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Kentucky Law Survey: Evidence

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Evidence

BY RICHARD H. UNDERWOOD* AND CAROLYN M. GEISLER**

INTRODUCTION

Kentucky courts faced a number of significant issues in evidence law during the Survey period.¹ Several decisions dealt with character evidence and problems arising from the admission of evidence of prior criminal acts of the accused, either as substantive evidence or for impeachment. This Survey will highlight these cases and to a lesser degree discuss cases on hearsay admissions, opinion, the Kentucky Dead Man Statute and privilege, which also were decided during the Survey period.²

I. CHARACTER EVIDENCE

The proper use of character evidence is confusing to both lawyers and law students. Whether character evidence is used for substantive purposes³ or impeachment,⁴ many of the “nuts and bolts” are the same. For example, the common law of Kentucky generally permits proof of character only by way of reputation, rather than by opinion or by specific acts or instances,

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¹ This Survey period includes June 1980 through June 1982. For purposes of continuity and utility, the authors have followed the format suggested in prior Surveys of Kentucky Evidence Law, e.g., Lawson, *Kentucky Law Survey—Evidence*, 66 KY. L.J. 585 (1977-78), and R. LAWSON, KENTUCKY EVIDENCE LAW HANDBOOK (1976) [hereinafter LAWSON]. The authors hope this Survey can serve as an interim supplement to the latter work.

² This Survey does not treat but takes this opportunity to point out the following cases: *Jones v. Commonwealth*, 623 S.W.2d 226 (Ky. 1981) (separation of witnesses; abuse of discretion in excluding testimony of witness); *Hatfield v. Commonwealth, Dept. of Transportation*, 626 S.W.2d 213 (Ky. 1982) (permitting introduction of comparable sales outside of the county in a condemnation proceeding); *City of Louisville v. Courier-Journal and Louisville Times Co.*, 637 S.W.2d 658 (Ky. Ct. App. 1982) (protecting disclosure of police department internal affairs investigatory files but approving of disclosure to public of initial complaints and action taken).

³ LAWSON, *supra* note 1, § 2.05 & 2.10.

⁴ *Id.* § 4.15.

whether the evidence is offered for substantive purposes⁵ or for purposes of impeachment.⁶ "Mechanics" aside, it is much more likely that character evidence will be admitted when it is offered to undermine a witness's credibility than when it is offered as a way of directly suggesting guilt in a criminal case or liability in a civil case.⁷ Specifically, considerable care is exercised to insure that a jury will not be permitted to infer, from evidence of a party's character or act,⁸ that he or she acted in conformity therewith on the particular occasion that is the subject of the prosecution or litigation. On the other hand, when character evidence or evidence of a prior crime is offered for impeachment purposes, the courts begin with the presumption that such evidence, in proper form, is helpful⁹ and that the jury will not misuse it if proper instructions are given.¹⁰

A. *The Use of Character Evidence to Impeach*

Kentucky Rule of Civil Procedure (CR) 43.07 governs impeachment in both civil and criminal cases.¹¹ In all but one of the

⁵ *Id.* § 2.15.

⁶ *Id.* § 4.15(B). An exception is provided for impeachment by the use of prior felony convictions relating to truth and veracity. Ky. R. Civ. P. 43.07 [hereinafter cited as CR]. See also LAWSON, *supra* note 1, § 4.15, 55-56. For the complete text of CR 43.07, see note 11 *infra*.

⁷ See generally LAWSON, *supra* note 1, §§ 2.05 & 2.10.

⁸ The authors treat evidence of prior criminal acts of the accused as a branch of the law of character evidence. Again, the risk of admission is that evidence of a previous crime will suggest that the accused person's character is consistent with the commission of the crime in question. See R. LEMPERT & S. SALTZBERG, *A MODERN APPROACH TO THE LAW OF EVIDENCE* 210, 226 (1977).

⁹ But see *id.* at 286 for the proposition that such a difference for impeachment is a "specious distinction."

¹⁰ This is useful, if not altogether satisfactory fiction. In *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court held that a limiting instruction was an inadequate substitute for the protection of an accused's constitutional rights. "The effect is the same as if there had been no instruction at all." *Id.* at 137.

¹¹ CR 43.07 states in its entirety:

A witness may be impeached by any party, without regard to which party produced him, by contradictory evidence, by showing that he had made statements different from his present testimony, or by evidence that his general reputation for untruthfulness renders him unworthy of belief; but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of a felony.

cases decided during the Survey period relating to impeachment, the courts cited both the Civil Rule and Dean Lawson's handbook.¹² In two cases, each characterized as a "swearing contest," the Court dealt with character evidence offered against an accused in a criminal prosecution.

In *Carver v. Commonwealth*,¹³ the defendant was charged with trafficking in alcoholic beverages in a dry county. She elected to testify, and the prosecution was permitted to present rebuttal testimony by a police officer to the effect that defendant's reputation for truth and veracity was bad. The testimony was in the form permitted by CR 43.07 and admissible under the rule that a criminal defendant who elects to testify may be impeached in the same manner as any other witness.¹⁴ The case is noteworthy only because the defense had urged reversal predicated on the admission of this reputation evidence by mistakenly citing that section of Dean Lawson's handbook relating to the *substantive* use of character evidence.

Confusion regarding proper impeachment also arose in *Warner v. Commonwealth*.¹⁵ In that case the defendant had been convicted of first-degree rape and sodomy allegedly committed while the defendant was a deputy county jailer. The defendant claimed on appeal that the court erroneously admitted into evidence testimony concerning unrelated prior acts of sexual misconduct of a different nature, involving different victims. After holding that such evidence could not be admitted in chief¹⁶ and noting that "impeaching testimony has been the subject of misunderstanding and improper evaluation,"¹⁷ the Kentucky Supreme Court ruled that the defendant had not opened the door to the rebuttal testimony. The Court also might have noted that neither the cross-examination nor the rebuttal testimony was in the form allowed by CR 43.07.¹⁸

¹² LAWSON, *supra* note 1, § 4.15.

¹³ 634 S.W.2d 418 (Ky. 1982) (reversing defendant's conviction on other grounds).

¹⁴ LAWSON, *supra* note 1, § 4.15(E).

¹⁵ 621 S.W.2d 22 (Ky. 1981).

¹⁶ See text accompanying notes 40-59 *infra* for a discussion of substantive use of prior acts evidence.

¹⁷ 621 S.W.2d at 25.

¹⁸ See note 11 *supra* for a complete reading of CR 43.07. In *Warner*, the defense

Similar confusion surrounds the use of testimony concerning a witness's reputation for truth and veracity for purposes of rehabilitation. Specifically, a witness must have been impeached before his or her testimony may be bolstered by a reputation witness in an effort to rehabilitate the witness.¹⁹ This question also arose in the *Carver* case,²⁰ in which the Court suggested that rebuttal testimony bolstering the prosecuting witness's reputation for truth and veracity may have been admitted improperly if the defendant had been foreclosed from cross-examining that witness for bias and hostility. Similarly, in *Ellis v. Ellis*,²¹ the Court reversed the judgment in a civil case and ordered a new trial, where the trial judge allowed a witness whose character had not been attacked to be "rehabilitated" by a reputation witness.²²

B. *Substantive Use of Character Evidence*

Kentucky law prohibits the use of character evidence for substantive purposes in civil cases, unless a trait of character is in issue.²³ In criminal cases, the prosecutor may not introduce evidence regarding the character of the accused until the defendant puts character in issue by attempting to show that his or her character for a particular trait is inconsistent with the commission of the offense charged.²⁴

might have challenged the ethical propriety of the cross-examination, which not only demanded that the defendant characterize the testimony of other witnesses, but also contained an assertion by the prosecutor of his personal belief in the testimony of the witnesses. See *Ryan v. Monson*, 179 N.E.2d 449 (Ill. App. Ct. 1961) (directing witnesses to characterize the testimony of others as true or false). On personal opinion or belief, see Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADV. (1982) (to be published).

¹⁹ LAWSON, *supra* note 1, § 4.15, at 55.

²⁰ 634 S.W.2d at 421.

²¹ 612 S.W.2d 747 (Ky. Ct. App. 1980).

²² The Court also reaffirmed the ancient Kentucky case of *Vance v. Vance*, 59 Ky. (2 Metcalf) 581 (Ky. 1859), which held that a witness who has been impeached by a prior inconsistent statement may not be rehabilitated through the introduction of evidence of his good reputation for truth and veracity. 612 S.W.2d at 748.

²³ An example would be a defamation case, where the defamatory statement charged the plaintiff with dishonesty. See LAWSON, *supra* note 1, § 2.05, for the general discussion of Kentucky law and this exception in civil cases. For a recent court statement of the rule, see *Ellis v. Ellis*, 612 S.W.2d at 748.

²⁴ LAWSON, *supra* note 1, § 2.10.

In *Neeley v. Commonwealth*,²⁵ the defendant was convicted of second-degree manslaughter. The evidence at trial suggested that the defendant was attempting to terrorize four teen-age boys by pulling alongside their station wagon and engaging in harassing tactics. The harassment ended abruptly when defendant's car collided with an oncoming car, killing the other driver. The defendant complained on appeal that the trial judge had erroneously allowed the teen-age boys to testify that they had not reported the accident because they were afraid of the defendant's family, which "had a bad reputation." The error was compounded by the prosecutor's summation, which portrayed the defendant as a person to be feared. In an unpublished opinion, the Kentucky Supreme Court noted that the defendant had not put his character in issue and reversed the conviction with the following observation:

[T]here is no question but that, in this case, in spite of an admonition by the trial judge with respect to only one of the witnesses, the evidence was highly prejudicial to the movant. The prosecution knew the value of the evidence to his case, as shown by its very introduction and by his use of it in his closing argument. In spite of the conflicting evidence, the jury not only found movant guilty, but gave him the *maximum sentence*.²⁶

Although Kentucky law permits a defendant to introduce evidence of the victim's character for violence in support of a plea of self-defense, as tending to prove who was the first aggressor,²⁷ a recent case reaffirmed the long-standing rule in the Commonwealth that such character evidence must be in the form of

²⁵ No. 81-SC-555-D (Ky. Mar. 30, 1982).

²⁶ *Id.*, slip op. at 3. Compare this protection of prejudicial character evidence and *Warner v. Commonwealth*, 621 S.W.2d at 27 (permissible for defense counsel to inquire of defendant while he is testifying in chief whether he committed the acts for which he was indicted without opening the door to character impeachment; irrelevant or collateral testimony also will not open the door) with *Massengill v. Commonwealth*, No. 81-SC-126-MR, slip op. at 2 (Ky. Sept. 22, 1981) (in prosecution for first degree assault, prosecution's reference to appellant's dress and long hair and association with a "disreputable motorcycle club" not improper, since it depicted defendant's appearance at the time of the assault and contrasted with his "immaculate" appearance at trial).

²⁷ LAWSON, *supra* note 1, § 2.10.

community reputation. In *Commonwealth v. Thompson*,²⁸ the court of appeals held that the admission of the victim's prior criminal convictions was error because such convictions were specific instances of violence, or prior bad acts, and not evidence of the victim's reputation in the community. Discretionary review has been granted in this case; practitioners should be alert to the Supreme Court's disposition.

II. PRIOR CRIMINAL ACTS OF THE ACCUSED

A. *The Use of Prior Criminal Acts to Impeach*

The general rule in Kentucky is that a witness, including an accused who chooses to testify, may be impeached by proof of felony convictions for crimes involving dishonesty or false statement.²⁹ Cases decided during the Survey year further clarified the types of crimes which may be used for impeachment.

In *Moore v. Commonwealth*,³⁰ a murder defendant sought to corroborate his alibi testimony by introducing the testimony of one Lofton, who had been incarcerated with the "actual killer." In an effort to discredit Lofton, the prosecution, during cross-examination of the defendant, first injected a reference to charges pending against him for kidnapping, capital murder and robbery. These references to unresolved charges were followed up on during the cross-examination of Lofton himself by questions relating to Lofton's prior convictions for murder and escape. Noting that impeaching crimes must be felony convictions, not pending charges,³¹ and that homicide and escape do not rest

²⁸ No. 81-CA-2262-MR (Ky. Ct. App. June 4, 1982) (29 KY. L. SUMM. 7, at 5 [hereinafter cited as KLS]), *discretionary review granted*, No. 82-SC-518 (Ky. Oct. 6, 1982).

²⁹ LAWSON, *supra* note 1, § 4.20. However, such evidence may not be admitted until a hearing is held outside the presence of the jury to determine that the nature of the conviction fits the rule and that its probative value outweighs the risk of prejudice to the defendant. *Cotton v. Commonwealth*, 454 S.W.2d 698 (Ky. 1970). For refinements of the doctrine, see Lawson, *Kentucky Law Survey—Evidence*, 66 KY. L.J. 585, 600-04 (1977-78) and Lawson, *Kentucky Law Survey—Evidence*, 64 KY. L.J. 273-78 (1975-76).

³⁰ 634 S.W.2d 426 (Ky. 1982).

³¹ The conviction also may not be lacking in any formality. In *Carver v. Commonwealth*, 634 S.W.2d at 420, the Court found error in admitting an unsigned prior conviction to prove the defendant was a recidivist bootlegger deserving of enhanced punishment.

on dishonesty, stealing or false swearing, the Supreme Court reversed the conviction.³²

The Kentucky courts continue to place no restriction on how old a felony conviction may be and still be used. Federal Rule of Evidence 609(b) limits the admissibility of criminal convictions to those less than ten years old, unless the proponent of the evidence gives advance written notice to the opposing party, and the trial court determines that the probative value of the evidence substantially outweighs its prejudicial effect.³³

In *Brewer v. Commonwealth*,³⁴ the defendant was convicted of stealing a motorcycle *owned* by a policeman. Although witnesses testified to seeing the defendant loading the motorcycle into his van and, in the appellate court's language, a "more substantial case could not have been made by the Commonwealth absent motion pictures," the defendant contended that he had taken the motorcycle "by mistake."³⁵ On appeal from his conviction, his counsel complained that his client was impeached by a prior felony conviction that was ten years old.³⁶ Both the client and the lawyer were advised that Kentucky has not adopted Federal Rule 609(b), that prohibits evidence of stale convictions. The remoteness of a conviction, however, is a proper subject for a Kentucky trial court to consider at a hearing required by *Cotton v. Commonwealth*.³⁷

Aside from the *Cotton* hearing, few procedural safeguards operate to prevent the admission of prior convictions. Although the only criminal convictions that may be used for impeachment purposes are felony convictions for crimes involving dishonesty or false statement, a defendant must object to the introduction of a misdemeanor conviction or waive the error, according to the Supreme Court's unpublished memorandum opinion in *Wayne v.*

³² The Court also rejected an argument that the impeachment was proper as tending to show interest or bias. The testimony could not have benefitted Lofton, and to allow the evidence as proof of some speculative general bias against the Commonwealth would "swallow the *Cotton* rule whole in every case." 634 S.W.2d at 436.

³³ FED. R. EVID. 609(b).

³⁴ 632 S.W.2d 456 (Ky. Ct. App. 1982).

³⁵ *Id.* at 457.

³⁶ Actually, the conviction was eight years old. *Id.*

³⁷ See note 29 *supra* for discussion of a *Cotton* hearing.

Commonwealth.³⁸ In addition, it is the duty of defense counsel to seek a limiting instruction or admonition that the jury not view the conviction as circumstantial evidence of the defendant's guilt.³⁹

B. *Substantive Use of Prior Criminal Acts*

Dean Lawson's treatise provides the general rule that evidence of prior criminal acts of the accused is not admissible substantively unless the evidence fits one of the established exceptions and the trial judge determines that the probative value of the evidence outweighs the risk of prejudice.⁴⁰ The Survey year

³⁸ No. 81-SC-265-MR (Ky. Sept. 22, 1981). One may question whether this opinion furthers the policies of *Cotton*. See 454 S.W.2d at 698.

³⁹ *Edwards v. Commonwealth*, No. 81-SC-651-MR, slip op. at 3 (Ky. Feb. 16, 1982) (unpublished memorandum) (citing *Romans v. Commonwealth*, 547 S.W.2d 128 (Ky. 1977)). According to *Brewer*, the admonition may be given immediately after testimony or at the conclusion of the witness' testimony. 632 S.W.2d at 457.

⁴⁰ LAWSON, *supra* note 1, § 2.20 states in its entirety:

Sec. 2.20 Prior Criminal Acts of Accused

(A) **General Rule:** Evidence of the commission of crimes other than the one that is the subject of a charge is not admissible to prove that an accused is a person of criminal disposition. Such evidence, however, is admissible if offered for one of the purposes described in subsections (B), (C), and (D), and if the trial judge determines that the possibility of prejudice to the accused is outweighed by the probative worth and need for the evidence.

(B) **Interwoven Criminal Acts:** Evidence that reveals an independent criminal act by an accused is admissible if the independent crime is so interwoven with evidence of the crime charged that its mention is both necessary and appropriate.

(C) **Independent Crimes Admissible for Limited Purpose:** Evidence of the commission of crimes other than the one charged is admissible if (1) offered to prove motive, intent, knowledge, identity, plan or scheme, or absence of mistake or accident, and (2) such evidence is relevant to the issues other than in proof of a general criminal disposition in the accused.

(D) **Prior Sexual Acts:**

(1) Evidence of independent sexual acts between an accused and the victim of an alleged sex crime is admissible to prove a disposition and inclination in the accused to engage in sexual acts with the victim. Upon admission of such evidence, the trial court must admonish the jury that such evidence may be used only to corroborate other testimony as to the offense charged.

contributed two interesting and important cases that demonstrate that the Supreme Court will narrowly construe the exceptions allowing admission of other crimes evidence to insure that the exceptions do not swallow the general rule or "stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial."⁴¹

In *O'Bryan v. Commonwealth*,⁴² the Supreme Court was presented with a classic problem of criminal evidence. The defendant's former husband, O'Bryan, died in 1979 of acute arsenic poisoning, and during the investigation of that death the police learned that another former husband, Sadler, had died of unknown causes in 1967. When Sadler's body was exhumed, authorities determined that he too had died of acute arsenic poisoning. Additionally, the sister of the second husband, LeAnne O'Bryan, became ill from what appeared to be arsenic poisoning shortly after visiting her dying brother at the hospital with her former sister-in-law, the defendant. She disclosed to the police that she had told the defendant there would be "one hell of an investigation" if her brother died, and suspected that the defendant had then put arsenic in "numerous cups of coffee" that defendant brought to her during their vigil at the hospital.⁴³

The defendant was indicted for the murder of both her former husbands, and the indictments were severed for trial. Shortly after the severance and the Commonwealth's notice that it would seek the death penalty grounded on "murder for monetary gain," the defendant was indicted for the attempted murder of her former sister-in-law, LeAnne O'Bryan. This indictment was joined for trial with the O'Bryan homicide.

The Commonwealth filed a motion to admit into evidence in the O'Bryan cases references to and facts concerning the 1967

(2) Evidence of independent sexual acts between an accused and persons other than the victim of an alleged sex crime, if such acts are similar to that involved in the charge and not too remote in time, is admissible to prove a disposition and lustful inclination in the accused, intent as to the act charged, motive or a common plan, scheme, or pattern. Upon admission of such evidence, the trial court must admonish the jury that such evidence may be used only to corroborate other testimony as to the offense charged.

⁴¹ C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 454 (2d ed. 1972).

⁴² 634 S.W.2d 153 (Ky. 1982).

⁴³ *Id.* at 155.

death of Sadler. The Commonwealth also planned to introduce evidence relating to yet another former husband, McGhee, to the effect that the defendant had once furtively put some "white powder" in his coffee.⁴⁴ The trial judge granted the Commonwealth's motions and denied the defendant's subsequent motions in limine.⁴⁵ At trial, the defendant was portrayed as a "jealous person acutely conscious of money and financial security" who had killed her former husbands for financial gain. The defendant was convicted of murder and attempted murder charged in the O'Bryan cases and was sentenced to death.

The issue before the Kentucky Supreme Court in *O'Bryan* was whether the trial court should have admitted evidence relating to the Sadler death, which was the subject of a pending indictment, as well as evidence relating to the defendant's relationship with her former husband, McGhee, under the exception permitting proof of other crimes to show "a common plan or scheme."⁴⁶

The many reported cases in England and the United States involving "other crimes" evidence present fact patterns as fascinating as they are grisly.⁴⁷ Moreover, many of the cases can be reconciled only after a careful analysis of the many different theories of admissibility that are grouped, too often and too readily, under the heading of "common plan or scheme." Among the cases are those in which a series of crimes have been committed by a device or modus operandi which is "so unusual and distinc-

⁴⁴ *Id.* at 157.

⁴⁵ *Id.* at 154.

⁴⁶ Presumably, the theory was that the evidence tended to prove identity by proving an overall larger and continuing plan, a distinctive modus operandi, and a motive. See generally C. MCCORMICK, *supra* note 41 at 451, for a discussion of the rationale.

The "identity" exception is most easily used by the Courts as evidenced by the multitude of examples in LAWSON, *supra* note 1, § 2.20 while there are no common scheme or plan examples. The unpublished case of *Edwards v. Commonwealth*, No. 81-SC-651-MR, slip op. at 2 (Ky. Feb. 16, 1982), rejected the common scheme or plan argument of the prosecutor but upheld the admission of evidence of prior criminal acts under the rationale of proving identity—even when the prosecutor did not advance this argument. In one unpublished case during the Survey period, the Court accepted the common plan or scheme exception. *Beardsley v. Commonwealth*, No. 80-SC-864-MR (Ky. July 7, 1981).

⁴⁷ For a delightful collection, the authors recommend J. WIGMORE, *CASES ON EVIDENCE* (1906).

tive as to be like a signature.”⁴⁸ The leading case of this genre is *Regina v. Smith*,⁴⁹ the famous “brides of bath” case, wherein the defendant murdered a series of wives, each time for financial gain and each time by employing a special technique for drowning the victim in the bathtub.⁵⁰

Another class of cases involves proof of the existence of a larger continuing plan, scheme or conspiracy. For example, in *Haley v. State*⁵¹ the defendant was tried for the shotgun murder of one Williams. The evidence tended to show that the defendant had had an affair with Mrs. Williams, but had been unable to persuade her to abandon her husband. The state was permitted to introduce evidence that ten months prior to the murder of Mr. Williams, the defendant’s wife had died of strychnine poisoning. The appellate court reversed the conviction, but in so doing provided a blueprint for the prosecution on retrial of the case.⁵²

Notwithstanding such notable precedents, the courts have cautioned that before the jury is entitled to consider the other crimes, there must be substantial evidence or “clear and convincing” evidence⁵³ of the commission of the other crime and the defendant’s connection with it. In addition, the better reasoned cases go beyond a mechanical pigeonholing of the evidence into

⁴⁸ C. McCORMICK, *supra* note 41, at 449.

⁴⁹ 84 L.J.K.B. (n.g.) 2153 (1915).

⁵⁰ Justice Clayton, who filed a separate dissenting opinion in *O’Bryan*, apparently felt that an arsenic poisoning “for profit” was a sufficiently distinctive *modus operandi* to justify admission of evidence relating to Sadler’s death. 634 S.W.2d at 159 (Clayton, J., dissenting).

⁵¹ 209 S.W. 675 (Tex. 1919).

⁵² The Court stated:

If, upon another trial, evidence is proffered sufficiently cogent to establish the fact that appellant’s wife died from poison, we believe the evidence should be received as coming within that exception to the rule excluding independent crimes which recognizes their admissibility when they are evidence of a systematic plan formed and executed by the accused. This arises from the theory advanced by the state that the appellant, desiring to continue unobstructed his illicit relations with the wife of deceased, formed a plan to remove the obstacles, viz. his own wife and the deceased Williams, and proof that he killed his wife in pursuance of his purpose to attain the same object which would furnish the motive for the killing of the deceased tended to identify appellant as the slayer of Williams.

Id. at 677-78.

⁵³ *Tucker v. State*, 412 P.2d 970 (Nev. 1966).

an arguable exception and emphasize the obligation of the trial judge to exclude the "other crimes" evidence, even if it appears to fit a pigeonhole of admissibility, if the probative value of the evidence is outweighed by its prejudicial effect.⁵⁴

The *O'Bryan* case was a particularly challenging one, inasmuch as the multiple incidents of arsenic poisoning did present something more distinctive than a string of crimes of the same general class.⁵⁵ On the other hand, assuming that the prior death was in fact the result of a criminal agency, specifically, the defendant, it is debatable whether or not it involved so distinctive a modus operandi as to provide compelling evidence of identity. Similarly, the remoteness in time between the alleged "other crime" and the crime charged arguably serves to distinguish the case from *Haley v. State*. Even so, one may readily agree that the trial judge had a basis for concluding that the evidence had *some* probative value.

On review, the Kentucky Supreme Court reversed the conviction. The Court focused on the absence of "substantial" evidence that the Sadler death arose from a criminal instrumentality, and, if so, whether the poison was administered by the defendant.⁵⁶ Moreover, although the opinion may have overstated the case against the probative value of the evidence, the Court's reversal of the jury verdict is amply justified on the theory that the trial judge abused his discretion in not leaning in favor of exclusion, to prevent the untried charge from bootstrapping an otherwise close case.⁵⁷

Within the Survey period, a second important case involving other crimes evidence clarified the exception regarding independent sexual acts between an accused and persons other than the victim of the sex offense charged. In *Warner v. Common-*

⁵⁴ C. McCORMICK, *supra* note 41, at 454. McCormick cites *Noor Mohamed v. The King*, [1949] App. C. 182, 192-93 (Privy Council) (error to admit evidence of the poisoning of a previous wife in a prosecution for spousal homicide by poisoning) and *State v. Gilligan*, 103 A. 649, 653 (Conn. 1918) (error to admit evidence of other deaths by poisoning).

⁵⁵ Cf. C. McCORMICK, *supra* note 41, at 449-50.

⁵⁶ 634 S.W.2d at 156.

⁵⁷ Cf. *Noor Mohamed v. The King*, [1949] App. C. at 190-93 (a case virtually on all fours with *O'Bryan*).

wealth,⁵⁸ the prosecution was permitted to introduce evidence relating to prior acts of sexual misconduct of a different nature, and involving different victims, than the offenses charged. In reversing a jury verdict of conviction, the Court ruled that the other instances of sexual misconduct recounted at trial did not meet the standard of "close similarity" required to evidence a scheme or pattern or to show a disposition to commit the crimes charged.⁵⁹

III. HEARSAY

No Kentucky Law Survey of evidence would be complete without a review of developments in the application of the hearsay rule, and this Survey period contributed several opinions.⁶⁰

The unpublished Supreme Court opinion in *Shelby v. Commonwealth*⁶¹ demonstrates continued reliance upon the garbage can of "res gestae." In that case, the defendant was convicted of conspiracy to commit first degree robbery and first degree assault. He and two cohorts were indicted for assault in connection with the shooting of Thelonius Hardin, whom they apparently believed to be a drug dealer. The defendant and another co-conspirator entered the victim's apartment heavily armed. A third co-conspirator overheard the defendant's partner say upon fleeing the scene: "Why did you do this man, why did you do this, what did you shoot him for?" When the defendant challenged the admission of this evidence on appeal, the Supreme Court upheld its admission under the "res gestae" exception.⁶² The authors' criticism of the case is not a reflection on the result or the close examination of the facts involving spontaneity, which were clearly correct, but instead a criticism of the Court's continued use of the doctrine of "res gestae."

⁵⁸ 621 S.W.2d at 22 (Ky. 1982).

⁵⁹ *Id.* at 26.

⁶⁰ No attention will be given to the shopbook exception as discussed in *O.C.E. v. Commonwealth*, 638 S.W.2d 287 (Ky. Ct. App. 1982), *discretionary review denied*, No. 82-SC-487-D (Ky. Oct. 6, 1982).

⁶¹ No. 81-SC-452-MR (Ky. Feb. 16, 1982).

⁶² The court also noted, correctly, that the statement was an excited utterance or a spontaneous exclamation. 81-SC-452-MR, slip op. at 2. See LAWSON, *supra* note 1, § 8.60 for a discussion of res gestae and spontaneous statements as one and the same.

Kentucky law has an unusual and progressive rule known as the *Jett* doctrine regarding the extrajudicial inconsistent statements of witnesses who testify at trial. Specifically, if the extrajudicial declarant appears as a witness at trial, is available for cross-examination and is given an opportunity to explain a prior inconsistent statement after a foundation is laid pursuant to CR 43.08,⁶⁴ then the inconsistent statement is admissible for proof of the matter stated therein.

The case of *Smith v. Commonwealth*⁶⁵ clarifies the application of this rule. In *Smith*, the defendant and one Johnson met their victim, Childers, with the putative intention of taking him to a prostitute. All three drove off in Childers' car, with Johnson in the back seat. However, after the car had proceeded only a few blocks, Childers was told that their intention was robbery and that Childers should pull over. When Childers pulled a gun and the defendant shouted a warning, Johnson shot Childers in the head, killing him. After Johnson was apprehended, he gave a signed statement to the police. At defendant's trial, Johnson was a hostile witness and was reluctant to answer questions regarding his prior statement to the police. However, having pled guilty and been sentenced, he had no right to refuse to testify. Moreover, he did eventually respond to the prosecution's questions. The defense chose not to pursue a detailed cross-examination but contended on appeal that the witness's hostility precluded full and effective cross-examination and that the application of the *Jett* doctrine was therefore improper.⁶⁶ The Supreme Court rejected this contention, opining that the witness was available for cross-examination⁶⁷ and that counsel should have posed any ques-

⁶³ See *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); LAWSON, *supra* note 1, § 8.05. This exception is endorsed in Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192-93 (1948).

⁶⁴ The rule requires the following foundation to be laid: "[The witness] must be inquired of concerning [the prior inconsistent statement], with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it." CR 43.08.

⁶⁵ 634 S.W.2d 411 (Ky. 1982).

⁶⁶ The defendant relied upon *Phillips v. Commonwealth*, 600 S.W.2d 485 (Ky. Ct. App. 1980) (where witness' refusal to testify was based on a legitimate plea of the privilege against self-incrimination, *Jett* doctrine would not apply).

⁶⁷ 634 S.W.2d at 412. The opinion did not discuss any problems of the "confronta-

tions he had to the witness and allowed the witness to refuse to answer each question to create a record for appeal.⁶⁸

IV. ADMISSIONS

In *Huff v. Conway*,⁶⁹ the court of appeals further clarified when a party's testimony may be held to be a judicial admission sufficient to preclude the introduction of contradictory evidence on the fact in issue.⁷⁰ *Huff* involved an action for legal malpractice brought by Mrs. Huff against her former divorce attorney, arising out of a December 1979, divorce. The action had been brought out upon the recommendation of her appellate counsel, attorney Porter. The defendant moved for summary judgment, asserting that the action was barred by the statute of limitations,⁷¹ suit having been filed on January 22, 1981. The plaintiff's attorney opposed the summary judgment on the ground that he had not discovered and advised the plaintiff of her rights against her former counsel until March 1980, and he countered the motion with an affidavit to that effect. The trial court granted summary judgment for the defendant on the ground that the plaintiff had testified in her deposition that attorney Porter had told her of her potential malpractice claim more than one year before the filing of the action.

The appellate court reversed, opining that the plaintiff's testimony was not sufficiently clear and unequivocal to constitute a judicial admission. After reviewing the transcript "as a whole,"

tion" clause of the sixth amendment. Presumably there were none. See, e.g., *Nelson v. O'Neil*, 402 U.S. 622 (1971); *California v. Green*, 399 U.S. 149 (1970); *Harrington v. California*, 395 U.S. 250 (1969).

⁶⁸ 634 S.W.2d at 413.

⁶⁹ No. 81-CA-1305-MR (Ky. Ct. App. Jan. 8, 1982), *rev'd on other grounds*, 29 KLS 15, at 6 (Dec. 15, 1982).

⁷⁰ The doctrine that testimony may constitute a judicial admission is discussed in *LAWSON*, *supra* note 1, § 8.10.

⁷¹ KY. REV. STAT. § 413.245 (Bobbs-Merrill Cum. Supp. 1980) [hereinafter cited as KRS] provides in pertinent part:

[A] civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.

the court could not say for sure whether the plaintiff knew or understood the exact nature of her deposition testimony.⁷² Because her statements on deposition were not conclusive judicial admissions, the court concluded that attorney Porter's affidavit as well as the plaintiff's confusing and contradictory deposition testimony presented a genuine issue of fact precluding the entry of summary judgment.

A similar issue was presented in *American States Insurance Company v. Audubon Country Club*,⁷³ in which the plaintiff Davis was injured in a golf cart accident and sued the driver of the cart and Audubon Country Club, the lessor of the cart and owner of the premises. The accident was allegedly the result of the golf cart being driven at a high rate of speed down a steep cart path, together with a possible malfunctioning of the cart itself. The trial court entered a directed verdict in favor of the driver, on the basis of what it viewed as a "judicial admission" by the plaintiff Davis concerning the driver's operation of the cart. Specifically, Davis was asked on cross-examination whether the driver had done anything Davis saw to make the cart turn over, to which Davis answered, "No, sir." The cross-examiner did not develop whether the driver had been driving fast, as other witnesses testified, whether Davis had been observant at the time or whether there was any malfunction of the vehicle. The appellate

⁷² No. 81-CA-1305-MR slip op. at 8. The court relied upon *Sutherland v. Davis*, 151 S.W.2d 1021 (Ky. 1941), which enumerated the factors to be considered in determining whether testimony should constitute a judicial admission:

- (2) Was his intelligence . . . such that he fully understood the purport of the questions and the answers thereto?
- (3) What was the nature of the facts to which he testified? Was he simply giving his impressions of an event as a participant or an observer, or was he testifying to facts peculiarly within his own knowledge?
- (4) Is his testimony contradicted by that of other witnesses?
- (5) Is the effect of his testimony clear and unequivocal, or are his statements inconsistent and conflicting?

151 S.W.2d at 1024 (quoting *Harlow v. Laclair*, 136 A. 128 (N.H. 1927)).

The Supreme Court opinion reviewing *Huff v. Conway* did not turn on Mrs. Huff's equivocal testimony concerning when she was told of her right to sue. Instead the Court reasoned that the statute of limitations began to run on January 18, 1980, when she was told she had been poorly represented. In other words it is the *date of discovery of the alleged wrong* that controls, and not the date of discovery of a right to sue for that wrong.

⁷³ No. 81-CA-859-MR (Ky. Ct. App. May 21, 1982) (29 KLS 6 at 8), *discretionary review granted*, No. 82-SC-682 (Ky. Oct. 5, 1982).

court held that the trial court had erred, finding that Davis' two-word answer was simply testimony of a "negative nature" that admitted nothing and did not justify a directed verdict in the driver's favor.⁷⁴ The court of appeals decision is not final because the Supreme Court has granted review of the case.

V. OPINION

Although the mere fact that a witness is a police officer will not qualify him or her to give an expert opinion concerning an automobile accident, several cases have held that police officers may testify as to the speed of the vehicle and the location of the point of impact if they have had some special training and experience and have adequately investigated physical evidence at the scene.⁷⁵ The court of appeals' decision in *Southwood v. Harrison*⁷⁶ not only provides a useful summary and analysis of the cases but also offers a reasoned approach to such expert testimony.

The case involved a head-on collision between two coal trucks, in which both drivers were killed. There were no witnesses, and, by the time state police arrived, a "multitude" of people had obliterated any traces of skid marks that might have existed on the dusty coal haul road. In addition, there was no visible debris that would tend to indicate the point of impact, and no evidence of the speed of either vehicle. The only apparent way the accident could have happened was that one vehicle had crossed the center line. Accordingly, the point of impact was the ultimate issue.

As to that issue, the plaintiff offered the testimony of a state police officer who had received the same fifty hours of classroom instruction on accident reconstruction as all other state police officers. In addition, the officer had been on the force for only a year and had investigated only about 125 accidents.⁷⁷ Doubting

⁷⁴ 29 KLS 6 at 9 (citing *Bryant v. Corley*, 455 S.W.2d 566 (Ky. 1970), and *McCallum v. Harris*, 379 S.W.2d 438 (Ky. 1964)). However, the court did not reverse, since the plaintiff had recovered an adequate and collectible judgment against the remaining party.

⁷⁵ LAWSON, *supra* note 1, § 6.15.

⁷⁶ 638 S.W.2d 706 (Ky. Ct. App. 1982), *discretionary review denied* (Ky. Oct. 5, 1982).

⁷⁷ The record was not developed to show how many of these accident investigations involved reconstruction.

that the officer was any more qualified than any other officer, the court turned to the physical evidence upon which the officer purported to base his testimony. Finding that the officer was relying only upon the post accident position of the vehicles⁷⁸ and an unsupported assumption that neither vehicle had moved forward after impact⁷⁹ the court distinguished the case from prior decisions approving police testimony regarding point of impact⁸⁰ and reversed a judgment for the plaintiff.

VI. DEAD MAN'S STATUTE

Mershon v. Land,⁸¹ presented yet another instance of attorney confusion surrounding the application of the Commonwealth's most unnecessary statute. In that case, Mershon claimed to have entered into an oral contract with Land to raise a tobacco crop on Land's farm. He began to work the farm, but Land sold the property to his children who raised the crop themselves. Mershon sued for breach of contract, but died prior to the trial of the action. The action was prosecuted by his administratrix.

In order to prove the existence of the oral contract, Mershon's administratrix offered the testimony of the landowner and the deposition of the landowner's wife. The trial court sustained the landowner's objection to the use of such evidence on the theory that it involved a transaction with the deceased tenant and, therefore, should be excluded under the Dead Man's Statute. The Court of Appeals reversed, pointing out that the statute provides that "no person shall testify *for himself* concerning any verbal statement of, or any transaction with . . . One who is . . . dead"⁸² The statute did not prohibit the use of Land's testi-

⁷⁸ This is an impermissible reliance, according to *Steeley v. Hancock*, 340 S.W.2d 467 (Ky. 1960) (post-accident position of vehicles alone will not suffice as evidence of their positions at impact).

⁷⁹ This is an unsupportable assumption since one truck had been loaded with coal and one had been empty.

⁸⁰ See, e.g., *Mulberry v. Howard*, 457 S.W.2d 827 (Ky. 1970) (visible skid marks and important tell-tale debris); *Moore v. Wheeler*, 425 S.W.2d 541 (Ky. 1968) (lengthy skid marks and other physical evidence).

⁸¹ 602 S.W.2d 186 (Ky. Ct. App. 1980).

⁸² *Id.* at 187 (quoting KRS § 421.210(2)).

mony if it was *against* his interest.⁸³ Moreover, the court pointed out that the deceased's administratrix could waive the bar of the Dead Man's Statute, since the bar exists solely for the protection of the deceased's estate and not for the other party to the alleged transaction.⁸⁴

VII. PRIVILEGE⁸⁵

The issue in *Commonwealth v. Boarman*,⁸⁶ was whether Kentucky Revised Statutes (KRS) section 199.335(7) abrogates the husband-wife privilege in criminal cases involving child abuse or neglect, as well as in actions in Juvenile Court. The statute provided:

Neither the husband-wife nor any professional-client privilege, except the attorney-client privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding an abused or neglected child or the cause thereof, in *any judicial proceedings resulting from a report pursuant to this section*.⁸⁷

The defendant was charged with first-degree sexual abuse of his three-and-a-half-year-old daughter, after the defendant's wife had reported the incident to Protective Services and later to the Jefferson County Police. She also provided a detailed statement to the Commonwealth's Attorney. In sustaining a motion to exclude the wife's statements and testimony from evidence pursuant to the statutory husband-wife privilege, KRS section 421.210(1),⁸⁸ the trial judge ruled that the abolition of the priv-

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Privileges are discussed in LAWSON, *supra* note 1, at ch. 5. Two cases which refused to apply privilege but were not chosen for discussion in this Survey are *Schooler v. Commonwealth*, 628 S.W.2d 885 (Ky. Ct. App. 1981), *discretionary review denied*, (Ky. Mar. 23, 1982) (approving use of juvenile records in a presentence investigation report) and *Tabor v. Commonwealth*, 625 S.W.2d 571 (Ky. 1981) (approving use of information of probation or parole officer for habitual offender).

⁸⁶ 610 S.W.2d 922 (Ky. Ct. App. 1980), *discretionary review denied*, (Ky. Feb. 13, 1981).

⁸⁷ KRS § 199.335(7) (Cum. Supp. 1980) (emphasis added).

⁸⁸ KRS § 421.210(1) (Cum. Supp. 1980) states in its entirety:

In all actions between husband and wife, or between either or both of them

ilege contained in KRS section 199.335 applied only to cases relating to the protection and removal of an abused child by the Juvenile Court. The court of appeals reversed, on the ground that the legislature is presumed to have intended that there be no such exceptions to the abolition of the privilege. Moreover, the court reasoned that the legislative intent was to have the protective agency report child abuse to the proper authorities for whatever action was necessary. Because the criminal proceedings in circuit court resulted from a report to Protective Services, the proceeding fell within the language of the waiver provisions of KRS section 199.355(7).⁸⁹

and another, either or both of them may testify as other witnesses, except as to confidential communications between them during marriage, provided, however, that in an action for absolute divorce or divorce from bed and board, either or both of them may testify concerning any matter involved in the action, including questions of property, and provided further, that neither may be compelled to testify for or against the other.

⁸⁹ The Court also noted the trend to limit the marital privilege, citing former Chief Justice Palmore's observation in *Wells v. Commonwealth*, 562 S.W.2d 622 (Ky. 1978) that "the rule that one party to a marriage cannot be compelled to testify against the other, codified in KRS 421.210, is one of the most ill-founded precepts to be found in the common law." 562 S.W.2d at 624.

It is interesting to note that KRS § 199.335 was repealed by Act of Apr. 9, 1980, ch. 280, § 152, 1980 Ky. Acts 915, effective July 1, 1982. Its counterpart is now KRS § 208B.030(5), which reads the same except that the following sentence has been added: "This subsection shall also apply in any criminal proceeding in district or circuit court regarding an abused or neglected child."