

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001290-MR

MARCUS BUFORD

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 00-CR-00292

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

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BEFORE: EMBERTON, CHIEF JUDGE; BAKER, JUDGE; and MILLER,  
SPECIAL JUDGE.<sup>1</sup>

BAKER, JUDGE: Marcus Buford ("Buford") brings this appeal from  
a June 3, 2002 judgment of the McCracken Circuit Court. We  
reverse and remand.

Buford was indicted on December 22, 2000, by the  
McCracken County Grand Jury on two counts of first degree sexual  
abuse. The indictment stemmed from allegations made by two

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<sup>1</sup> Senior Status John D. 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.

girls, H.S. and J.R., who were members of Concord United Methodist Church where Buford served as youth minister. H.S. and J.R. both claimed that, on separate occasions, Buford touched them in a manner constituting sexual abuse.

Buford was convicted by a jury upon two counts of sexual abuse in the first degree pursuant to Kentucky Revised Statute (KRS) 510.110.<sup>2</sup> He was sentenced to prison for two consecutive five-year terms and appeals to this Court as a matter of right.

Buford first asserts that the circuit court erroneously admitted testimony pertaining to a prior bad act. The testimony in question revolves around allegations of sexual abuse made against Buford in 1997 by his niece, S.B. Although the charges were sent to a Trigg County Grand Jury, Buford was never indicted.

Buford filed a pre-trial motion to exclude all evidence regarding these alleged prior acts. The circuit court denied his motion.

Kentucky Rule of Evidence (KRE) 403 dictates that, "[a]lthough relevant, evidence may be excluded if its probative

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<sup>2</sup> Kentucky Revised Statute 510.110 states:

- (1) A person is guilty of sexual abuse in the first degree when:
  - (a) He subjects another person to sexual contact by forcible compulsion; or
  - (b) He subject another person to sexual contact who is incapable of consent because he:
    1. Is physically helpless;
    2. Is less than twelve (12) years old; or
    3. Is mentally incapacitated.
- (2) Sexual abuse in the first degree is a Class D felony.

value is substantially outweighed by the danger of undue prejudice. . . ." It is well established that "[a]n appellate court should reverse a trial court's ruling under KRE 403 only if there has been an abuse of discretion." Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 103 (1998). In deciding upon a KRE 403 issue, three factors must be taken into consideration: "the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth." Id. at 103; see also Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.10(II) (3d. ed. 1993).

Weighing the three factors presented in Barnett, we believe the circuit court committed an abuse of discretion under KRE 403 by admitting the testimony of S.B. The probative value of the testimony is, at best, questionable. S.B. testified that she could not remember the events surrounding her alleged sexual abuse by Buford. She theorized that the event may have only been a dream or that she may have been told what to say by someone else. The lack of credibility of these statements and S.B.'s inability to recall with any certainty whether the events actually occurred mar any probative value of her testimony.

S.B.'s testimony also bears a high probability of undue prejudice. "Prejudice" has been defined as "that which is

unnecessary and unreasonable." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996). KRE 404(a) states that, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. . . ." The most likely assumption to be drawn from S.B.'s testimony is that if Buford sexually abused a young girl in the past, he must have done it again. This assumption is precisely what the introduction of character evidence is designed to avoid. The admission of this evidence unavoidably caused undue prejudice by unnecessarily and unreasonably leading the jury to the conclusion that Buford's actions against H.S. and J.R. were "in conformity" with his alleged actions against S.B.

The likelihood of undue prejudice far outweighed any probative value of S.B.'s testimony. Therefore, we hold that the circuit court committed an abuse of discretion under KRE 403 by admitting this testimony.

Alternatively, we also believe that S.B.'s testimony was improperly admitted as evidence of a "prior bad act." KRE 404(b) states in relevant part:

- (b) Other crimes, wrongs, or acts.  
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. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;

In Adcock v. Commonwealth, Ky., 702 S.W.2d 440, 443 (1986), the Kentucky Supreme Court set forth the standard by which 404(b) should be applied:

In every case in which evidence of other crimes is sought to be introduced to establish a pattern or scheme, the real question is whether the method of the commission of the other crime or crimes is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person. If it does so, evidence that the defendant committed the other crime is admissible. If it only tends to show a tendency or disposition to commit a crime, the evidence is not admissible.

Furthermore, "evidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." Billings v. Commonwealth, Ky., 843 S.W.2d 890, 892 (1992). Because of the high risk of prejudice involved with the admission of "other crimes" evidence, "trial courts must apply the rule cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." Bell v.

Commonwealth, Ky., 875 S.W.2d 882, 889 (1994); see also Lawson, supra, § 2.25(II)(B) ("evidence of other crimes is inadmissible to prove the criminal propensity or predisposition of the accused, . . .").

The pertinent inquiry in this case is whether the facts surrounding the alleged sexual abuse of Buford's niece, S.B., and the sexual abuse of H.S. and J.R. are "so similar and so unique" as to permit the court to admit the evidence as an indication of Buford's modus operandi. See Billings 843 S.W.2d at 893. We do not believe they are.

In Bell, appellant was convicted of sodomizing his live-in girlfriend's son, A.C. During the trial, A.C.'s older brother, T.C., was called to testify regarding incidents of sodomy that appellant also had allegedly perpetrated against him. On appeal, the Court held that the testimony of T.C. had been erroneously admitted. In particular, the Court held that the acts alleged by A.C. and T.C. were too dissimilar to prove the requisite pattern of conduct to identify appellant as the perpetrator. The Court noted that:

dissimilarity with respect to the acts, the number of acts, the time, the approach, and the place. . . convince us that evidence of appellant's alleged crime against T.C., when compared with evidence of appellant's conduct against A.C., fail to establish the *striking* similarity that "in itself would

identify appellant as the perpetrator of the acts in question.”

Bell, 874 S.W.2d at 890 (quoting Lantrip v. Commonwealth, Ky., 713 S.W.2d 816 (1986)).

Like the Court in Bell, we believe that the allegations of sexual abuse made by S.B. are too dissimilar from the allegations made by H.S. and J.R. to have been properly admitted as 404(b) evidence. When compared, the crimes lack the requisite striking similarity that would necessarily identify Buford as the perpetrator.<sup>3</sup> Although the alleged crimes do share some comparable characteristics, we believe the evidence lacks sufficient similarity to permit S.B.’s testimony under 404(b). Rather than identify Buford as the perpetrator or establish a pattern or scheme, the evidence merely points towards Buford’s criminal predisposition. We, therefore, hold that the circuit court erroneously admitted the testimony of S.B under 404(b).

We also believe the admission of S.B.’s testimony constituted prejudicial error. KRE 103(a) dictates that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is

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<sup>3</sup> The dissimilarities in the cases are as follows: S.B. is Buford’s niece, while H.S. and J.R. are of no relation to Buford. The incident with S.B. allegedly occurred when S.B. was eight years old. The incident with H.S., however, occurred when she was twelve years old, and the incident with J.R. occurred when she was fifteen years old. S.B.’s allegations of sexual abuse arose in 1997, while J.R.’s allegations stem from an incident in 1999, and H.S.’s allegations are from 2000. The incident with S.B. allegedly occurred on a camping trip while Buford was alone in a tent with his wife, S.B., and S.B.’s sister. The incidents with H.S. and J.R. both occurred in rooms filled with people at church youth group functions.

affected. . . ." See also Ky. R. Crim. P. 9.24. Not every error will constitute reversal; rather, "'if upon a consideration of the whole case [the] court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.'" Rogers v. Commonwealth, Ky., 60 S.W.3d 555, 559 (2001) (quoting Abernathy v. Commonwealth, Ky., 439 S.W.2d 949, 952 (1969)).

Since there were no eyewitnesses, the testimony at trial was predicated solely on the credibility of the parties. By erroneously admitting the testimony of S.B., the circuit court impinged upon Buford's credibility. As there is a substantial likelihood that the outcome of the trial would have differed had S.B.'s testimony been excluded, we hold that admission of the evidence constituted prejudicial error.

On the whole, we are of the opinion that the testimony of S.B. was erroneously admitted under KRE 403, and/or as a prior bad act under KRE 404(b). We further hold that such error was prejudicial; thus, reversal is required.

Buford's second argument is that the testimony of Greg Waldrop ("Waldrop") was improperly admitted. Waldrop and Buford were coworkers at Concord United Methodist Church. Upon the suggestion of Dr. Jerry Jeffers, Superintendent of local Methodist churches, and Collette Buford, Buford's wife, Waldrop

went to Buford's home to discuss the allegations of sexual abuse. Waldrop testified that he was chosen to speak with Buford because the two men were friends. When Waldrop arrived at Buford's home, Buford refused to speak with him.

The Commonwealth sought to introduce Buford's refusal to communicate with Waldrop at trial. Although Buford filed a pre-trial motion to exclude Waldrop's testimony, the circuit court denied the motion and permitted Waldrop to testify.

Buford asserts that the circuit court's decision to allow Waldrop's testimony was improper. Specifically, Buford claims that Waldrop was allowed to testify about confidential communications he had with Buford and that such testimony violated the religious privilege of KRE 505. The basis for Buford's argument is that Waldrop's testimony should have been excluded because Buford believed his conversation with Waldrop was confidential and privileged. We disagree.

The pertinent language of KRE 505 is as follows:

- (a) Definitions. As used in this rule:
  - (1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
  - (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons

present in furtherance of the purpose of the communication.

- (b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the person and a clergyman in his professional character as spiritual adviser.

In Kentucky, it is well established that, "[f]or a communication to be covered under this privilege it must be communicated to a member of the clergy when that person is acting as a spiritual advisor. . . ." Sanborn v. Commonwealth, Ky., 892 S.W.2d 542, 550 (1995). We interpret the language of KRE 505 as implementing an objective standard for determining whether a clergyman is acting "in his professional character as spiritual advisor." This determination is not made by looking solely to the communicant's state of mind, but by reviewing all the facts surrounding the allegedly confidential communication. Therefore, to determine if the communication between Buford and Waldrop fell within the confines of KRE 505, we look objectively at the record to decide whether Waldrop was acting as a spiritual advisor when he called upon Buford.

Reviewing the record of this case, we do not believe Waldrop visited Buford in his professional capacity as a spiritual advisor as required by KRE 505. Although Waldrop, a minister at Concord United Methodist Church, was a "clergyman"

within the KRE 505(a)(1) definition, there was nothing "spiritual" about his visit with Buford. Waldrop testified that his purpose for visiting Buford was not to give spiritual advice but rather to discuss the allegations of sexual abuse. Waldrop testified that he and Buford did not pray together on the night in question; in fact, the only communication made was Buford's refusal to speak. Although Buford stated in an affidavit that "[he] believed that any conversation that [he] had with Dr. Greg Waldrop was protected by clerical privilege," this belief alone is not the determining factor in deciding whether the communication in question was made while Waldrop was acting as a spiritual advisor. (Affidavit of Marcus Buford and Collette Buford). Because Waldrop was acting as a friend rather than a spiritual advisor when he met with Buford, we hold that the conversation did not fall under the KRE 505 religious privilege.

Although we believe that the conversation does not fall under the religious privilege of KRE 505, we nevertheless hold that Waldrop's testimony regarding Buford's unwillingness to speak should have been excluded. The Fifth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution both provide for a right against self-incrimination. This right has long been revered as a "'fundamental trial right' that reflects 'principles of humanity and civil liberty.'" Winthrow v. Williams, 507 U.S. 680, 705,

113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)(quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990), and Bram v. United States, 168 U.S. 532, 544, 18 S. Ct. 183, 42 L. Ed. 568, (1897)). Likewise, this right "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty." Kastigar v. United States, 406 U.S. 441, 444, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The privilege against self-incrimination stands for the proposition that an individual cannot be forced to implicate himself, or to offer evidence which could be incriminating.

The United States Supreme Court has broadly interpreted the scope of the right against self-incrimination. In Kastigar, 406 U.S. at 444-45, the Court stated that the privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Despite this broad interpretation, neither the United States Supreme Court nor any Kentucky Court has yet to address the issue of whether pre-

arrest silence may be used substantively as proof of a defendant's guilt.<sup>4</sup>

The Sixth Circuit Court of Appeals has, however, addressed this issue. In Combs v. Coyle, 205 F.3d 269, 283 (6<sup>th</sup> Cir. 2000), the Sixth Circuit Court of Appeals held that "a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination." The Court reasoned that, "in a pre-arrest setting as well as in a post-arrest setting, it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply." Id. at 283.

Although we are not bound by the Sixth Circuit, we perceive its reasoning as persuasive; thus, we hold that the substantive use of a defendant's pre-arrest silence as proof of guilt violates the right against self-incrimination as guaranteed by the Fifth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution.

In the case at hand, Buford's refusal to speak to Waldrop regarding the allegations of sexual abuse was a "disclosure" which Buford "reasonably believe[d] could be used

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<sup>4</sup>We recognize that the United States Supreme Court has held that the use of a defendant's pre-arrest silence for impeachment purposes does not violate the Fifth Amendment. See Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). However, the Supreme Court has yet to address the issue of whether pre-arrest silence may be used substantively as proof of guilt.

in a criminal prosecution.” Kastigar, 406 U.S. at 444-45. Regardless of whether the silence was in a pre-arrest or post-arrest setting, Buford nevertheless had a right against self-incrimination that could not be waived by the circuit court. We, therefore, conclude that Buford’s refusal to speak with Waldrop concerning the allegations of sexual abuse was improperly admitted.

Buford’s third contention is that the circuit court erroneously interpreted the term “forcible compulsion” as found in KRS 510.110. Specifically, Buford claims that the court verbally instructed the jury that a finding of “physical force” was sufficient to sustain a conviction for first degree sexual abuse. He argues that mere physical force is insufficient to sustain such a conviction, but that the physical force must be such force “which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person.”

Under KRS 510.110, “ [a] person is guilty of sexual abuse in the first degree when . . . [h]e subjects another person to sexual abuse by forcible compulsion.” Forcible compulsion is defined by KRS 510.010(2) as meaning:

physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the

immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition;

We interpret KRS 510.010(2) as defining "forcible compulsion" as occurring when either: (a) physical force or (b) the threat of physical force "which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter" is utilized. We view such interpretation as consistent with the plain language contained in KRS 510.010(2). We, thus, reject Buford's argument that mere physical force is insufficient to establish forcible compulsion.

The jury was also given a written definition of the term "forcible compulsion." Jury members were instructed that in order to convict Buford of first degree sexual abuse, they must find that he subjected H.S. and J.R. to sexual contact, and "that he did so by forcible compulsion." (Jury Instruction Number Four). Forcible compulsion was defined in jury instruction number three as meaning "physical force or threat of physical force, express or implied, which places a person in fear of immediate death or physical injury to self or another person, fear of the immediate kidnap of self or another, or fear of any sexual offense. Physical resistance on the part of the

person subjected to forcible compulsion is not necessary to meet this definition."

Taken together, we believe these written instructions provided sufficient guidance for the jury. The jury was well aware of the elements to be established in order to convict Buford of first degree sexual abuse. Although the definition of "forcible compulsion" given to the jury differed slightly from the statutory definition of KRS 510.010(2), the difference was not significant enough to alter the meaning of the term. Therefore, we hold that the written jury instructions were appropriate.

Fourth, Buford argues that his motion for a directed verdict was improperly denied by the circuit court. On appellate review, we must determine whether it was clearly unreasonable for the jury to have found Buford guilty upon two counts of first degree sexual abuse. See Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). Buford particularly maintains that the Commonwealth failed to prove the element of forcible compulsion beyond reasonable doubt. We disagree.

The evidence revealed that J.R. attempted to pull Buford's hand away from her vaginal area but was unable to do so immediately; it also revealed that Buford put his leg upon H.S. and that H.S. also tried to remove Buford's hand. Considering

the totality of H.S. and J.R.'s testimony, we are of the opinion that a jury could have reasonably found that Buford used physical force to carry out his sexual assaults. Hence, we hold that the circuit court properly denied Buford's motion for directed verdict.

For the foregoing reasons, the judgment of the McCracken Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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