

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000634-MR

DAVID NICHOLS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 02-CR-00370

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

COMBS, CHIEF JUDGE: David Nichols appeals from the judgment of the McCracken Circuit Court convicting him of second-degree abuse and sentencing him to serve five years in prison. Nichols alleges that the evidence was both incomplete and insufficient to support his conviction for abuse of the victim, 11-month-old Gage Kirk. He also argues that the trial court made several evidentiary errors that deprived him of a fair trial. After a careful review of the evidence and the applicable law, we

conclude that the trial court erred in excluding evidence tending to implicate the victim's babysitter, David Darnell, as the actual perpetrator of the crime. Therefore, we vacate and remand.

On August 7, 2002, Gage Kirk suffered a serious and painful fracture of his left thigh. The expert testimony at trial indicated that the injury was likely to have been caused by someone's picking him up by the leg. Gage was the youngest of three children living with their mother, Misty Kirk, and her boyfriend, David Nichols. Misty and Nichols were both employed. Misty worked during the day, and Nichols worked the evening shift. On the day on which Gage was injured, Misty's three children were being cared for by David Darnell, a substitute for her regular child care provider, who was on vacation.

Misty arrived home from work between 6:00 and 6:30 p.m. Because she worked at a chemical factory, she needed to take a shower before coming into contact with her children. The evidence presented at trial established that Darnell obtained permission from Misty to leave before she got into the shower; however, the evidence was conflicting as to the time that he actually left the residence. Misty noticed that Gage was whining and believed that he needed to be put to bed. She asked Nichols to get clean sheets out of the dryer, make Gage's bed, and put the child down for a nap.

While Nichols was in the laundry room gathering the bed linens, he heard Gage whimpering in the living room. As he picked up the child, he heard a loud popping noise come from Gage's leg. He took the child to Misty, who was still in the shower, and the two proceeded to take Gage to the hospital. They had not driven far when Gage stopped crying and fell sleep. Believing that they had perhaps over-reacted, they returned home. When Gage awoke two hours later, Misty noticed that he was not moving as usual. She and Nichols again set out for the emergency room.

Dr. Thane DeWeese determined that Gage had sustained a spiral fracture to his leg, administered narcotic medication to him for pain, and placed him in a cast. The history taken by the doctor from Misty indicated that Gage may have fallen off a coffee table. Doubtful that the injury could have happened in that manner, the doctor contacted the authorities and reported his suspicions that Gage had been abused. An investigation was conducted by Detective Rusty Banks and a social worker, Rebecca Kinslow.

Nichols was indicted for the crime of first-degree criminal abuse on November 22, 2002. On March 11, 2003, the trial court entered an order setting the matter for trial. The order further required any motion *in limine* to be filed "no later than twelve (12) days prior to the trial date." However,

on the morning of trial, the court heard the Commonwealth's oral motion to exclude evidence in support of Nichols's defense that the babysitter, David Darnell, was responsible for breaking Gage's leg. This evidence included the testimony of two witnesses who had observed Darnell acting inappropriately toward Gage and his older brother, Jonathon. The trial court accepted the Commonwealth's argument that the admission of Darnell's bad acts required analysis under KRE<sup>1</sup> 404(b). Over Nichols's strenuous objection, the court granted the Commonwealth's motion to exclude this evidence in support of his defense.

During a recess, Nichols called one witness who testified on avowal that she saw Darnell lift Gage's seven-year-old brother by his thighs and throw him on the floor. He also called Misty, who also testified by avowal that after Gage's injury, she had observed Darnell lifting Gage by the cast that covered his injured leg; that she then ordered him from her home; and that she reported the incident to Ms. Kinslow, the social worker investigating the abuse of Gage.

During Misty's avowal testimony relating to Darnell, the prosecutor suggested that the court should alert her to the potential for self-incrimination. Misty had testified before the grand jury without invoking her Fifth Amendment privilege against self-incrimination. Additionally, she had been in the

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<sup>1</sup> Kentucky Rules of Evidence.

shower when Gage's injury was discovered. However, the court warned her of the possibility that she could be charged in relation to the abuse of Gage and advised her that she could refuse to answer any questions that might tend to incriminate her. Misty continued to testify about Darnell without invoking the privilege.

Later in the trial, during the presentation of the evidence for the defense, Nichols's attorney informed the court that Misty might invoke her privilege during cross-examination. Outside the presence of the jury, the court asked her if she had any concerns about testifying. Misty responded that she feared losing her children if she testified. Based on that exchange, the trial court ruled that Nichols could not call Misty as a witness.

Recognizing the possibility that Misty might not rely on her Fifth Amendment privilege, the court suggested that the better procedure would be to take Misty's testimony by avowal before the jury retired to deliberate. Neither the prosecutor nor Nichols's attorney stated any preference about the timing of the avowal. Due to time considerations, however, the court decided to postpone taking Misty's testimony for the record until after the jury began deliberating. Misty did not invoke her Fifth Amendment privilege, answering all of the questions posed by the attorneys for Nichols and the Commonwealth.

In moving for a mistrial, Nichols contended that he was improperly and unfairly deprived of the benefit of Misty's exculpatory testimony. The court delayed ruling on his motion until after the jury reached its verdict. Following the guilty verdict, the court denied the motion. Nichols was sentenced on March 4, 2004, and this appeal followed.

Nichols first argues that the trial court erred in excluding his proffer of evidence of bad acts performed by Darnell -- conduct that was highly similar to that which caused Gage's injury. This evidence clearly supported his defense that it was Darnell who had abused and injured Gage.

The factual evidence placed David Darnell at the home after Misty got in the shower, the time the Commonwealth alleges the injury occurred. Therefore, testimony that David Darnell subsequently abused Gage and Jonathan Kirk was relevant to establish he reasonably could have caused Gage's spiral fracture.

(Appellant's brief, p. 6.) The Commonwealth maintains that the trial court did not abuse its discretion in excluding the evidence. It argues that there was "insufficient information . . . to establish any similarities or relevant connections" between Gage's injury and the subsequent acts committed by Darnell. (Appellee's brief, p. 8.)

The exclusion of evidence in support of a defendant's alternative perpetrator theory was recently addressed in Beaty

v. Commonwealth, 125 S.W.3d 196 (Ky. 2004), and Blair v. Commonwealth, 144 S.W.3d 801 (Ky. 2004). In Beaty, the defendant's conviction on methamphetamine-related charges was reversed because he was denied the opportunity to present evidence that another person had planted the drugs in the car that he was operating. In concluding that the trial court erred in excluding the evidence, the Supreme Court of Kentucky discussed the defense theory of an alternate perpetrator as being essentially integral to the Sixth Amendment right to present an adequate defense:

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, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). This right, often termed the "right to present a defense," is firmly ingrained in Kentucky jurisprudence, e.g., *Rogers v. Commonwealth*, Ky., 86 S.W.3d 29, 39-40 (2002); *Holloman v. Commonwealth*, Ky., 37 S.W.3d 764, 767 (2001); *Mills v. Commonwealth*, Ky., 996 S.W.2d 473, 489 (1999); *McGregor v. Hines*, Ky., 995 S.W.2d 384, 388 (1999); *Barnett v. Commonwealth*, Ky., 828 S.W.2d 361 363 (1992), and has been recognized repeatedly by the United States Supreme Court. See *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 (1998)[.] [Additional citations omitted.] An exclusion of evidence will almost invariably be declared unconstitutional when it "significantly undermine[s] fundamental elements of the defendant's defense." *Scheffer*, *supra*, at 315, 118 S.Ct. at 1267-68.

Id. at 206-207. Beaty holds that when a defendant offers evidence suggesting that another committed the crime with which he is charged, exclusion of that evidence will only be permitted when "the defense theory is 'unsupported, speculat[ive], and far-fetched' and could thereby confuse or mislead the jury." Id. at 207, citing Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997). "No matter how credible [the alleged alternative perpetrator] defense, our system of justice guarantees the right to present it and be judged by it." Id. at 210, citing Pettyjohn v. Hall, 599 F.2d 476, 480 (1<sup>st</sup> Cir.1979).

Expanding on the principles articulated in Beaty, supra, the court in Blair, supra, focused on the admissibility of other crimes or bad acts committed by the alleged alternative perpetrator, analyzing it as "reverse 404(b) evidence." 144 S.W.3d at 810. In Blair, the appellant had been convicted of murdering his victim during the course of robbing her. The court held that he should have been allowed to present evidence that the police officer who investigated the murder had previously been involved in the theft of property from the police evidence room.

Exclusion of evidence that an "aaltperp"  
[alleged alternative perpetrator] had both  
the motive and the opportunity to commit the  
act for which the accused is charged  
deprives the accused of the Due Process  
right to present a defense. . . . We  
recognize that the similarity between the



two acts in question (theft of a VCR from the evidence room and theft of money from a crime scene) would not satisfy the high standard of admissibility established for KRE 404(b) evidence offered against an accused. See *Billings v. Commonwealth*, Ky., 843 S.W.2d 890, 893 (1992) (prior acts must be so sufficiently similar to demonstrate a modus operandi). However, as pointed out in the leading case of *United States v. Stevens*, 935 F.2d 1380 (3<sup>rd</sup> Cir.1991), "a lower standard of similarity should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor." *Id.* at 1404. "It is well established that a defendant may use similar 'other crimes' evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt of the crime charged against him." *Id.* . . . If the evidence has relevance, then **it should be excluded only upon application of KRE 403 principles, i.e.,** that its probative value is substantially outweighed by considerations of confusion of the issues, misleading the jury, or undue delay. *Stevens, supra* at 1405. None of those factors militate [*sic*] against admission of the evidence in this case. (Emphasis added.)

Id.

Thus, according to the reasoning of Blair, the exclusion of the bad acts evidence might arguably be appropriate under KRE 404(b) in a prosecution of Darnell. However, Nichols should not have been deprived of the defensive use of evidence that Darnell had harmed Gage and his brother on other subsequent occasions. An analysis of the issue pursuant to KRE 403 reveals that the evidence was relevant to show Darnell's propensity to commit the offense. The Commonwealth does not counter that

probative value by suggesting how its admission would have resulted in confusion, misled the jury, or caused delay. However, without the evidence, Nichols was not allowed to develop his defense, and the jury lacked direction as to the possible motive that Darnell would have had for harming Gage.

Pursuant to Beaty, supra, and Blair, supra, we conclude that the trial court erred in excluding evidence indicating Darnell to have been the true perpetrator of the crime. A trial is at its most profound essence a quest for truth. In denying Nichols the opportunity to present a complete defense, the court not only impaired his right to a fair trial, but it also may have deprived the public of the opportunity to identify, to punish, and to deter the true perpetrator of a crime that as a matter of public policy is particularly heinous as its victim was a very young child.

Because we are remanding the matter for a new trial, we will discuss the other issues raised by Nichols. Nichols contends that the trial court committed reversible error by excluding the testimony of Misty Kirk. He argues that Misty was willing to testify on his behalf until the prosecutor improperly employed a "clear tactic of intimidation [that] was inappropriate for a witness who had no intention of asserting the Fifth Amendment." (Appellant's brief, p. 15.) Under these circumstances, he contends that the court erred in excluding her

testimony without questioning her to determine whether she had a valid basis for invoking the privilege against self-incrimination or whether she had simply been scared into silence.

The exclusion of a defense witness's testimony is a "drastic remedy," and for that reason, a trial court has limited discretion in disallowing the evidence. Combs v. Commonwealth, 74 S.W.3d 738, 743 (Ky. 2002). Prior to deciding whether or not to permit Nichols to call Misty as a witness, the court had a duty to conduct a preliminary inquiry (a "dry run") into the proposed testimony outside the presence of the jury. Id. at 745. Nichols properly tendered his prepared questions to the trial court for that very purpose. Nevertheless, the court ignored counsel's request and ruled without inquiry that she could not be called as a witness.

It was improper for the court "to assume that [the witness] would invoke the privilege as to questions she was never asked." Id. In Commonwealth v. Gettys, 610 S.W.2d 899, 900-901 (Ky.App. 1980), this Court outlined the duties of a trial court to examine and to determine whether there is a reasonable basis for a witness to fear self-incrimination. In the case before us, the error could have been cured if Nichols had accepted the trial court's initial invitation to call Misty on avowal before the jury retired to deliberate. When the court

postponed the avowal, Nichols failed to object. Therefore, he waived the right to complain about the ruling on appeal. See, e.g., Hardy v. Commonwealth, 719 S.W.2d 727 (Ky. 1986). We hold that the lack of preservation prevents us from finding error. However, should this situation repeat itself, the court is hereby advised of the technique prescribed in Gettys, supra, to address her testimony.

Next, Nichols argues that Deputy Banks was wrongfully allowed to testify about the timing of Gage's injury -- a medical opinion that he was unqualified to offer. He acknowledges that this error was not preserved for review. On remand, the trial court should take care to restrict expert medical testimony to properly qualified medical experts.

Nichols also complains about testimony given by Gage's treating doctor. The doctor testified that there was no reason for Nichols to lie about how the injury occurred unless he was attempting to "cover up some type of abuse." Nichols contends that Dr. Deweese was allowed to speculate and thereby to invade the province of the jury with this comment. We disagree. As the Commonwealth correctly argues, the jury was aware that Dr. Deweese suspected abuse by the fact that he involved the police and social workers. His opinion did not indicate his belief in the guilt or innocence of Nichols, a matter that was left intact for jury determination:

Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, Greer's Adm'r v. Harrell's Adm'r, 306 Ky. 209, 206 S.W.2d 943 (1947), and when the subject matter is outside the common knowledge of jurors. O'Connor & Raque Co. v. Bill, Ky., 474 S.W.2d 344 (1971). Presumably, jurors do not need assistance in the form of an expert opinion that the defendant is guilty or not guilty. However, they usually do need the assistance of a medical expert in determining the cause of a physical condition in order to understand the evidence and determine the ultimate fact in issue. KRE 401; KRE 702.

Stringer v. Commonwealth, 956 S.W.2d 883, 889-90 (Ky. 1997).

Finally, Nichols contends that the trial court erred in failing to direct a verdict of acquittal. We disagree. It was not "clearly unreasonable" for the jury to have found Nichols guilty of the abuse of Gage in light of the limited evidence that it heard and evaluated. Commonwealth v. Benham, 816 S.W.2d 187 (Ky. 1991). Therefore, while a directed verdict was not warranted, a new trial is required.

The judgment of the McCracken Circuit Court is vacated, and this matter is remanded for a new trial consistent with this opinion.

ALL CONCUR.

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