

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
FILE NO. 2014-SC-000468-DG

LEON M. GRIDER

APPELLANT

ON REVIEW FROM THE COURT OF APPEALS  
NO. 2011-CA-002003  
ADAIR CIRCUIT COURT NO. 05-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT  
LEON M. GRIDER

SUBMITTED BY:

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**CERTIFICATE OF SERVICE:**

The undersigned does hereby certify that copies of this reply brief for appellant were served upon the following named individuals, by mail, first class postage prepaid, on the 30th day of December 2015: Hon. James Bowling, c/o Hon. Judy D. Vance, Judge, Adair Circuit Court, 201 Campbellsville Street, Suite 299, Columbia, Kentucky 42728; Hon. Taylor Payne, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601; and Hon. Gail Williams, Commonwealth's Attorney, 29<sup>th</sup> Judicial Circuit, 116 Campbellsville Street, Suite 3, Columbia, Kentucky 42728. The undersigned does also certify that the record on appeal has not been removed from the office of the Clerk of this Court.

  
J. VINCENT APRILE II

## PURPOSE OF THIS REPLY BRIEF

The purpose of this reply brief is to respond to and refute the argumentation, analyses and legal authorities presented by the Commonwealth in its brief for the appellee.

## STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth has not requested oral argument because the appellee “believes that the issue ... may be adequately addressed by the parties’ briefs.” [Appellee’s Brief, ii.] However, Mr. Grider renews his request for oral argument, particularly in view of the failure of the appellee’s brief to address many of the arguments, both factual and legal, advanced by Mr. Grider in his opening brief.

## CITATIONS TO THE RECORD

The following abbreviations are used within in citing to the record on appeal:

TR I	Transcript of Record (Volume One)
CD	CD-R

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## THE COMMONWEALTH'S COUNTERSTATEMENT SHOULD BE REJECTED

Appellee submitted the court below's summary of the underlying facts as its counterstatement of the case. [Appellee's Brief, 1-2.] This summary does not qualify as a counterstatement and should be rejected. "A 'COUNTERSTATEMENT OF THE CASE'" shall "stat[e] whether the appellee accepts the appellant's Statement of the Case and, if not," shall "set[] forth the matters the appellee considers essential to a fair and adequate statement of the case in accordance with the requirements of paragraph (4)(c)(iv) of this Rule." CR 76.12(4)(d)(ii). A counterstatement must "consist[] of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, *with ample references to ... tape and digital counter number in the case of untranscribed videotape ... recordings ..., supporting each of the statements narrated in the summary.*" CR 76.12(4)(c)(iv); (emphasis added).

Contrary to the rule, appellee's counterstatement did not state whether the appellee accepted or rejected appellant's statement of the case. More importantly, the court below's summary of the underlying facts, offered as a counterstatement, contains *no references to tape and digital counter number of the untranscribed videotape recordings*, which support each of the statements narrated in the summary. This again violates the rule on counterstatements. Without taking issue with the specific contents of the court below's factual summary, Mr. Grider notes that on appeal neither the factual nor legal findings of the court below are binding on this Court. Appellee's counterstatement should be disregarded because in the final analysis it is of no value to this Court.

### ARGUMENT

**THE TRIAL COURT ERRED TO APPELLANT GRIDER'S SUBSTANTIAL PREJUDICE AND DENIED HIM DUE PROCESS BY DENYING THE DEFENSE MOTION FOR A MISTRIAL AND INSTEAD CHOOSING TO ADMONISH THE JURY TO DISREGARD THE TESTIMONY OF THE CHIEF OF POLICE REGARDING OTHER CRIMINAL INVESTIGATIONS OF THE APPELLANT**

**INVOLVING THE INFORMANT IN THIS CASE AND DRUG TRAFFICKING, WHEN SUCH EVIDENCE HAD BEEN PRECLUDED BY THE TRIAL COURT ON A MOTION IN LIMINE AND THE POLICE CHIEF WAS PRESENT WHEN THAT RULING WAS ANNOUNCED.**

The Commonwealth cites *Sherroan v. Commonwealth*, 142 S.W.3d 7, 17 (Ky. 2004), specifically this Court's statement that "it would be tenuous to conclude that the jury was incapable of ignoring such brief and undetailed remarks regarding [Sherroan's] probation, and even more tenuous to conclude that they were 'devastating' to his defense." [Appellee's Brief, 6-7.] However, the Commonwealth conveniently leaves out this Court's rationale for that conclusion in *Sherroan*.

Although the trial court "made a pre-trial ruling ... to exclude evidence of [Sherroan's] parole violation and a warrant for his arrest on unrelated charges," two witnesses, one an acquaintance, the other a Lexington Police Lieutenant, "made unsolicited comments that [Sherroan] was on probation," not parole. *Sherroan* at 16-17. As the *Sherroan* court emphasized, "because the jury could have assumed that [Sherroan] was on probation for any number of relatively minor crimes, the testimony was not 'inflammatory'; both references to [Sherroan's] probation lacked any description of the underlying offense." *Sherroan* at 17. "The jury could also have assumed that [Sherroan] was on probation for a drug-related conviction, which would not have prejudiced him, because his own audiotaped statement, which was played to the jury, contained numerous references to his illegal drug use." *Id.* at 17-18.

Sherroan's scenario is in marked contrast with Mr. Grider's situation. Chief Irvin's answer that Leah Wilson had previously worked directly for him as a confidential informant "[o]n the other trafficking cases involving Mr. Grider in Russell County" informed the jury that Ms. Wilson and Chief Irvin had been working together in the adjacent county investigating Mr. Grider with regard to serious felony offenses exactly like the single charge before them. [CD; 08/09/11; 01:19:17-26.] The jurors deciding Mr. Grider's guilt or innocence were unlikely to

“assume” anything other than Mr. Grider had committed these same offenses in Russell County and had undoubtedly committed this offense in Adair County.

Indeed, in Mr. Grider’s case “it would be tenuous to conclude that the jury” was capable “of ignoring such” an unambiguous remark regarding his involvement in another county with the same kind of drug trafficking cases for which he was being tried, making Chief Irvin’s unresponsive answer “devastating to [Mr. Grider’s] defense.”

The Commonwealth contends that “the presumptive curative effects of the admonition” is “not rebut[ted]” by “the fact that the evidence was introduced despite being ruled inadmissible by the trial court in a pre-trial order,” citing *Sherroan* at 16. [Appellee’s Brief, 8.] But *Sherroan* does not support that contention. The trial court in *Sherroan* did not exclude by a pretrial ruling any reference to *Sherroan* being on *probation*. The pretrial ruling applied only to parole, which neither witness mentioned. Unlike Mr. Grider’s case, the witnesses in *Sherroan* did not violate a pretrial exclusion ruling, despite the appellee’s erroneous claim to the contrary.

The situation in the *Sherroan* case is not analogous, either factually or legally, to what occurred in Mr. Grider’s trial that necessitated a mistrial.

The Commonwealth cites *Kinser v. Commonwealth*, 741 S.W.2d 648 (Ky. 1987), as another case analogous to the violation of the trial judge’s pretrial ruling in Mr. Grider’s case. Initially, the Commonwealth notes that the *Kinser* court “determined that an admonition cured a police officer’s testimony that *he believed the defendant committed the murder.*” [Appellee’s Brief, 7; (emphasis added).] However, Detective Gaddie did not testify that he “believed” that the three accused had “committed the murder.” As the *Kinser* court explained, “[i]n answering a question as to what next was done in the investigation,” Detective Gaddie “stated”:

At this point in time, the three defendants were suspects in the case. I knew enough about the case *to think that they had possibly committed this murder.*

*Kinser* at 653; (emphasis added).

Detective Gaddie only testified that at a certain point in the investigation of the case he thought the three defendants, who were suspects, “had possibly committed the murder.” When Detective Gaddie decided the three defendants were “suspects,” it was because he thought that they could have “possibly committed the murder.” If Detective Gaddie believed the three could not possibly have committed the murders, those three would no longer be suspects. Detective Gaddie’s statement was no different than testifying that the three defendants during the investigation were suspects, which would hardly be prejudicial as the jury knew the three on trial had to have been suspects in the matter during the investigation because those three were now defendants being tried for that same murder.

In Mr. Grider’s case, the jury knew that he had been a suspect before being charged with the drug trafficking offense in Adair Circuit Court, but, absent Chief Irvin’s nonresponsive statement, the jury would never have known of the cases of drug trafficking involving him in the adjacent county. Additionally, unlike Chief Irvin, Detective Gaddie in *Kinser* apparently violated no pretrial ruling when he made his statement about his opinion that the three “had possibly committed this murder.” Again the *Kinser* case is not analogous, factually or legally, to Mr. Grider’s claim of prejudicial error that required the granting of a mistrial.

The Commonwealth has also relied upon this Court’s decision in *St. Clair v. Commonwealth*, 455 S.W.3d 862 (Ky. 2015), as being analogous to Mr. Grider’s assigned error. [Appellee’s Brief, 6.] This Court in *St. Clair* recognized that “[t]he evidence that St. Clair was already wanted for murder when he arrived in Kentucky and that he was a danger to friends” was “inadmissible.” *Id.* at 892. As the Commonwealth noted, the *St. Clair* court could not “say that [this] testimony ... was so devastating that it could not be overcome by an admonition.” *Id.* However, it is important to understand the reasoning behind this Court’s conclusion.

The jury heard “evidence of Timothy Keeling’s murder by St. Clair,” a crime for which

St. Clair had not been convicted, but a crime that the jury would “assume” that St. Clair was charged with in New Mexico. As a result, in this context, an inadmissible statement that St. Clair was “wanted for murder when he arrived in Kentucky” would have not caused the jury to speculate that St. Clair was “wanted” because he had been convicted of the Keeling murder, but because he was suspected of committing that murder.

Significantly, this Court in *St. Clair* “conclude[d] that the trial court abused its discretion in admitting evidence of Timothy Keeling’s murder by St. Clair at the third trial” and on the basis of this and other errors reversed St. Clair’s conviction. *St. Clair* at 891, 897. Had evidence of the Keeling murder not been before the jury, the *St. Clair* court most likely would have found the “wanted for murder” testimony too prejudicial to be cured by an admonition. As the *St. Clair* court emphasized, “evidence which requires an admonition,” such as being *wanted for murder*, “should not be offered on retrial.” *Id.* at 892.

The trial judge in *St. Clair* had apparently not made a pretrial ruling prohibiting witnesses from testifying that St. Clair was “wanted for murder when he got to Kentucky.” As a result, Kentucky State Trooper Bennett violated no court ruling when he testified that St. Clair was “wanted for murder.” The absence of a pretrial order excluding the inadmissible evidence is another significant basis for distinguishing the *St. Clair* decision from Mr. Grider’s case.

When parsed, the *St. Clair* case is not analogous, factually or legally, to Mr. Grider’s claim of prejudicial error requiring the granting of a mistrial.

The Commonwealth has also cited *Chandler v. Commonwealth*, No. 2007-SC-000881-MR, 2009 WL 1108878 (Ky. April 23, 2009), an unpublished memorandum opinion. Although the Commonwealth claims this unpublished case is “[c]ited in accordance to CR 76.28(c),”<sup>1</sup> that is incorrect. [Appellee’s Brief, 8 n.1.]

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<sup>1</sup> This is undoubtedly a reference to CR 76.28(4)(c).

“Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court *if there is no published opinion that would adequately address the issue before the court.*” CR 76.28(4)(c), *Opinions*, (emphasis added). The Commonwealth has not established that citing the unpublished *Chandler* opinion is justified because no published opinion adequately addresses the issue before this Court. That would be extremely difficult to do because the analysis in *Chandler* cites published opinions of this Court for virtually every point made, such as *Woodard v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004), *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005), *Sherroan v. Commonwealth*, 142 S.W.3d 17 (Ky. 2004), *Terry v. Commonwealth*, 153 S.W.3d 794 (Ky. 2005), and *Phillips v. Commonwealth*, 679 S.W.2d 235 (Ky.1984). Many of these cases were cited in the appellee’s brief. All the issues in the unpublished *Chandler* opinion had been adequately addressed in previous published opinions of this Court. According to the mandate of CR 76.28(4)(c), the unpublished *Chandler* opinion should not be considered by this Court.

Nevertheless, Mr. Grider will address the *Chandler* decision. The jury found Chandler “not guilty of attempted murder, but guilty of assault in the first-degree, robbery in the first degree, attempted burglary in the first-degree, wanton endangerment in the first degree, kidnapping, tampering with physical evidence, and receiving stolen property valued over three hundred dollars (\$300).” *Chandler* at 2. For these offenses, Chandler was sentenced to forty-five years of imprisonment. On appeal, Chandler “claim[ed] that, when Billy,” a prosecution witness and an alleged victim, “testified that [Chandler] had thrown his girlfriend to the ground on the day of the crimes, it was inadmissible testimony of prejudicial acts of violence.” *Id.*

There is nothing in the *Chandler* opinion that indicates that Billy’s testimony violated any pretrial ruling, which is in direct contrast to Mr. Grider’s case. Billy’s testimony did not identify

a crime, such as assault in the fourth degree, but only described an act of possible criminality. As there was apparently no further elaboration of Chandler throwing his girlfriend to the ground, the jury would most likely assume that because this incident occurred “on the day of the crimes” Chandler was not being prosecuted for this action against his girlfriend as it was not included in the charges at this trial.

This Court in *Chandler* apparently viewed the situation similarly, noting that “the testimony complained of concerns [Chandler’s] character” and “the brief reference to [Chandler’s] bad acts did not directly implicate [Chandler] as to the crimes for which he was charged.” *Chandler* at 5. Chief Irvin’s statement, however, informed the jury that both he and the confidential informant, Leah Wilson, had or were working together “[o]n the other trafficking cases involving Mr. Grider in Russell County,” crimes that were identical to the trafficking charge before the jury. Once the jury, aware that Mr. Grider was being tried for a single drug trafficking charge in Adair County, was informed that Mr. Grider has or had other trafficking cases in nearby Russell County, their first thought must have been that Mr. Grider was a multiple drug trafficking offender operating in two adjacent counties. This was not a reference to Mr. Grider’s character; this was an attempt to mark Mr. Grider as a repeat drug trafficker. This was “devastating” to Mr. Grider’s defense in a one count drug trafficking case.

Under the circumstances in *Chandler*, at the worst the jury would have probably speculated that the action of throwing his girlfriend to the ground, if it was criminal, was only a misdemeanor as no information was provided about any harm occurring to Chandler’s girlfriend. See *Sherroan* at 17 (“because the jury could have assumed that [Sherroan] was on probation for any number of minor crimes, the testimony was not ‘inflammatory’”).

Significantly, Billy, an alleged victim who testified to observing the altercation between Chandler and his girlfriend, was not imbued with any special authority as a witness, in striking

contrast to Chief Irvin, whose credentials as an experienced law enforcement officer were meticulously presented to the jury in Mr. Grider's case.

It is difficult to conclude that Chandler's jury was inflamed against him by the reference to him throwing his girlfriend to the ground when the jury found him "not guilty of attempted murder, but guilty of assault in the first degree." *Chandler*, 2. Conversely, the jury's recommendation of nine years imprisonment out of a maximum ten year sentence for a conviction of a single count of first degree drug trafficking for a 75-year-old man<sup>2</sup> with no prior convictions is a strong indicator that the admonition was ineffective in purging Chief Irvin's inflammatory reference to "the other trafficking cases involving Mr. Grider in Russell County." When analyzed, the *Chandler* case is not analogous, either factually or legally, to what occurred in Mr. Grider's trial.

The Commonwealth asserts that "the fact that the testimony was introduced through a police officer does not rebut the presumptive curative effect of the admonition," citing *St. Clair*, *Sherroan* and *Kinser*, all *supra*. [Appellee's Brief, 8.] However, as explained above, the reasons why an admonition was sufficient in each of those cited cases were due to facts and circumstances extremely dissimilar to Mr. Grider's claim. The impact of a police officer introducing bad acts was never reached in any of those cases.

The Commonwealth claims that Chief Irvin's "answer was neither unresponsive ... nor a malicious or inflammatory response to deliberately sway the jury," completely ignoring that the pretrial ruling prohibited any reference to the other trafficking charges in Russell County. [Appellee's Brief, p. 9.] Chief Irvin heard this ruling when it was announced, yet disobeyed it. The prosecutor admittedly did not address this ruling with his witnesses, omitting a necessary prophylactic measure [Appellant's Brief, 23-25.]

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<sup>2</sup> Leon Grider, born March 23, 1936, was seventy-five (75) years old at his 2011 trial.

Appellee even misrepresents Chief Irvin's unresponsive answer labeling it a "brief mention of another trafficking case," when it was actually a reference to an *unlimited number* of "other trafficking cases." [Appellee's Brief, 9; CD; 08/09/11; 01:19:17-26.]

According to appellee, "[t]he Commonwealth presented an overwhelming case against Grider." [Appellee's Brief, 9.] This conclusion was followed by references, without record citations, to: (1) the confidential informant's positive identification of Mr. Grider as the perpetrator; (2) the videotape of the drug transaction; and (3) the testimony of police officers conducting the surveillance. [Appellee's Brief, 9-10.] However, appellee makes no meaningful attempt to address the list of deficiencies in the prosecution's case delineated in Mr. Grider's opening brief, including the defense's impeachment of the confidential informant, the failure of the videotape of the transaction to show the face of the perpetrator, and the inability of any of the police officers who conducted the surveillance to identify the person who entered and departed the informant's residence prior to and after the videotaped transaction. [Appellant's Brief, 27-35.] The major deficiencies in the prosecution's proof demonstrate that the case against Mr. Grider was far from "overwhelming." Appellee's failure to address those deficiencies does not mean those deficiencies do not exist in this case.

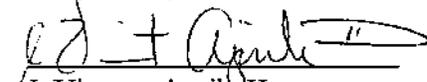
The Commonwealth, after acknowledging that "the confidential informant was fully impeached by defense counsel regarding her drug use and prior criminal history," notes that "the jury still found her credible..." [Appellee's Brief, 10.] That reality is further proof that, upon hearing Chief Irvin's statement that both he and the informant had or were working together "[o]n the other trafficking cases involving Mr. Grider in Russell County," the jury would no longer entertain doubts about Ms. Wilson's credibility, despite evidence that she was a drug user, who illegally sold drugs while working as a paid informant. Without doubt, Chief Irvin's reference to the uncharged trafficking cases, in violation of the pretrial order, was

devastating to the defense.

### CONCLUSION

Accordingly, for the reasons delineated above as well as in Mr. Grider's opening brief, this Court must reverse the opinion of the Court of Appeals, reverse the judgment and sentence of the Adair Circuit Court and remand this case to the Adair Circuit Court for a new trial and/or any other relief this Court finds appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Vincent Aprile II", written over a horizontal line.

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