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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2011-SC-000525-D
(COURT OF APPEALS CASE NUMBER 2011-CR-000000)

DARBY ASHLEY BARNES

MOVANT

APPEAL FROM FAYETTE CIRCUIT COURT
HON. KIMBERLY BUNNELL, JUDGE
INDICTMENT NO. 09-CR-01051

COMMONWEALTH OF KENTUCKY

RESPONDENT

BRIEF FOR MOVANT, DARBY ASHLEY BARNES

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The undersigned does certify that copies of this Brief for Movant were mailed first class postage prepaid to the Hon. Kimberly Bunnell, Judge, Fayette Circuit Court, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; the Hon. Kimberly H. Baird, Assistant Commonwealth's Attorney, Suite 300, 116 N. Upper Street, Lexington, Kentucky 40507; the Hon. Herb West, Assistant Public Advocate, 111 Church Street, Lexington, Kentucky 40507; and to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 4024 Capital Center Drive, Frankfort, Kentucky 40601 on March 21, 2012.



GENE LEWTER

INTRODUCTION

Appellant appeals from a judgment wherein he was convicted of Burglary Second Degree and Persistent Felony Offender First Degree, for which a sentence of five years was fixed by the jury on the burglary charge and enhanced to fifteen years by the Persistent Felony Offender charge, and imposed by the court. He appealed to the Court of Appeals and his conviction was affirmed on May 20, 2011. This Court granted Discretionary Review.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant welcomes oral argument if this Court believes that it would assist it in rendering a fair and just opinion in this case.

DESIGNATION OF RECORD

There is one written record in this case, hereafter referred to as "TR." There are two video records of the trial in this case, and citations to them will be made in "VR [No] [date]; [time]" form.

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STATEMENT OF THE CASE

Katherine Manning, a 19-year-old college student, was a friend of the family who lived at 417 Lake Shore Drive, in Lexington, Kentucky. In May of 2009, Manning fed the cat and watered the plants for the family while they were visiting in Chicago. She went over two times a day on Friday and Saturday and followed the same routine on Sunday, May 24, 2009. She returned the second time that day at approximately seven o'clock in the evening while it was still daylight, but beginning to get dark. She had already watered the plants in the back yard when she went up onto the back deck to water more plants. She had not yet been inside the house.

When she got to the top of the stairs on the back deck she heard a noise of blinds moving around and thought it was the cat. (VR No. 1: 3/1/10; 12:02:39). She then saw someone bending over and picking up the stick that blocked the sliding doors. She called out, "Hello, hello," and saw a man stand up and look at her for what she estimated to be five to eight seconds (VR No. 1: 3/1/10; 12:05:34), before he turned and disappeared into the interior of the house. He never said anything.

Manning described the man in court significantly differently from the way she described him to the police on the evening of May 24, 2009. In court, she first described him as having dark hair, wearing black rimmed glasses, short black or dark hair, wearing a dark colored shirt and "olivy" or khaki-like shorts. She explained that she was down below him, on the bottom step, and he was inside the house, behind the glass door. (VR No. 1: 3/1/10; 12:05:50). She later used the fact that she was below him (on the bottom of three steps) to partially explain why she said he was 5'9" when in fact he was only 5'5." (VR No. 1: 3/1/10; 12:26:39).

Manning identified Appellant in open court as the person she saw in the residence that evening (VR No. 1: 3/1/10; 12:27:38). As part of the original description she had given to the police on the day it happened, she stated the age of the person she saw as between 18 and 22 years. (VR No. 1: 3/1/10; 12:20:29).

Appellant was 38.

In response to a question from the Commonwealth why she thought the person was so young, Manning explained, "He didn't have any facial hair at the time." (VR No. 1: 3/1/10; 12:20:48). "He just looked a lot younger to me." Then she repeated that he "just looked a lot younger."

The facial hair brought about an interesting, blatant contradiction in her description of the person she saw. Her first reference to it was as stated above: that he looked younger because "*he didn't have any facial hair at the time,*" (VR No. 1: 3/1/10; 12:20:48), referring to the evening of the burglary, May 24, 2009. (Appellant's photo, taken on June 15, 2009, showed facial hair.) When the police first asked Manning to describe what features stood out about him, she said he had dark hair, not a "buzz" but a little longer than a buzz cut, then specifically added, "And no facial hair." (VR No. 1: 3/1/10; 12:27:23). This was clearly stated as one of the things she particularly noticed about the person she saw for a period of from five to eight seconds. In fact, she had been so clear in her testimony that the court, at the bench, made the comment to the attorneys that Manning had testified that Appellant did not have any facial hair when she saw him. (VR No. 1: 3/1/10; 12:24:33).

However, barely more than one minute after testifying to that clear, unequivocal statement that the person she saw *had no facial hair*, the Commonwealth asked; "One

last question: you also indicated with respect to the facial hair that he had, could you tell if he had any facial hair?"

Manning responded immediately, "No." The Commonwealth, for clarification, asked, "No, didn't have any, or no, couldn't tell?"

Manning responded without hesitation, "No, couldn't tell." (VR No. 1: 3/1/10; 12:28:44).

Manning's memory was also called into question when she was showed the six picture lineup card by the Commonwealth. One of the photographs had been circled and initialed, and Manning correctly stated that was Appellant. The Commonwealth asked her if she had circled the photograph. Manning replied that she had only been asked to initial the photograph, and that was all she had done. (VR No. 1: 3/1/10; 12:18:44). Later, Detective Wolfe testified that when Manning had picked out Appellant from the photo lineup, he (Wolfe) asked her to circle the photo and she did so. (VR No. 1: 3/1/10; 2:44:04). She had completely forgotten that she had circled the photo.

At almost every opportunity when asked what stood out about the person she saw (except when she referred to his lack of facial hair), Manning reiterated, "It was mainly the glasses. They really stuck out to me. The dark rimmed glasses." (VR No. 1: 3/1/10; 12:19:20.)

Moments later, she answered again, "The glasses were a big thing. They stuck out to me a lot." (VR No. 1: 3/1/10; 12:27:15). When she first gave the description in court of the person she saw at the residence, she described his glasses as "black rimmed" (VR No. 1: 3/1/10; 12:05:44). Later, she began to say "dark rimmed."

The owner of the residence later testified that they were missing at least 20 pieces

of jewelry, none of which was ever recovered. She also testified that she did not know Appellant, and that she had never given him permission to be in her home.

Appellant was convicted of one count of second-degree burglary and of being a first-degree persistent felony offender. He was sentenced to 15 years in prison and appealed to the Court of Appeals. His conviction was affirmed by the Court of Appeals on May 20, 2011, and this Court granted Discretionary Review.

Any additional relevant evidence will be set forth in the arguments.

ARGUMENT ONE

APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT BECAUSE THE COURT DENIED HIS MOTION TO PRECLUDE ANY PRETRIAL OR IN-COURT IDENTIFICATION OF APPELLANT, DUE TO THE IMPROPER ACTIONS OF THE DETECTIVE DURING THE PHOTO LINEUP.

This issue was partially preserved for appeal by Appellant's motion to suppress both the in-court identification by Manning, and the pretrial photo lineup identification. (TR 34). Part of the basis for the motion was the lack of a reasonable, articulable suspicion as a justifiable basis for stopping Appellant when he and his brother were observed walking down a street near an area where several burglaries had occurred. A hearing was conducted on September 8, 2009, after which the court overruled Appellant's motion on both issues. (TR 43). Detective Wolff testified that Appellant generally matched two separate descriptions provided by two different witnesses, including Manning.

However, minute details of the descriptions became unimportant when the

detective discovered an outstanding warrant for Appellant, and he was placed under arrest pursuant to the warrant. A photo was taken of him on that same day and was included in a six-photo lineup which was shown to Manning and one other burglary victim. Manning made a positive identification but the other witness did not.

The error referred to herein did not come to light during the suppression hearing because neither the detective nor the Commonwealth ever mentioned the fact that another, larger, photograph was also taken of Appellant outside the jail that same day. Of much greater significance is that neither the Commonwealth nor Wolff made any reference, until the middle of the trial, to the fact that the larger photo of Appellant had also been shown to Kathryn Manning. According to the Commonwealth, in a statement at the bench, the larger photo was shown to Manning after she had identified Appellant in the photo lineup, but nothing more specific was stated. (VR No. 1: 3/1/10; 12:21:50).

The first reference to the larger photo was made in a motion in limine just before trial when Appellant objected to any reference being made to the fact that it was taken at the jail. The Commonwealth agreed that where it was taken would not be mentioned in the trial. (VR No. 1: 3/1/10; 09:08:08). Appellant still had no idea that anything sinister was afoot.

When Manning took the stand, the Commonwealth showed her exhibit number seven, the large, approximately 8 x 10 color photo of Appellant. The Commonwealth then casually asked her if she had seen the photograph before. The witness answered that she had. (VR No. 1: 3/1/10; 12:21:02).

Appellant asked to approach the bench and a discussion ensued. Appellant stated that he was not aware that the witness had seen the larger photo (VR No. 1: 3/1/10;

12:22:15). The prosecutor stated she did not intend to ask Manning when she had seen it, stating only that she knew the witness had seen it after the lineup (VR No. 1: 3/1/10; 12:21:50). Appellant said, "It's like another identification of the photograph taken of him that day. I don't know if it would be proper if she's going to just show the witness just to bolster her previous identification." The Commonwealth said that the photo was taken the day of Appellant's arrest, June 15, 2009 (VR No. 1: 3/1/10; 12:22:36). This was the same day the photo used in the lineup was taken.

When the court asked the Commonwealth why she wanted to show this photo, the Commonwealth responded that she wanted to ask whether Manning saw any tattoos on this photo, adding, "*It's a better photo than this little one that's in the lineup.*" (VR No. 1: 3/1/10; 12:23:41). The Commonwealth pointed out that it wanted Manning to identify Appellant from this picture because he looked different from when she saw him before. Appellant said it would be alright for the officer to say that's the way Appellant looked when he was picked up, but otherwise it was just a way for the Commonwealth to try to bolster Manning's identification of Appellant. (VR No. 1: 3/1/10; 12:24:58). The Commonwealth then agreed not to use the photo with Manning, and instead used it only with Wolff to show that Appellant looked differently at the time of the trial than he did on June 15, 2009, when the picture was taken. (VR No. 1: 3/1/10; 12:25:07).

Unfortunately for Appellant the problem with this photograph goes much deeper than the infinitesimal usage claimed for it by the Commonwealth.

When was Kathryn Manning shown this photograph? Why was there nothing in the discovery of when and why she was shown? Why was there nothing about it mentioned at the suppression hearing concerning the identification of Appellant by

Manning?

After all, Manning had never seen Appellant, a 38- year old man, before May 24, 2009, when she claims to have seen him for five to eight seconds at 417 Lake Shore Drive through a glass door, and said he was about 18-22 years old. She also testified that what stood out was the fact that he had no facial hair and then barely one minute later said she could not tell if he had any facial hair. She picked a small photo of him from an ordinary six photo lineup on June 16, 2009, and then was shown, for no legitimate, albeit mysterious, reason, an 8 x 10 color photo of Appellant.

Only in the middle of Appellant's trial did Appellant learn that the only witness against him had a private viewing of the 8 x 10 color photo of Appellant taken by the detective on the same day as the tiny photo used in the lineup with five other photos. The only information offered by the Commonwealth at the bench in response to the court's question of whether the witness saw the large photo before or after the lineup was that the witness had been shown the large photo "afterwards." (VR No. 1: 3/1/10; 12:21:50).

Information concerning the fact that Manning had viewed this photograph should have been turned over to Appellant as part of the discovery under **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). If it had been turned over, or even mentioned, trial counsel would have been in a position at the suppression hearing to address its improper use.

Appellant claimed at trial, when the Commonwealth sought to introduce the photograph, that the Commonwealth was attempting to use the 8 x 10 color photo to bolster the identification of Appellant. However, what counsel for Appellant overlooked was that the damage had already been done. Appellant should have immediately moved

for a mistrial on the basis that the in-court identification by Manning had been tainted at the time Detective Wolff showed her the 8 x 10 color photograph of Appellant after she had identified him in the small photo array. This would have confirmed, in her mind, the correctness of her photo lineup identification, and provided her with a much better picture of him, from the same day, to lock down her memory of what Appellant looked like and secure a positive in-court identification.

At the time of the suppression hearing neither the court nor Appellant knew of the transgression which had already tainted Miss Manning, so naturally it was not addressed at that time. However, as soon as Appellant learned of it, in the middle of the trial, it was necessary to take immediate steps to remedy the situation. The only thing to be done at that time was to move for a mistrial, and to renew the motion to suppress the identification because of the taint of having shown Manning the large single photo of Appellant.

To the extent this error is not preserved for review Appellant asks this court to treat it as a palpable error under **RCr 10.26**.

RCr 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered... by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Here it is certainly a palpable error which effects Appellant's substantial rights by his trial counsel's failure to raise the issue of who showed Manning the large photograph, precisely when it was shown to her, and what was said to her at the time the photo was

shown to her. However, of even greater significance than counsel's failure to respond appropriately when blindsided by this evidence is the fact that the Commonwealth failed to provide this crucial information in discovery long before the trial. **Brady**, *supra*.

In **Simmons v United States**, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the United States Supreme Court held that convictions based on eye witness identification at trial following a pretrial identification by photograph will be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, and each case must be considered on its own facts. The Court pointed out that part of the danger is "the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." **Simmons**, 390 U.S. at 384.

In **Stovall v. Denno**, 388 U.S. 293, 87 S.Ct.1967, 18 L.Ed.2d 1199 (1967) the Supreme Court also held that a defendant could claim that the confrontation conducted was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. It must be determined on the totality of the circumstances.

In **Neil v Biggers**, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) the Supreme Court explained that it is the likelihood of misidentification which violates a defendant's right to due process. Listed in evaluating the likelihood of misidentification were five separate aspects of the totality of the circumstances: (1) The opportunity of the witness to view the criminal at the time of the crime: (2) the witness's degree of attention: (3) the accuracy of the witness's prior description of the criminal: (4) the level of

certainty demonstrated by the witness at the confrontation: (5) the length of time between the crime and the confrontation.

The totality of the circumstances herein must include unknown factors because Appellant was never told the details of when the witness was shown the 8 x 10 color photo and what she was told.

There can be no doubt that if the police officer had shown her the 8 x 10 photo and said, "You got the right guy; here's a big picture of him so you'll be certain to recognize him in court," the identification in court would have unquestionably been tainted and must be thrown out. In **Patterson v. Commonwealth**, unreported, 2004 WL 537932 (Ky. 2004) the detectives made statements to the witnesses following their identification of the suspect which confirmed the witnesses had picked the right person, i.e., the police suspect. This Court, although not reversing, agreed that the comments made the pretrial identification procedures unduly suggestive. "These remarks undoubtedly bolstered the witnesses' confidence in their identifications of Patterson from the array of photographs, and the police should have refrained from making such statements." Id.

In the case *sub judice*, however, the detectives went a huge step further and showed the witness an 8 x 10 color photograph of Appellant (after the identification, according to the Commonwealth) which created the additional problem referred to in **Simmons**: the witness may remember the photo at the trial rather than the person she observed.

The Opinion of the Court of Appeals in this case adopted the analysis in **Grady v. Commonwealth**, 325 S.W.3d 333 (Ky. 2010), in which the lineup materials were lost

before the defendant could view them. The Grady Court adopted the approach of a “rebuttable presumption that the materials were unduly suggestive.” Opinion, page 7. Using that method in its analysis, the Court of Appeals indulged in a rebuttable presumption that the use of the 8 x 10 color photo had been unduly suggestive herein. The Opinion then discussed the five aspects of “the totality of the circumstances” set forth in Neil v Biggers, *supra*, in connection with the transgression here.

First was Manning’s opportunity to observe the criminal, which, in her best guesstimate, was five to eight seconds. That is actually being very generous to the Commonwealth because no experienced burglar is going to stand still for five to eight seconds and stare, eye to eye, with someone who has just discovered him inside their house. In addition, she gave him a warning by calling out, “Hello, hello” as soon as she heard the rustling of the blinds. (VR No. 1: 3/1/10; 12:05:34). With that small bit of warning it is highly unlikely that their visual confrontation lasted anywhere near five to eight seconds.

The second aspect is Manning’s degree of attention. She testified that at first she was not concerned about seeing the man because once before when she was there to feed the cat and water the plants the family had asked someone else to come and do the same thing, and the two of them met in the same manner and spoke to each other for a moment and realized the mistake. Here it took at least a brief time for her to realize the person was not responding to her and was in fact leaving. She was not realizing the actual situation until the burglar turned away and left. It was then too late to focus her attention on his features, which would explain her contradictory descriptions of the person.

The third factor is the biggest negative for the Commonwealth. It is the accuracy

of the prior description of the criminal. If it were a college test (she was a sophomore in college), she flunked royally. She was accurate on the weight of approximately 160, and also the sex and race of Appellant. However, it seems unfair to give her credit for getting “male white” accurate, especially since that, to use a sports analogy, was a “gimme.”

The huge, fatal-to-her-credibility miss was the age. She said the person she saw was 18 to 22 years old. Appellant was 38. That’s a huge blunder, virtually shunted aside by the Court of Appeals, which simply accepted Manning’s explanation that the person just “looked younger.” Opinion, page 9. As a young college student herself in that same age range, 19, it is frankly impossible to think a stranger is her own age when he is actually twice her age.

Another major discrepancy in her description is that on at least three occasions during the trial Manning said that at the time she saw him (May 24, the day of the burglary) he *had no facial hair*, even giving that as a reason for thinking he looked so young. However, in the next breath Manning unequivocally stated in response to a question by the Commonwealth that she couldn’t tell if he had facial hair or not. (VR No. 1: 3/1/10; 12:28:44).

How could a *possible* lack of facial hair make him look younger to her if she couldn’t even tell if he had facial hair? How could she state unequivocally one minute that he had no facial hair, and then a minute later state, without batting an eye as the saying goes, that she couldn’t tell if he had any facial hair? What enabled her to identify his face in a photographic lineup if she did not get a good enough look to even be able to tell if he had facial hair? All of the photos used in the lineup, including Appellant’s, had facial hair, as did the large eight by ten photo. She must have told the detectives that the

person she saw had facial hair, yet the reason she gave for thinking he looked young was that he “had no facial hair.”

All of the confusion over facial hair, whether he had it, didn't have it, or she couldn't tell suggests the very real possibility that she was remembering the 8 x 10 photo in which Appellant had facial hair, and blurring the photo with her mental image of the burglar who she remembered as having no facial hair. This would explain her apparently unknowing contradictions from one minute to the next. When she responded, “No, couldn't tell,” she obviously did not remember having just stated unequivocally that the burglar had no facial hair.

On the question of the “certainty of her choice,” she did claim to be certain of the identification, but that's easy enough to say after they showed her the 8 x 10 photo of Appellant. Her contradictions in the description belie that claim of certainty. Other than saying “white male,” she wasn't certain about anything else.

The time between the incident and the photo lineup was only 23 days, but her identification was put into question by having been shown the 8 x 10 color photo of Appellant which may have blurred her mental image of the actual burglar. The detective obviously did not trust her actual description of the criminal because all of the photos in the lineup were based on Appellant's age (38) and looks (the presence of facial hair), and not her description. The person in photo number 4 of the photo lineup clearly looks more like he is fifty, than 18 to 22, so it appears no one paid any attention to Manning's age estimate in preparing the photo array. In fact, if five clean shaven, male whites with black rimmed glasses, aged 18 to 22 had been placed in a photo lineup with Appellant's photo, someone else would undoubtedly be in prison now instead of Appellant.

When adding all of the mistakes of her description of the criminal, together with the lack of trust in her description of those who put together the photo lineup, it is easy to see how a misidentification could have been made. The combination of the bolstering of the witness's out-of-court identification with the 8 x 10 color photo, the ignoring of her description of the criminal when setting up the photo array for her to examine, and the seemingly endless errors in her description casts incredible doubt on her in-court identification.

Therefore, Appellant was denied due process of law by the failure of the Commonwealth to provide the information to Appellant, pursuant to **Brady**, *supra*, concerning the private showing to the witness of the 8 x 10 photo of him, and the improper bolstering of her photo-lineup identification and tainting of her in-court identification by the showing of the bigger, better color photo to her.

ARGUMENT TWO

APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT PERMITTED THE COMMONWEALTH TO TELL THE JURY THAT A PARTIAL PRINT, WHILE NOT A "MATCH" WITH APPELLANT, MATCHED APPELLANT ON FOUR POINTS.

This error was preserved for review by Appellant's motion in limine immediately prior to trial. Appellant approached the bench and stated they had just received results on the fingerprint analysis (VR No. 1: 3/1/10; 09:14:37). The Commonwealth indicated *it was not a match* but Appellant objected to the witness referring to the number of matching points. Appellant pointed out that one of the detectives examining the print said, "Let's call it six," while the one testifying said, "Call it four or five." There was no report. Appellant argued that they should just say they can't call it a match.

The Commonwealth argued that the witness needed to explain *why* there was no match, since people “hear about CSI and think you ought to be able to say there is a match.” The Commonwealth further argued that while the detective would say they compare the loops and swirls, they need ten matching points. Here “they could only match four points and that’s not enough.” (VR No. 1: 3/1/10: 09:15:27).

The court concluded, “I’ll allow him to testify to that.” (VR No. 1: 3/1/10; 09:16:09). The Commonwealth then added that it was a partial print, so the court expanded its ruling to “[t]he witness can say it was a partial print, with four points, but can’t call it a match. (VR No. 1: 3/1/10; 09:18:31).

Appellant contends that since the print found was not a match to Appellant the evidence of “four matching points on a mere partial print,” which even the examiner agreed was not a match, does not meet the evidentiary requirements for expert testimony under **KRE 702**. Therefore, it was totally irrelevant and served no purpose other than to prejudice the jury with the strong implication that it was actually Appellant’s fingerprint.

KRE 401 provides:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

KRE 402 provides “Evidence which is not relevant is not admissible.”

Here, the Commonwealth claimed that it wanted to show that the detectives succeeded in finding a print, but it was only a partial print. The Commonwealth then claimed that it wanted to show that the detectives could not establish who the print belonged to, partly because it was only a partial print. Up to that point there is essentially nothing wrong.

However, when the Commonwealth combined the evidence of how many identifiable points it takes to call a match with how many identifiable points were found in this case, it moved into irrelevant, prejudicial territory. There would have been no prejudice to say that it takes ten identical points between two prints to call them a match. That is certainly a valid point and helps to explain to the jury why there is sometimes, as in this case, not a match. However, when the Commonwealth insisted on the testimony that the detective *actually found four identical points* with *only a partial print*, but could not call it a match because he needed ten, it crossed the line into irrelevant and highly prejudicial territory.

It is not relevant for the very reason that the expert **cannot call it a match**. If it is not a match, there is nothing more that is of consequence to the determination of the action, as required by **KRE 401**, and therefore is, by definition, not relevant to the case and not admissible. It makes no difference whether there is one point, six points or no points, or any other number short of ten. If there are ten or more identical points the detective could have testified there was a match, which is a matter of consequence in the trial pursuant to **KRE 401**, and therefore relevant.

How close it may have come is not relevant, but it is very prejudicial. That is the point the Commonwealth obviously wanted to make. By pointing out that it was only a partial print but there were still four points out of the ten required, the Commonwealth impliedly told the jury that it was close enough to conclude that it was Appellant's fingerprint. The Commonwealth's claim that it "needed to show why there was no match" is extremely disingenuous. The officer needed only to say, "To call a match it is required to have a certain number of matching points between two prints, and they were

not present in this case. Therefore we cannot call it a match." It is not in the least relevant to say how close they came to making it a match, and the only reason to provide that number is to lead the jury to the conclusion that it was "close enough" for the jury to call it a match even though the detective could not under house rules.

In fact it would not have been admissible even if somehow it could have been deemed to be relevant. **KRE 403** provides that even evidence which is relevant "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury...." Here there is no probative value to telling the jury there were four matching points between the partial print and Appellant's known print, when the examiner admitted that he could not call it a match. The real purpose of telling the jury of the four matching points was to confuse the issue of whether there was really a match, thereby misleading the jury and creating enough prejudice to obtain a conviction. The Commonwealth succeeded on all points.

In reaching the conclusion that the trial court did not abuse its discretion in allowing the testimony of the four point match, the Court of Appeals relied heavily, though incorrectly, on **Fields v. Commonwealth**, 274 S.W.3d 375 (Ky. 2008), overruled on other grounds by **Childers v. Commonwealth**, 332 S.W.3d 64 (Ky. 2010), as modified on denial of rehearing (Ky. 2011). While quoting from this Court in **Fields**, the Court of Appeals herein stated:

[T]he Kentucky Supreme Court addressed a defendant's argument that a trial court improperly admitted fingerprint evidence that, after analysis, was not identified as those of the defendant. Id. at 406. ***The argument in Fields, like Barnes' (sic) argument, was that the fingerprints were not relevant because they were not a match.*** (Emphasis added) The Kentucky Supreme Court did not agree. Instead, the Court noted that "results of tests performed on fingerprints

found at the crime scene are, of course, relevant to a determination of [a defendant's] guilt ... we are unable to fathom how [a defendant is] prejudiced by fingerprints that [are] never identified as his." Id. Moreover, fingerprint evidence and testimony regarding its analysis rebuts any claims of "shoddy police work." Id.

Likewise in Barnes' (sic) case, the Commonwealth had an interest in bolstering the credibility of all of the evidence by explaining the police work involved in collecting and analyzing fingerprints. The Commonwealth's witness testified as to his forensic unit's general policy that they require ten "points" to call a fingerprint a "match." He also testified that he was only able to obtain a partial print. Because the matching point system of fingerprint analysis perhaps varies from one department to another or from one analyst to another, it was relevant for the witness to testify as to how he arrived at his conclusion that in this case the print was not a "match." He determined that it was not a "match" for two reasons: (1) because only four points matched, and (2) because it was only a partial print. Opinion, 11, 12.

Inexplicably, the reliance on Fields by the Court of Appeals was misplaced. In fact, Fields permitted the exact evidence which Appellant requested of the trial court in this case, and certainly offers no support for the result reached either by the trial court or Court of Appeals herein. In Fields, the Commonwealth *did not* introduce the amount of points that were obtained in the fingerprint analysis: the testimony was *only that there was no match*, which is *exactly* what Appellant requested here.

Unfortunately for Appellant, the Court of Appeals also incorrectly characterized Appellant's argument in the quoted portion above: "*The argument in Fields, like Barnes' argument, was that the fingerprints were not relevant because they were not a match.*"

Appellant's argument is not, and never was, that the lack of a match of the

fingerprints was not relevant, but that the *four matching points* found by the detectives between the partial print and the known print were not relevant, and were indeed highly prejudicial. Appellant agrees completely with the conclusion reached in Fields, which actually supports his argument in the present case. That is exactly what Appellant asked the trial court to permit the Commonwealth to do in the instant case. That would have enabled the Commonwealth to explain "the police work involved in collecting and analyzing fingerprints," without creating the prejudice of telling the jury how close they came *on a mere partial print*. It is the additional evidence, beyond what was admitted in Fields, that there were *four matching points* in the *partial print* of which Appellant complains. In fact, all that was necessary was *exactly* what was admitted in Fields: a partial print was found, a comparison was made with a known print of the defendant, and there was no match. As Fields stated, that is not prejudicial, and Appellant herein does not make such a claim.

Here, the evidence of guilt was far from overwhelming. Manning's identification of Appellant as the burglar was highly questionable. The Commonwealth was obviously seeking more from the partial fingerprint than merely showing a lack of shoddy police work. It wanted to show the jury that it was "almost" a match, and imply that the reason it was not a complete match was because it was only a partial print. Why else would the Commonwealth fight to be permitted to show the jury they matched four points out of ten, on merely a partial print?

The Commonwealth knew what it was doing. If it didn't have an actual match on a fingerprint, it could treat it like horseshoes and hand grenades: "close" to a match still gets the job done when all that is needed is to lead the jury where you want it to go.

Appellant is not arguing, and never has, that fingerprint identification is not admissible in a criminal trial, especially where the conclusion is the fingerprints do not match the defendant. The admissibility of fingerprint identification is arguably a settled question under the guidelines set forth in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), even though it does not exactly fit the scientific focus of **Daubert**. Any possible confusion on the aspect of science and fingerprint identification was settled in **Kumho Tire Co. v. Carmichael**, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), where the standards were extended to cover not only scientific evidence, but also any evidence of scientific, technical, or other specialized knowledge. However, regardless of whether fingerprint identification is or is not admissible, that is not the issue here.

The issue here is in the ruling of the trial court and the ultimate conclusion by the Court of Appeals that it was necessary for the detective to explain why there was not a match by stating: (1) because only four points matched, and (2) because it was only a partial print. In **Blackford v. Commonwealth**, 2003 WL 22975282 (Ky. 2003), an unpublished case from Fayette County as is the case *sub judice*, the fingerprint expert for the Commonwealth testified concerning the process he used in the course of fingerprint analysis. He admitted that fingerprint analysis is subjective and susceptible to error, and explained that no universal minimum number of points exists to determine a fingerprint match. Of particular significance, however, he testified that he used ten points before calling a match *because he had found that five points led to more than one matching individual*. This shows, incontrovertibly, the prejudicial error of the trial court in permitting the detective in the instant case to emphasize that he found four matching

points in a mere partial print.

The other strange but interesting point adopted by the Court of Appeals as part of the basis for why the prints could not be called a match was that the print found at the scene was *only a partial print*. The Commonwealth was able to parlay its emphasis on the print being only a partial, but still with four matching points *even on a partial print*, to make the un-matching fingerprint a fundamental aspect of its proof.

What the detective and the Commonwealth Attorney failed to tell the jury, thus totally misleading it, is the fact that *virtually all prints found at a crime scene are partial prints*. In United States v. Baines, 573 F.3d 979, 982 (10th Cir. 2009), the Court stated that latent fingerprints are partial prints like those found at crime scenes and often are invisible to the naked eye. The Court pointed out that one study had determined that a latent print *is only, on average, about 22% of a known print*. The argument in Baines was that the government did not establish that the method for determining a *match* of the latent print to that of the defendant was reliable.

Appellant's argument here is simply that the detective should have been permitted to say *only* that there *was no match*, since the detective admitted there was no match. He should not have been permitted to say that they obtained four points toward a match, coupled with the emphasis that it was merely a partial print.

KRE 702, as amended in 2007 to conform to the principles of Daubert and Kumho Tire, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods;
and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

This rule is a codification of the principles set forth in **Daubert** to require an analysis of factors by the trial judge in determining whether particular scientific evidence is admissible. To admit such evidence the trial court must act as a gatekeeper and make a preliminary determination that the underlying science is, in fact, valid.

Kumho Tire, as stated previously, extended the principles to cover any evidence of scientific, technical, or other specialized knowledge.

The commentary to **KRE 702** states that the numbered items above are not intended to specifically state the factors found in **Daubert** and **Kumho Tire**, but are meant to indicate that the court is to determine the reliability of such evidence based upon the flexible factors suggested by those cases.

It is clear in the instant case that the trial court did not properly act as a gatekeeper to evaluate the testimony of the detective concerning the fingerprint. While there are numerous cases concluding that testimony is proper that a latent print *matches* a known print, there are no cases found which hold that it is proper to tell the jury how close the analysis came to a match. An unpublished case from Michigan, **People v. Ballard**, 2003 WL 697334 (Mich.Ct.App. 2003), reversed on other grounds, 664 N.W.2d 211 (2003), was an appeal claiming ineffective assistance of counsel for the failure of trial counsel to object to the testimony of the government's fingerprint expert. The expert testified that she was 99% certain that the latent fingerprint matched the defendant. The expert indicated that she had found six points of agreement between the latent and the known

print and those six points matched at 100% each. However her rule was to require seven points of agreement before she would actually declare a match, so she therefore concluded she could not make an absolute identification. She concluded, however, that she was 99% certain that the latent print matched the defendant. The trial court determined that there was no scientific foundation laid for the expert's testimony, specifically stating that the challenged testimony had no demonstrated basis in an established scientific discipline. The court therefore concluded that counsel had been ineffective for not objecting to her testimony. The case was reversed on appeal because the Appellate Court determined that counsel had not been ineffective in view of the other strong evidence in the case.

The same principle discussed in Ballard is applicable here, in that the Commonwealth failed to establish, or even offer, any scientific, technical, or specialized knowledge as a foundation for the detective's testimony that there was a 40% agreement between the latent print and the known print. Therefore it was neither relevant nor even meaningful in the least. Prejudice to the jury was the real goal of the Commonwealth, and was easily attained.

A proper gatekeeping analysis of the testimony of the detective in this case would find that no part of KRE 702 was met by the Commonwealth. Even the introductory paragraph of KRE 702 does not fit the facts of this case, because the testimony by the detective was not designed to either assist the trier of fact to understand the fingerprint evidence, or to determine a fact in issue.

The requirements of the three numbered segments are also not met in this case. The testimony of the detective that there were four matching points of a partial print is not

based upon sufficient facts or data. He misled the jury into thinking that the partial print was significant, in that virtually all prints found at crime scenes are partial prints, as stated in Baines, *supra*. In addition, while testifying that there was no match, the detective testified in such a way as to attempt to influence the jury to decide that there was, in fact, a match based upon the four matching points with only a partial print.

The second numbered segment was also not met because the testimony was not the product of reliable principles and methods. The detective testified that in order to call a match between two sets of prints they used the principle that there must be ten matching points, which he admitted were not present. There was no testimony whatsoever that finding 40% of the required matching points is sufficient if one is dealing with only a partial print. There was no testimony that any studies have shown that 40% of a match requirement is sufficient to "assume" there is a match even though an expert cannot call it a match, or that it is even a significant number.

The third numbered segment of KRE 702 was also clearly not followed here. The detective did not reliably apply the principles and methods of fingerprint analysis to the facts of this case. The principles and methods of the fingerprint analysis that the detective had been taught and followed in order to call a match required ten matching points between two sets of fingerprints. He offered no evidence to suggest that 40% of the required ten matching points was sufficient for any purpose, or was relevant for any purpose. He offered no evidence of any study showing that 40% is very close to a match, or that rarely does one find as many as four points matching with different individuals.

The facts of this case required that his testimony be only that there was no match. Since the Commonwealth was able to dupe the judge, the gate keeper in the admissibility

of such evidence, into thinking the evidence was relevant shows that the Commonwealth could easily dupe the jury into believing that it was important and significant evidence. The detective herein certainly did not tell the jury that the partial with four matching points with Appellant's prints would have matched the prints of multiple people, as **Blackford**, *supra*, indicated.

The detective never mentioned in his testimony that virtually all prints recovered at a crime scene are partial prints. There is no police officer at a crime scene rolling the fingers of the criminal, properly inked, onto a fingerprint card with which to obtain a full print on every occasion. Yet virtually millions of fingerprints found at crime scenes are called matches by their examiners.

At the beginning of a long and thorough discussion of fingerprints in **United States v. Mitchell**, 365 F.3d 215 (3rd Cir. 2004), in which a five-day **Daubert** hearing, consisting of over 1000 pages of testimony, was conducted on the admissibility of *matching* fingerprint testimony, the Third Circuit Court of Appeals formed the question as whether or not an identification can be made by examination of *latent fingerprints*. Under the heading “The Field of Latent Fingerprint Identification,” the court began:

Criminals generally do not leave behind full fingerprints on clean, flat surfaces. Rather, they leave fragments that are often distorted or marred by artifacts [generally small amounts of dirt or grease that masquerade as parts of the ridge impressions seen in a fingerprint, while distortions are produced by smudging or too much pressure in making the print, which tends to flatten the ridges on the finger and obscure their detail]. These “latent” prints—from the Latin *lateo*, “to lie hidden,” because they are often not visible to the naked eye until dusted or otherwise revealed—*are the typical grist for the fingerprint identification expert's mill*. Testimony at the Daubert hearing suggested that *the typical latent print is a fraction—perhaps 1/5th—of the size of a full fingerprint*. A “full” fingerprint is familiar to anyone

who has been fingerprinted for identification or law enforcement reasons: It is the print made by rolling the full surface of the fingertip onto a fingerprint card or electronic fingerprint capture device... A full set of full-rolled fingerprints on a card—as would be taken during a police booking, for example—is known as a “ten-print card.” Ten-print cards usually also have space at the bottom of the card for “flat impressions” or “plain impressions,” where all four fingers of the hand are pressed at once onto the card without rolling.

Rolled prints and latent prints alike are subject to artifacts and distortions, though the problems with latent prints are more acute because they are smaller, and left more carelessly than full-rolled prints, and are left on surfaces that many other fingers have also touched... See Andre Moenssens et al., *Scientific Evidence in Civil and Criminal Cases*, § 8.08 at 514 (4th ed. 1995) (“Many latent impressions developed at crime scenes are badly blurred or smudged, or consist of partially superimposed impressions of different fingers.”). Mitchell, 221-222. (Emphasis added.)

Through all of that, despite the fact that a latent print contains artifacts and distortions and is only a fraction of a full fingerprint (perhaps 1/5 the size), examining experts call literally millions of matches between partial prints found at crime scenes and those of suspects.

Mitchell described the standard method for the identification of latent prints, used by the FBI and most examiners, as ACE-V, an acronym for “analysis, comparison, evaluation, and verification.” After the ACE, the examiner evaluates whether there is sufficient similarity to declare a match. In the final step, the match is independently verified by another examiner, although the Mitchell Court acknowledged there is some dispute about how truly independent the verification is.

A match is called when the examiner finds a sufficient number of points in a latent

print that are identical to a known full print. The Mitchell Court mentioned that a number of jurisdictions both within and outside the United States rely on a system where a minimum number of corresponding points must be found before a match may be declared. For instance, the Mitchell Court stated that in France the required number of points most often used for a match is 24, while the number is 30 in Argentina and Brazil.

Therefore it is perfectly clear that the so-called "partial print" with which the Commonwealth and the detectives were "stuck" in the present case, and were ostensibly thwarted from arriving at a successful match, was, in fact, the standard, every day latent print found at every crime scene where fingerprints are left by careless criminals. The detectives simply could not match it to Appellant's print, but managed by subterfuge to disguise that detail by the emphasis on finding four matching points on a mere partial print. This left the obvious impression with the jury that if they had a "real" print instead of a "partial" print they would have certainly found more than four matching points, and a match would have been flawless.

All that was necessary to show the jury that the detectives did their job, which was what the Commonwealth claimed they were trying to do, was that they found a partial print that could not be matched to anyone. In fact, according to the treatise *Modern Scientific Evidence*, 4th Ed., *The Law and Science of Expert Testimony*, Fingerprint Identification, § 33:36 (2010- 2011):

Fingerprint examiners abhor qualified, "probable," identifications-to the degree that offering such opinions, except under extraordinary conditions (such as being directly ordered to do so by the court), is considered unethical by the profession. In essence, *the profession* refuses *en bloc* to give testimony unless it is absolutely sure of an identification. (Internal quotes removed, emphasis in original)

Apparently Fayette County fingerprint examiners did not receive that memo. In the instant case, the detective implied that the identification was probable because of the four matching points on a mere partial print. Not only did he attempt thereby to surreptitiously avoid the ten-points-for-a-match requirement established locally, but he ignored the standards of his entire profession.

If experts have established that there must be a certain amount of points which are identical in order to call two prints a match, it must be clearly established that anything short of that is simply not a match, and is therefore not relevant. Imagine the confusion, and prejudice to a defendant, if fingerprint experts are able to testify that they cannot call it a match unless there are ten identical comparison points, but then are able to explain to the jury a “fudge factor.” “Here we have only a partial print, which cuts down on the likelihood of finding ten identical points, so the fact that we found four identical points is strongly suggestive that the partial print belonged to this defendant.”

Jurors can easily arrive at that reasoning with the evidence in this case. When the Commonwealth said that it needed to advise the jurors why there was no match, the simple answer should have been because there were not ten points of identical lines and swirls between the latent print and the known print.

There has been no testimony in this trial, or any expert testimony in any **Daubert** hearing, to establish how many points are routinely identical between two prints that are known not to match. Until experts establish through proper scientific, technical, or other specialized method that a certain amount of identical points, though short of a match, are strong evidence, or show a strong likelihood of a match even though not conclusive, it is improper to allow the Commonwealth to inappropriately influence the jury by showing a

less-than-a-match point total. A suitable study could well show that all white males have three or four or five identical points in their fingerprints. Or not. The jury certainly does not know the answer to that question, and therefore should not be permitted to speculate.

Since there has been no such published study to show how many points of exactness on fingerprints are common among family members, distant relatives, or even at random, the horseshoes/hand grenade approach used by the Commonwealth here was improper.

A match may be whatever the experts say it is, but this is not a game of horse shoes for the Commonwealth to play. It is either a match, or not a match. In order for the Commonwealth to introduce evidence concerning how close the prints were to a match, there must be a Daubert hearing to establish the "likelihood" of identity using a fingerprint database, as is done in DNA cases. To simply throw out a number for the jury to use to speculate is not relevant, and is highly prejudicial. Appellant was denied due process under the Fourteenth Amendment of the United States Constitution by the court's ruling that this evidence was admissible.

CONCLUSION

Based on the foregoing, Appellant requests this Honorable Court to reverse his conviction herein.

Respectfully submitted,



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APPENDIX

Tab Number	Item Description	Record Location
1	Order Granting Discretionary Review	N/A
2	<i>Barnes v. Commonwealth</i> , Kentucky Court of Appeals Case No. 2010-CA-000670 Opinion Affirming	N/A
3	Final Judgment	TR 118-122
4	<i>Patterson v. Commonwealth</i> , 2004 WL 537932 (Ky. 2004)	N/A
5	<i>Blackford v. Commonwealth</i> , 2003 WL 22975282 (Ky. 2003)	N/A
6	<i>People v. Ballard</i> , 2003 WL 697334 (Mich.Ct.App. 2003)	N/A