexual abuse as to any of the children included in the indictment, as physicians are required to do by KRS 620.030 if they suspect abuse. None of the doctors selected to examine and interview the children for the investigation and trial found any physical signs of sexual abuse. No eyewitnesses were found and there was no corroborative evidence as to any of the allegations, save one, J.B., for whom Detective Alexander

fabricated evidence, and which resulted in the one felony conviction in this case.

J.B.'s case started out no differently than the other children. He attended the Lighthouse day care from 1994, when he was 18 months old, until late May or early June of 1998, when he was five years old. He usually rode the van. His older sister attended the day care as well. The family had no concerns of sexual abuse while J.B. was attending the day care, or at any time leading up to Detective Alexander's investigation.

J.B. had not attended the Lighthouse day care for almost a year when the day care story broke in March, 1999. On March 30, 1999, Detective Alexander and social worker Cindy Maggard interviewed J.B., who was not quite six years old. During this interview, they got him to say that he was touched by Joey. The same day, Detective Alexander sought and executed a search warrant on the East Main Street building.

The search included the second floor,[11] which included the storage area, Brother Portis's office, and Joey and Jesse's apartment. Detective Alexander was present at the search. What would become significant to this case are three items she took from Brother Portis's office; a picture of a lighthouse and

[11] The day care had been located on the first floor.

birds[12] (the "eagle picture"), a wood plaque with an eagle on it (the "eagle plaque"), and a mug with a lighthouse on it. She also picked up a child's toy necklace, allegedly from the floor of the apartment.

The next day, Detective Alexander interviewed J.B. again, by herself, for the purpose of discussing the furnishings in the "apartment." Following this interview, she wrote up a Uniform Offense Report, wherein she falsely reported that J.B. could accurately describe Joey's apartment. In this U.O.R, she explained that J.B. had "advised" her that he had been in Joey's apartment, and that he identified the eagle picture and eagle plaque as having been in the apartment. Knowing full well that the eagle picture and eagle plaque were actually found in the office, she nevertheless went on in the report to verify these items were, in fact, found in Joey's apartment in the search. Thus began the lie that J.B. could accurately describe items in Joey's apartment.

This lie, that J.B. could describe items found in Joey's apartment, was fed by Detective Alexander to J.B.'s mother, as proof that J.B. must have been taken into the apartment and abused. The angry mother became one of the

[12] We will refer to the picture as it was at trial, as an eagle picture. The picture appears to be of a lighthouse, ocean, and flying birds. Detective Alexander originally called it a picture of eagles in her search warrant return. Joey's roommate, Jesse Bailey, testified that Brother Portis bought this picture from Captain D's, and that it had always hung in Brother Portis's office.

leaders of the protest group. J.B. was put in sex abuse counseling with a social worker, and was taken to a child abuse clinic, where he was interviewed and examined by Dr. Janice Kregor, both of whom were told this lie.[13] Detective Alexander also fed this misinformation to the prosecutor,[14] who relied on this bogus evidence in trying the case.

II. THE TRIAL

Due to the publicity and hysteria surrounding the case, the trial court granted a change of venue from Madison County to Clark County.[15] On the morning of trial, August 23, 2000, in chambers, the prosecutor revealed a last minute breaking discovery. The child's toy necklace, allegedly found in the apartment, previously was of no significance. However, while preparing items for trial the past week, Detective Alexander noticed what appeared to be African-American hairs in the "knot" of the necklace, which was made out of rope. Detective Alexander believed the hairs were a lead to the necklace's ownership, and decided to show it to "all the children." The second child she showed it to was J.B., who claimed it was his and told her that he might have lost it on

[13] J.B.'s examination was normal, and showed no physical evidence of sexual abuse.
[14] As evidenced by the "Commonwealth's Response to Pretrial Order" of July 14, 2000, wherein the prosecutor states that J.B. has a good recall of items located inside the defendant's apartment.
[15] The change of venue order even notes a June, 2000, Lexington Herald Leader article which reported Joey had been threatened with harm.

the playground. J.B., however, is Caucasian. The importance of finding something of J.B.'s in the apartment as possible corroborative evidence was not lost on the defense. The defense immediately moved for a continuance to have the hairs tested to see if they were, in fact, African-American hairs, which would tend to prove the necklace was not J.B.'s (exculpatory evidence). The trial court denied the continuance and the trial immediately commenced thereafter.

A well-prepared J.B., now seven, testified at trial. At this time, he had been out of the day care for over two years. With leading from the prosecutor, J.B. had a story to tell. One day at day care,[16] Joey grabbed J.B. by the shirt, dragged him upstairs into the apartment and threw him on the bed. There, he made J.B. touch his "pee-bird" and Joey touched his. Both Joey and J.B. had their clothes on all the time. When the prosecutor asked if he tried to get away, J.B. said that he tried to get away but Joey pulled a knife and "tried to get me." As to how the standoff ended, J.B. said his mother pulled up outside so Joey put the knife away.

The Commonwealth had no evidence to corroborate any of this story. Therefore, the prosecutor's strategy was to show that J.B. could describe items in the apartment as proof that he

[16] No one asked, and J.B. did not say, "when" this alleged incident happened. However, J.B. was in the day care from the time he was 18 months old, until May or June of 1998, when he was five years old, and had been out of the day care for almost a year before the investigation began.

was in the apartment, from which the jury could infer the abuse happened. The prosecutor had J.B. identify the "eagle picture"[17] and "eagle plaque,"[18] and asked where he saw them. J.B. said they were hanging over Joey's bed. The lighthouse mug[19] was added to the story as well, and J.B. identified it, and said that it was in the apartment too, although he did not know where. We know from earlier in the investigation that Detective Alexander found these three items in Brother Portis's office, not Joey's apartment. It is unknown to this Court why she ever fabricated finding these items in the apartment to back up J.B.'s story.

J.B. could not remember anything else about the apartment, except for these three exhibits, all of which came from the office. J.B. was asked if he had ever been in the office, and he denied that he was ever in there. This is not true. Teachers called as witnesses by both the Commonwealth and defense, testified that J.B. was a frequent discipline problem who had been taken up to the office to talk to Brother Portis about his behavior.[20]

[17] Commonwealth Exhibit 18.
[18] Commonwealth Exhibit 21.
[19] Commonwealth Exhibit 19.
[20] J.B. was considered by his teacher as one of the worst behaved children in her class. J.B.'s mother admitted that the day care had sent notes home to her about J.B.'s fighting, and that she had been called to come to the day care for a conference in the office as well.

After being reminded that he was wearing something around his neck when Joey dragged him upstairs, J.B. said he was wearing the rope necklace[21] and immediately volunteered that "I might have lost it up in his apartment." Reminded that when Detective Alexander first showed him the necklace a few days ago, he told her he lost it on the playground, J.B. claimed that he had told her he could have lost it in the apartment or on the playground.

On cross-examination, the defense tried to reconcile J.B.'s trial testimony with the completely different story that he had told to Dr. Janice Kregor, who had testified earlier in the trial. Dr. Kregor had interviewed J.B. and his mother in connection with the investigation on April 20, 1999. Dr. Kregor had testified that, in response to her questions about what Joey did, the story J.B. had told her was that Joey "sticks his finger in my butt," that it happened "about twice on the weekend and 45 on the days," and that one time Joey grabbed J.B.'s peter and ran away. When Dr. Kregor had asked if Joey made J.B. touch him, J.B. had said "nope." When questioned about this conflicting story, at first, J.B. said he couldn't remember seeing Dr. Kregor because that was when he was six and now he is seven. When the defense tried to refresh his memory by reading him the statements he had made to Dr. Kregor, J.B. vehemently

[21] Commonwealth Exhibit 22.

denied that he ever told Dr. Kregor those things and insisted that they never happened and that the story he told today was what really happened.

Detective Alexander assisted the prosecutor with the trial, and even sat at counsel's table for the duration of the trial. She was also the Commonwealth's star witness at trial, having opened the investigation and nursed it to trial. At trial, she attempted to mislead the jury whenever possible if it benefited her case. In J.B.'s case, she tried to bolster his testimony that he was in the apartment by manipulating the facts. She attempted to represent the three items in J.B.'s story, the eagle picture,[22] eagle plaque,[23] and lighthouse mug,[24] as having been in found in Joey's apartment. Even when the prosecutor initially had some question about the exact location where she found these items, she dispelled his concerns with statements like the office and apartment were all "one unit." Fortunately for the defense, other officers of the Richmond Police Department had videotaped the search. The defense notified Detective Alexander that they had seen the video, and were going to play the tape to the jury (and in fact did so) before she finally conceded (as the tape would show) that the

[22] Commonwealth Exhibit 18.
[23] Commonwealth Exhibit 21.
[24] Commonwealth Exhibit 19.

eagle picture,[25] eagle plaque,[26] and lighthouse mug[27] were actually recovered from Brother Portis's office, not the apartment, and that the office and apartment were separate.

Another deceit at trial by Detective Alexander involved the child's necklace which was the focus of the pretrial hearing in chambers a few days earlier.[28] At the hearing, the Commonwealth disclosed to the defense that it had just learned that the necklace was J.B.'s, although Detective Alexander first believed that hairs found in the knot of the necklace were African-American hairs (possible exculpatory evidence since J.B. is Caucasian). At trial, Detective Alexander claimed to have found the necklace on the floor of Joey's bedroom. She also testified that J.B. identified it as his and said he might have lost it on the playground. However, contrary to the representation made a few days earlier in chambers, she refused to admit that the hairs appeared African-American or that she ever believed that the hairs were African-American.

Another noteworthy attempt to mislead the jury occurred when Detective Alexander described in detail how she found a turquoise diaper bag containing children's clothing and underwear in Joey's bedroom (to suggest to the jury that Joey

[25] Commonwealth Exhibit 18.
[26] Commonwealth Exhibit 21.
[27] Commonwealth Exhibit 19.
[28] Commonwealth Exhibit 22.

must be of despicable character).[29] This "smoking gun" was dispelled by the defense when he informed Detective Alexander that he had seen the videotape of the search warrant which showed the bag was not found in Joey's bedroom. It was found in the day care's upstairs storage closet, and had been carried into Joey's bedroom by another police officer. Showing that Detective Alexander knew this all along, defense counsel had her read from the notes she was testifying from, which listed the diaper bag as having been found on the "top shelf on right at top of stairs" (the storage area).[30]

Through Detective Alexander, the Commonwealth also introduced four videotape snippets which served as the basis of four (non-sexual) misdemeanor counts. As previously noted, the Lighthouse day care had a videotaping system, which recorded the goings on in the large room, as part of the day care's normal operating procedure. In her search, Detective Alexander seized 18 of these videotapes. She watched them all, eight hours each (or about 144 hours worth). No evidence of sexual abuse was found on the tapes. However, she picked out four snippets which

[29] Detective Alexander emphasized the fact that the diaper bag was found in Joey's bedroom, even going into great detail of just where she found it. "When you walk in the bedroom, you go straight back. There's a small closet to your left. The diaper bag was in the very back, sitting beside the closet. Not inside the closet, but beside the closet."

[30] Although the Commonwealth appeared to consider this bag a very important piece of evidence, Detective Alexander testified that she was not able to find out who it belonged to. At trial, when Joey was asked if he could identify it, he simply opened the bag, and written inside was the name of Sister Portis's daughter.

showed Joey using the “criss-cross applesauce” hold on four children. The defense rewound the tapes, and showed the misbehavior which precipitated the hold. Even the trial court found there was no physical injury.[31]

Joey took the stand on his own behalf, testifying at length about the day care and himself. Most importantly, he denied ever abusing any child, sexually or otherwise. Teachers and even a former student testified on Joey’s behalf. No witness, called by either the Commonwealth or the defense, which included the teachers who actually had these children in their classes, ever saw Joey do anything sexually inappropriate with any child. No witness, including the teachers and day care workers, had any corroborative evidence that J.B. was ever in the apartment. Even Joey’s roommate Jesse Bailey’s testimony included that he never saw any children in the apartment with Joey.

The prosecutor’s closing argument reflected the weakness of his case. His only corroborative evidence (save the necklace) that J.B. had been in the apartment was exposed as a fabrication by Detective Alexander. His alleged victim, J.B., gave a contradictory story to the one he told Dr. Kregor and denied telling the first story to the doctor. Without evidence

[31] The prosecutor’s position was that the use of the hold for discipline automatically constituted fourth-degree assault, or third-degree criminal abuse.

to comment on, out of desperation, the prosecutor attacked Joey's choice of the teaching profession as proof that he was a child molester. Why else, he queried the jury, would a passing engineering student work his way down to education, other than as part of a plan to gain access to young children? The prosecutor also forgot to change his closing argument after the fabrication by Detective Alexander was exposed, mistakenly telling the jury that J.B. had given specific details of the apartment (the picture, plaque, and mug) which proved J.B. was telling the truth. The prosecutor went on to embellish J.B.'s story, dramatically asking the jury to remember how J.B. said the necklace was "torn off" in the apartment or as he was dragged up the stairs – neither of which J.B. ever said.

Still, Joey was convicted of one felony count of first-degree sexual abuse (involving J.B.) and four misdemeanor counts of third-degree criminal abuse (non-sexual). Joey was sentenced to five years on the felony count, and twelve months plus fines on each of the misdemeanor counts, to run concurrently. This appeal followed with a number of alleged errors.

III. THE APPEAL

A. Denial of Continuance to Obtain a Witness

On appeal, Joey contends the trial court erred when it refused to grant a continuance in order to obtain Brother Portis

as a witness. The defense had originally planned to call Brother Portis as a witness on Joey's behalf. However, Brother Portis had been charged in Madison County with misdemeanor facilitation charges related to Joey's charges, and, therefore, upon the advice of his attorney, would refuse to testify. Consequently, Joey requested his trial be continued until after Brother Portis's trial.

At the continuance hearing, the Commonwealth Attorney explained that the Madison County Attorney was refusing to try Brother Portis until after Joey's trial. The court did not dispute the fact that Brother Portis was an important witness for Joey, but denied the continuance because the continuance would still not require Brother Portis to testify.

Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances presented. Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991), overruled on other grounds, Lawson v. Commonwealth, Ky., 53 S.W.3d 534 (2001). We agree with the trial court that there was no reasonable solution to the Brother Portis issue. "[T]he privilege against self-incrimination may be invoked whenever a witness has a real and appreciable apprehension that the information requested could be used against him in a future criminal proceeding." Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 841 n.2 (2000). Clearly, the facilitation charges give

Brother Portis the right to claim the Fifth Amendment privilege. Further, the trial court was without power to compel the Madison County Attorney to try Brother Portis much less who to try first.[32] See Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 158 (2001). See also Sections 27 and 28 of the Kentucky Constitution. Further, were Brother Portis tried and convicted, he could continue to claim the privilege on appeal. See Shelton v. Commonwealth, Ky., 471 S.W.2d 716, 718 (1971). Additionally, Kentucky has no statute of limitation on felonies. Reed v. Commonwealth, Ky., 738 S.W.2d 818 (1987). Therefore, even if the misdemeanor charges were dismissed or Brother Portis were tried and acquitted, he could continue to invoke the privilege because of possible future charges. Id.; Hodge, 17 S.W.2d at 841 n.2. Accordingly, a continuance would not have resolved the Brother Portis issue, and as such, the trial court did not abuse its discretion in denying a continuance on this ground. Snodgrass, 814 S.W.2d 579; Rosenzweig v. Commonwealth, Ky. App., 705 S.W.2d 956 (1986).

B. Denial of Continuance to Obtain Exculpatory Evidence

The next assignment of error is the trial court's denial of a continuance to have the hairs in the rope necklace

[32] Complicating the matter is the fact that the Commonwealth Attorney prosecutes felonies in circuit court while the County Attorney prosecutes misdemeanors in district court.

analyzed. At trial, the necklace[33] was alleged to be J.B.'s, and was used as evidence to corroborate his story that he was abused in Joey's apartment. We agree the denial of a continuance was error.

The necklace was allegedly found by Detective Alexander on the floor of Joey's bedroom, on March 30, 1999, during the execution of the search warrant.[34] It was given no significance. However, the week before trial, in August, 2000, Detective Alexander noticed what appeared to be African-American hairs tangled in the knot of the necklace, which was made out of rope. Believing she had a "lead" because of the hairs, she first showed it to an African-American girl, who denied it was hers. She next showed it to seven-year-old J.B., who is a Caucasian boy. J.B. claimed it was his and told her that he might have lost it on the playground. At this time, J.B. had not attended the day care for over two years.

On the morning the trial was to begin, in chambers, the Commonwealth announced that Detective Alexander had just discovered that the rope necklace found in Joey's apartment belonged to J.B., although the hairs in the knot of the necklace did appear to be African-American. The defense moved for a

[33] Commonwealth Exhibit 22.
[34] Joey did not recognize this necklace. The apartment was very messy, and was also used for day care storage. Joey and Jesse were not the first occupants of this apartment. Additionally, in an earlier time not relevant to this case, the apartment area had been used as a day care.

continuance to have the hairs analyzed. The trial court denied the continuance and the trial started immediately.[35]

The announcement that the necklace would be introduced at trial as J.B.'s came as a surprise. The necklace had previously been given no significance in the case. J.B. had not even attended the day care for almost a year when the necklace was found, and, in the year and a half leading up to the trial, he had never mentioned owning, losing, or wearing a necklace in any of his prior interviews associated with this case. At trial, J.B. claimed he was wearing the necklace the day he was abused, and that he might have lost it in Joey's apartment. Detective Alexander testified she found it on the floor of Joey's bedroom, but, despite the representation made in chambers, suddenly could not remember telling the prosecutor that the hairs in the necklace appeared African-American. Even with a persistent cross-examination, she insisted she did not know what type of hairs they were or ever believed they were African-American. The prosecutor also enhanced the necklace evidence by adding to J.B.'s story in his closing, telling the

[35] Contrary to the Commonwealth's assertion, it is apparent, from the post-trial motions and hearing on the motion to set aside/new trial, that Joey did timely move for a continuance, and that such was done during the conference in chambers immediately prior to trial. Further, we dismiss the Commonwealth's assertion that Joey was required to tender an affidavit with regard to what proof he believed hair testing would produce, per RCr 9.04. Defense counsel made his motion for a continuance orally, immediately prior to trial, at which time he gave his reasons orally that he would have put in such an affidavit. The court accepted the oral reasons and ruled on the motion. Accordingly, we conclude the issue was properly preserved.

jury that J.B. said his necklace was "torn off" when Joey abused him. (J.B. said no such thing.)

All of the other evidence which supposedly corroborated J.B.'s story of being in the apartment was exposed at trial as a fabrication by Detective Alexander. The necklace found in the apartment, if believed to be J.B.'s, thus became the only direct or circumstantial evidence that in any way corroborated J.B.'s story. Testing the hair was critical.

Evidence of hair testing is admissible in Kentucky. Johnson v. Commonwealth, Ky., 12 S.W.3d 258 (1999). The Kentucky Supreme Court has recognized the significance of hair as exculpatory evidence. In Funk v. Commonwealth, Ky., 842 S.W.2d 476, 481 (1992), the appellant alleged that the Commonwealth had withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In Funk, among the evidence the Commonwealth failed to disclose in advance of trial was information that a human hair found on the victim's sock was from an African-American person. Funk, 842 S.W.2d at 481-482. This information tended to exculpate the appellant, who was Caucasian. Id. at 482.

In the present case, the defense was not only denied a continuance to have the hairs in the necklace tested as exculpatory evidence, but the investigating officer even misled the jury by refusing to admit the hairs appeared African-

American or that she ever believed they were. The Kentucky Supreme Court, in Funk, considered the value of hair as exculpatory evidence of such an "importance and magnitude to constitute reversible error." Funk, at 482. Justice demands no less under the facts of this case. The necklace alleged to be J.B.'s was the only piece of evidence the Commonwealth had which in any way corroborated J.B.'s story of being in the apartment. Both J.B. and Detective Alexander had told numerous untruths in this case. The defense was entitled to any exculpatory evidence that showed the necklace was not J.B.'s, but just another lie.

J.B. is Caucasian. We believe this hair evidence was of such importance that, if the hairs in the necklace were African-American, the jury would have believed the necklace found in Joey's apartment was not J.B.'s, and this would likely have changed the outcome of the trial. See Stump v. Commonwealth, Ky., 747 S.W.2d 607 (1987); Funk, 842 S.W.2d at 481-482. The trial court's denial of a continuance to have the hairs tested was an abuse of discretion, and constitutes reversible error.[36]

[36] We also believe it was unreasonable, particularly considering the complexity of this trial, for the trial court to expect the defense to be able to have the hair tested during trial. The trial court itself acknowledged that a hair expert was difficult to find. "[T]he question cannot be limited to what the defense is able to do despite the denial of its continuance motion, but whether legitimate, substantial avenues of investigation were prematurely cut off." Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 700 (1994), overruled in part on other grounds, Commonwealth v. Barroso, Ky., 122 S.W.3d 554 (2003). The trial court's denial of the continuance had such an effect in the present case.

C. Competency: KRE 601

Joey contends the trial court erred when it concluded that the children were competent to testify. In this appeal we need only address the competency of J.B. as his testimony is the only child witness testimony that resulted in a felony conviction. The trial court conducted a pre-trial competency hearing on June 29, 2000, and ruled J.B. competent to testify. J.B. was seven years old when he testified at trial on August 28, 2000, at which time he had not attended the Lighthouse day care for over two years.

Competency is an ongoing determination for a trial court. Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). An appellate court may consider a trial court's competency determination from a review of the entire record, including the evidence subsequently introduced at trial. Id. It is clear from our review of the record that J.B. failed to meet the minimal qualifications for competency under KRE 601, which provides:

> (b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
>
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
>
> (2) Lacks the capacity to recollect facts;

> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
>
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

The record in this case, in particular the evidence introduced at trial and the testimony of J.B. at trial, conclusively proves that J.B. could not accurately recall facts or accurately perceive the matters about which he was called to testify, or, in the alternative, lacked the capacity to understand the obligation of a witness to tell the truth. J.B.'s testimony at trial was that he was abused on the bed in Joey's apartment. The prosecutor's strategy was to have J.B. describe items in Joey's apartment as proof that he was in the apartment, from which abuse could be inferred. J.B. identified the eagle picture and eagle plaque, as hanging over Joey's bed in the apartment, and the lighthouse mug as having been somewhere in the apartment. He could not remember anything else about or in the apartment. The problem was that the three items he identified were conclusively proven to have been recovered from Brother Portis's office, not from Joey's bedroom, or even from the apartment. J.B. could not accurately recall facts or accurately perceive the matters about which he was called to testify. To see if perhaps J.B. was merely confused as to where he had seen those items, he was asked by the Commonwealth if he

was ever in the office or knew what was in there. He denied that he was ever in the office. The teachers testified otherwise. As a disciplinary problem, J.B. was a visitor to the office. Again, J.B. could not accurately recall facts, or, he was lying.

Dr. Kregor testified at length to a conversation she had with J.B., wherein he told a completely different story about what Joey supposedly did. At trial, J.B. denied that he ever made those statements to Dr. Kregor at all. Again, J.B. could not accurately recall facts, or, he was lying.

A few days before trial, J.B. identified the rope necklace as his, and told Detective Alexander he lost it on the playground. Yet, at trial, he changed the story to say he might have lost it in the apartment. When reminded of what he told Detective Alexander just a few days earlier, he accused Detective Alexander of getting it wrong. J.B.'s recall was in error, or, he was lying.

Our Supreme Court once warned in a child abuse case that "[t]here may be a temptation among judges to let pity for small children who may have been victimized . . . overcome their duty to enforce the rules of evidence". Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 546 (1993). "'The rules of evidence have evolved carefully and painstakingly over hundreds of years as the best system for arriving at the truth. They bring to the

law its objectivity. Their purpose would be subverted if courts were permitted to disregard them at will . . . [O]beying these rules is the best way to produce evidence of a quality likely to produce a just result.'" Id., quoting Fisher v. Duckworth, Ky., 738 S.W.2d 810, 813 (1987).

Because he could not accurately recall facts or accurately perceive the matters about which he was called to testify, J.B. was incompetent under KRE 601(b)(1) and (2). If we did not hold that J.B. could not accurately perceive or recall, then we would be compelled, in the alternative, to hold him incompetent on grounds that he did not understand the obligation of a witness to tell the truth, KRE 601(b)(4). The trial court should have reversed itself following J.B.'s trial testimony, found him incompetent, and stricken the testimony. Stincer, 482 U.S. 730. J.B. was incompetent, and the trial court's admission of his testimony was an abuse of discretion and constitutes reversible error. Whitehead v. Stith, 268 Ky. 703, 709, 105 S.W.2d 834, 837 (1937). See also, Pendleton v. Commonwealth, Ky., 83 S.W.3d 522 (2002).

D. Hearsay Evidence: KRE 803(4)

Joey next contends that the trial court erred when it allowed Dr. Janice Kregor to repeat out-of-court statements allegedly made by J.B. describing alleged abusive acts and identifying Joey as the perpetrator. The trial court admitted

the hearsay under the exception for statements made for the purpose of medical treatment or diagnosis, KRE 803(4). We conclude the admission of this testimony constitutes reversible error.

Dr. Kregor is a pediatrician with a pediatric practice at the University of Kentucky. She also examines alleged sexual abuse victims at UK's Children's Advocacy Center. She is not a psychologist, and does not provide psychological treatment. She rarely sees children brought to the Children's Advocacy Center for follow up, doing so only if they have a medical condition such as a sexually transmitted disease.

J.B. was brought to see Dr. Kregor at the Children's Advocacy Center on April 20, 1999, at which time he had not attended the Lighthouse day care for almost a year.[37] She took a medical history on J.B. from his mother and conducted a lengthy question and answer type interview with J.B., focused on gathering information about Joey sexually abusing him at the day care. Dr. Kregor performed a complete physical exam of J.B., including rectal, genital, and testing for sexually transmitted diseases. The exam was normal and showed no signs of sexual abuse. She provided no treatment for J.B. and never saw him

[37] Dr. Kregor was not J.B.'s regular doctor, and had never seen him before this visit. No doctor had ever reported any suspicion of sexual abuse as to J.B., as doctors are required to do per KRS 620.030 if they suspect abuse.

again, but did provide her report of the interview to Detective Alexander.

Dr. Kregor was called as a Commonwealth's witness at trial. Dr. Kregor described J.B. as a "talker" and admitted that she believed he had been told that he was brought to see her because "Joey did bad things." Over the objections of the defense, Dr. Kregor was permitted to read the interview she conducted with J.B., in complete, unsanitized form.[38] In reading the interview, Dr. Kregor testified that, in response to her questions, J.B. told her about these sexual acts: that Joey "sticks his finger in my butt," that it happened "about twice on the weekend and 45 on the days," and that their clothes were on when it happened; that Joey grabbed J.B.'s peter and "runned away," and that their clothes were on when this happened; and that he saw Joey's "peter."

When she asked if Joey ever made J.B. touch him, J.B. said "nope." When asked if Joey ever touched J.B. with his mouth, J.B. said "nope." When she asked if Joey ever made J.B. kiss him, J.B. said "no." When asked if Joey made him play any games, J.B. told her just criss-cross applesauce which he explained was a "very bad game" where you pass around a "little

[38] The interview was not recorded. Dr. Kregor took handwritten notes of what J.B. said during the interview, which defense counsel noted she had "enlarged somewhat" in creating the report from which she testified.

peter" which was a "bean baggy little thing and has hair all over it."

The trial court found Dr. Kregor to be a "treating" physician, and as such, ruled the hearsay admissible under KRE 803(4), the exception for statements made for purposes of medical treatment or diagnosis. Joey contends the admission of the hearsay testimony was error. We agree.

We first note that much of the argument regarding the admissibility of Dr. Kregor's testimony revolved around whether she was a "treating" or "examining" physician. Since the trial of this case, Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), which retained a distinction between treating and examining physicians in determining the admissibility of statements under KRE 803(4), has been overruled by Garrett v. Commonwealth, Ky., 48 S.W.3d 6 (2001). Garrett held that KRE 803(4) does not distinguish between statements made to treating and examining physicians. Hence, we must analyze the testimony of Dr. Kregor under Garrett, which requires us to simply apply the rule as written.

KRE 803 provides, in pertinent part:

> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
>
> (4) Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis

> and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

The hearsay at issue is Dr. Kregor's reading of her interview with J.B. She was permitted to read this interview in complete, unsanitized form, which not only repeated J.B.'s statements alleging abuse, but identified Joey throughout as the perpetrator.

On an aside, but not necessary for our decision, it appears somewhat questionable as to whether this interview, or at least numerous statements therein which Dr. Kregor was allowed to repeat, should qualify under KRE 803(4) on its face. J.B. was taken to Dr. Kregor, almost a year after he left the day care, for purposes of the criminal investigation, to look for physical evidence of sexual abuse. She found none. J.B.'s statements did not relate to "past or present symptoms, pain, or sensations" – he had no such complaints. She was not providing psychological treatment.[39] It would appear quite a stretch of the hearsay exception to consider many of J.B.'s statements in the interview as "medical history," which included J.B.'s answers to questions such as "did you see his peter," "what did it look like," "who did you tell about Joey," and whether Joey

[39] In fact, she believed J.B. was already in sex abuse therapy, which she was told by J.B.'s mother.

said anything; or that such statements were reasonably pertinent to medical treatment or diagnosis.[40]

However, we do not need to make a line-by-line analysis of J.B.'s statements, because the identity of the perpetrator was not admissible. KRE 803(4) requires, as a prerequisite for admission, that a statement be "reasonably pertinent to treatment or diagnosis." It is well-settled law that, even in child abuse cases, "statements of identity are 'seldom if ever' pertinent to diagnosis or treatment." Garrett, 48 S.W.3d at 12, quoting United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980), cert. denied, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981). See also, Souder v. Commonwealth, Ky., 719 S.W.2d 730, 735 (1986) (Information important to an effective diagnosis and treatment "does not include information provided as part of a criminal investigation, nor does it usually include information identifying the name of the wrongdoer because normally the name of the wrongdoer is not essential to treatment.") A narrow exception, wherein a child's statements identifying a perpetrator were found reasonably pertinent, has been found in cases where the doctor was providing psychological treatment and

[40] We believe Dr. Kregor's testimony represents the type of testimony Professor Lawson has warned about in child abuse cases, as testing the "outer limits" of a number of hearsay exceptions, including the one for statements made for purposes of medical treatment or diagnosis. Robert G. Lawson, The Kentucky Evidence Law Handbook, §8.55[6] at 661 (4th ed. 2003).

the abuser was a household member, under the theory that the identity was important to treatment because the abuse would continue if the child were left in the home. Garrett, at 11-12. None of these factors were present in this case.

J.B. was presented to Dr. Kregor as a sexual abuse victim of Joey Herndon. Dr. Kregor knew Joey's identity from the intake process, from the history taken by the mother, and admitted J.B. had been told he was there because of "Joey." Dr. Kregor's exam of J.B. was completely normal. Dr. Kregor was not providing psychological treatment, and Joey was not a household member for which learning the identity of a perpetrator was important to removing the child from the home. Most telling was Dr. Kregor's own testimony when the prosecutor questioned her as to whether a perpetrator's identity was important to her. She testified that a perpetrator's identity was only important to her in a situation where it pertained to keeping a child safe, and that was not an issue when a child is brought to the Children's Advocacy Center, as was J.B. She explained that when children are brought to the Center, the case has already been reported, and she already knows the identity of the perpetrator from the intake form. Hence, she does not need to find out this information to keep a child safe.[41]

[41] Dr. Kregor described the type of situation where the identity of a perpetrator would be important to her, as being if she was examining a child in her general pediatric practice and saw signs of sexual abuse. Then she

J.B.'s identification of Joey falls squarely under the general rule, that statements of identity are not pertinent to diagnosis or treatment, and were inadmissible under KRE 803(4). See Garrett, 48 S.W.3d at 11-12. Accordingly, the trial court erred in allowing that testimony of Dr. Kregor which identified Joey as the perpetrator of the acts alleged by J.B. The admission of the testimony identifying Joey was reversible error.

Garrett also reminded us that even when hearsay is admissible under KRE 803(4), it is still, of course, subject to exclusion under KRE 403, which excludes otherwise relevant evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence". Id. at 14. The probative value of Dr. Kregor's testimony was extremely low. She admitted that J.B. had been told that he was there to see her because Joey had done bad things. J.B. had not even attended the day care for almost a year when she interviewed him. Much of what J.B. told Dr. Kregor in the interview was blatantly false, for example, J.B.'s claim that Joey abused him on the weekend (the day care was closed on weekends), and that criss-cross applesauce was a game where you passed around a

would want to try to find out from the child who did it so that she could report it in order to keep the child safe.

"peter" (it was not). Further, J.B. himself testified at trial and denied that any of the things he told Dr. Kregor ever happened. The Commonwealth's case was extremely weak. Dr. Kregor's testimony was unduly prejudicial and misleading to the jury, and of little or no probative value. Therefore, it should have been excluded under KRE 403 as well.

E. Witness Tainting

Joey contends the trial court erred when it held the children's testimony was not tainted. In light of our decision that J.B. was not competent to testify, this argument becomes moot. Likewise, our Supreme Court, in Pendleton v. Commonwealth, Ky., 83 S.W.3d 522 (2002), declined to adopt the holding in State v. Michaels, 136 N.J. 299, 642 A.2d 1372 (1994), which set forth special procedures for taint hearings to determine whether the interviewing techniques were so flawed as to distort the child witness's recollection.

F. Misdemeanors

The Lighthouse day care had a videotaping system as part of its normal operating procedure. In her March 30, 1999, search, Detective Alexander seized 18 of the day care's videotapes from Brother Portis's office. She watched all the tapes, or about 144 hours worth, and picked out four snippets which showed Joey holding four different children. For this, Joey was originally indicted on four (non-sexual) misdemeanor

counts of fourth-degree assault, or, in the alternative, third-degree criminal abuse.

Testimony at trial referred to the hold Joey was using, a “basket-weave” type hold, as “criss-cross” or “criss-cross applesauce.” The testimony indicated that this is a hold which is taught to day care workers, and was used by the other Lighthouse teachers as well. The hold consists of the worker sitting on the floor cross-legged with the child in his/her lap, with the arms and legs crossed across the child so that the child cannot get away. There was conflicting testimony as to whether this type of hold should be used only when a child is a danger to himself or others, or for discipline. In either case, however, the testimony indicated that it was up to the subjective judgment of the day care worker when the hold should be used.

The Commonwealth introduced four snippets of videotape showing Joey using the “criss-cross applesauce” hold on four children. The defense rewound the tapes and showed the jury the behavior which precipitated the hold. It was the prosecutor’s opinion that the “criss-cross” hold should be used only if the child is in imminent danger to himself or others, but that, in his opinion, Joey was using it for discipline. The prosecutor’s position was that the use of criss-cross for discipline would

automatically constitute either fourth-degree assault or third-degree criminal abuse.

The trial court ruled that the evidence was insufficient to find any physical injury and gave a directed verdict of acquittal as to each of the four children on the charge of fourth-degree assault. That left the jury with the alternative charge of third-degree criminal abuse (non-sexual). The jury returned a verdict of guilty as to each of the four counts. Joey contends there was insufficient evidence to support the verdict. We have reviewed the tapes played to the jury.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

KRS 508.120, criminal abuse in the third degree, states in pertinent part:

> (1) A person is guilty of criminal abuse in the third degree when he recklessly abuses another person or permits another person of whom he has actual custody to be abused and thereby:
>
> (a) Causes serious physical injury; or
>
> (b) Places him in a situation that may cause him serious physical injury; or

> (c) Causes torture, cruel confinement or cruel punishment;
>
> to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

In the present case, the jury was instructed as to KRS 508.120(1)(c) only.

In Cutrer v. Commonwealth, Ky. App., 697 S.W.2d 156, 158 (1985), we discussed the meaning of what constitutes "cruel" as follows:

> Our courts experience no difficulty in determining what constitutes cruel punishment within the strictures of Section 17 [of the Kentucky Constitution] and the Eighth Amendment. See, e.g., Workman v. Commonwealth, Ky., 429 S.W.2d 374 (1968). [Cruel punishment is punishment which shocks the general conscience and violates the principles of fundamental fairness]. Outside the criminal arena, our cases define "cruel" as "heartless and unfeeling". [Citation omitted.] This is consistent with KRS 446.080's directive that ordinary words in statutes shall be given their ordinary meaning, and the dictionary definition of "cruel" as "disposed to inflict pain or suffering: devoid of human feeling." Webster's Ninth New Collegiate Dictionary 311 (1984).

The videos depict Joey appearing to instruct some of the children to do something (such as to take a nap or quit running around) but the child would continue doing what he or she wanted, while disturbing the other children who, in some cases, were trying to nap. The tapes show all four occasions where

children were held with the basket-weave hold. We saw no evidence of being held too tight, no evidence of pain, suffering, or even fear on the part of any of the children while in the hold. In fact, after being released, one child runs after Joey and another begins doing pushups. There was no physical injury. No hold lasted longer than two minutes. Joey's actions do not shock the conscience, are not "disposed to inflict pain or suffering," and are not "devoid of human feeling." Cutrer, 697 S.W.2d at 158. Although the children were restrained, it was minimal, reasonable, and necessary to calm down the children and prevent them from disturbing the other children. We do not believe Joey's conduct in holding any of these children depicted in the tapes amounted to criminal abuse, and it would be unreasonable for a juror to so find. The Commonwealth introduced no statute, regulation, or policy that says criss-cross should not be used for discipline. The Commonwealth simply misstates the law. Therefore, we reverse all four counts of criminal abuse in the third degree.

G. Due Process

Due process requires that a defendant receive a fair trial.[42] United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375,

[42] Due process requires a court notice issues which bring into question the substantial fairness of the proceedings at any time, even upon appeal or discretionary review. Vachon v. New Hampshire, 414 U.S. 478, 94 S. Ct. 664, 38 L. Ed. 2d 666 (1974). See also, RCr 10.26; Schoenbachler v. Commonwealth,

87 L. Ed. 2d 481 (1985). This Court finds it necessary to remind the Commonwealth that its goal at trial "is not that it shall win a case, but that justice shall be done." Id. at 675, n.6, quoting, Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). The purpose of trial is as much to acquit the innocent as to convict the guilty. Bagley at 692 (citation omitted) (Marshall, J., dissenting).

From the very beginning of the Lighthouse investigation, Joey Herndon was targeted, without cause. The investigation was supported or carried out with outright lies. Children were told what to say. Even though the investigation found no corroborative evidence of abuse, the matter was taken to trial where the investigating detective continued lying to mislead the jury. "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972), quoting, Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791 (1935).[43] "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Giglio at 153, quoting, Napue v.

Ky., 95 S.W.3d 830, 836 (2003); Perkins v. Commonwealth, Ky. App., 694 S.W.2d 721, 722 (1985).

[43] The police are part of the prosecutor's team. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959).

IV. PROCEEDINGS ON REMAND

The question on remand is whether the matter should be retried or the charges dismissed. As to the misdemeanor convictions, as a matter of law, they must be dismissed because the convictions are based on a record lacking evidence of guilt as to crucial elements of the four counts of the offense of third-degree criminal abuse. In fact, the record, specifically the videotapes of the incidents, exonerates the appellant. Therefore, on remand, the circuit court should enter an order dismissing the misdemeanor charges. Vachon v. New Hampshire, 414 U.S. 478, 94 S. Ct. 664, 38 L. Ed. 2d 666 (1974).

The lone felony conviction, for first-degree sexual abuse, is not so simple. With our opinion that J.B.'s testimony was inadmissible and that Dr. Kregor's testimony was inadmissible, there is no evidence of a crime. Therefore, the trial court should have given a directed verdict of acquittal based on the insufficiency of the evidence. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830 (2003). See also, Vachon, 414 U.S. at 480, quoting Harris v. United States, 404 U.S. 1232, 1233, 92 S. Ct. 10, 12, 30 L. Ed. 2d 25 (1971), "a conviction based on a record lacking any relevant evidence as to a crucial

element of the offense charged . . . violate[s] due process." Therefore, on remand, the felony charge should be dismissed.

For the foregoing reasons, the judgment of conviction entered in the Clark Circuit court is therefore reversed and the case is remanded with directions to dismiss the charges.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Burl McCoy
Tonya S. Conner
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

Matthew D. Nelson
Assistant Attorney General
Frankfort, Kentucky