

SUPREME COURT OF KENTUCKY  
FILE NO. 2013-SC-291-DG  
COURT OF APPEALS CASE NUMBER 2012-CA-628

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ETHAN HUGHES

MOVANT

VS.  
Appeal from Crittenden Circuit Court  
Hon. Rene Williams, Judge  
Case No. 10-CR-00044

COMMONWEALTH OF KENTUCKY

RESPONDENT

BRIEF FOR MOVANT



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CERTIFICATE OF SERVICE

This is to certify that a copy of the enclosed Brief for Movant has been served by mailing to the Hon. Rene Williams, Judge, Crittenden Circuit Court, Judicial Annex, 35 E.S. Hwy. 41AS, P.O. Box 126, Dixon, Ky., 42409; Hon. Zach Greenwell, Commonwealth's Attorney, 215 N. Main Street, P.O. Box 341, Marion, Ky., 42064; Hon. Paul Sybil DPA, 739 S. Main Street, P.O. Box 695, Henderson, Ky., 42419; and to the Hon. Jack Conway, Attorney General, Frankfort, Kentucky, 40601, on this the 13<sup>th</sup> day of January, 2014. The record was not checked out in preparation of this Brief for Movant.



GENE LEWTER

## **INTRODUCTION**

This case is before this Court following its granting of a motion for discretionary review following the adverse ruling of the Court of Appeals from a judgment in which Ethan Hughes was convicted of second-degree rape and sentenced to ten years in prison.

There are 13 discs overall, but the trial is contained on one CD, labeled as 4B, with the date of 1/27/12. It is cited herein simply as VR No. 1 with the date, 1/27/12, and references to the trial will be in the standard manner.

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Movant welcomes Oral Argument if this Court deems it necessary.

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## STATEMENT OF THE CASE

Ethan Hughes, who had just turned 19 years old at the time of the offense, is now serving a 10 year sentence for second-degree rape. The sexual encounter which is the basis of the charge came to light after the birth of a child to the 12-year-old victim CH, which caught the attention of authorities. In a true rarity in the court system, there is virtually no dispute of any important facts in this case. The only issue in the case was whether Hughes believed that CH was 16 years old. Not only did CH admit that she told Hughes she was 16. VR No. 1: 1/27/12; 01:29:27, but she further testified that she thought Hughes believed her. Id. 01:32:28. Hughes testified that he did in fact believe her. Each testified similarly that Hughes learned CH's age much later when her mother called Hughes sometime after CH learned she was pregnant and informed Hughes that CH was only 12 years old. Id. 03:26:29. Hughes testified that he was very angry when he learned her true age, and insisted that he had believed her when she told him that she was 16.

Hughes and CH each testified that they had spoken on the phone before meeting in person, but met for the first time on an early August night in 2008, when the sexual encounter occurred. CH said Hughes was at her residence along with another girl for a time, and CH's mother was also there. Id. 01:24:04. At some point, CH and her mother went to bed, leaving Hughes alone on the couch watching television.

CH testified that she got up to get something to eat, then walked in and sat down beside Hughes on the couch. CH's description of what happened next was succinct. They were watching a movie "for a minute" then one thing led to another, and they had sex. Id. 01:26:45. Hughes testified that he asked CH if she had a condom and she said she did

not. Id. 03:47:58. Hughes then stayed at the house, leaving and returning periodically over the three-day weekend (CH's mother was also present). CH testified that they had sex three times during that weekend, and that was the end of it. Id. 01:27:40.

What finally brought the matter to the attention of the authorities was when the Cabinet for Human Resources learned that a 12-year-old had given birth to a child. After the investigation began concerning the identity of the father, DNA tests ultimately confirmed Hughes as the father. Although he was not the first suspected father, this fact came out only in chambers and not in front of the jury.

After learning that he was the father Hughes testified that he was a frequent visitor at CH's residence and helped care for the child. The only question to be determined in the trial was whether Hughes believed CH was 16 years old, as he claimed and CH confirmed. Hughes testified that he believed CH when she told him she was 16, and CH also testified that she thought he believed her. Id. 01:32:28. In a genuine rarity, the jury apparently did not believe either the accused or the accuser.

The Court of Appeals, in a 2-1 decision, affirmed the judgment of the trial court, specifically rejecting each of the following arguments. The Court granted discretionary review.

Additional relevant information will be set forth in the arguments.

## ARGUMENT ONE

### **HUGHES WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE INTRODUCTION OF A PHOTOGRAPH OF CH TAKEN AT THE HOSPITAL THE DAY AFTER SHE GAVE BIRTH**

This error was preserved by Hughes's objection at the bench when the Commonwealth introduced the photograph. VR No. 1: 1/27/12; 01:14:06-01:15:20. Hughes pointed out that the issue was how CH looked when Appellant was around her, which was only a three day period nine months before, and certainly not how she looked in the hospital. Appellant further argued that the pictures of CH in the hospital with her child would be too prejudicial, adding that they don't accurately depict how she would have looked at the time of the sexual encounter. Id.

The court overruled Hughes's objection and permitted the Commonwealth to introduce the photograph of CH, taken at the hospital the day after the birth of the child which resulted from the sexual encounter with Hughes. It shows CH holding the child and wearing no makeup, which she confirmed in her testimony. She testified that she normally wore makeup, and that she was wearing some when she first met and had sex with Hughes. Id. 01:34:12. There is no doubt the photo did its intended job: it is incontrovertible that she looks like a very young child in the photo, obviously under age, just as the Commonwealth planned for the jury to conclude. It is highly unlikely that anyone could have mistaken her for a 16 year old from that photo. This photo alone is ample explanation of why the jury did not accept the testimony of either CH, that she thought Hughes believed her when she told him she was 16, or the testimony of Hughes that he did in fact believe her.

However, the issue for the jury to determine was not how CH looked in the hospital after giving birth: the issue was how she looked when Hughes had been with her, nine months previously, when she was wearing makeup and trying to pass herself off as being 16 years old.

It is indisputable that the pictures of CH in the hospital with her child did not accurately depict how she looked at the time of the sexual encounter with Hughes, which was when the alleged crime occurred. The entire purpose of the photograph was to show CH in the helpless, totally defenseless, and highly prejudicial position of a hospital bed, with no makeup, and no intention to pass herself off as being 16 years old. It also had the added benefit to the Commonwealth of showing the unintended consequences of Hughes's sexual folly. If the photo accurately reflected the way CH looked on the day of the sexual encounter, the only decision for the jury to have made would have been to name a foreperson.

The law is well established that for a photograph to be admitted into evidence it must have some probative value. *Wager v. Commonwealth*, 751 S.W.2d 28, 31 (Ky. 1988). Even then, it is still not admissible unless it is determined that the prejudicial effect does not outweigh its probative value. Otherwise the photograph is not admissible. *KRE 403. Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993). In response to Hughes's objection to the photo, the trial court simply stated, "Well, I don't think he's denying that he fathered this child, so I don't see how that could be prejudicial to him." The trial court did not weigh the probative value and the prejudicial effect of the photo, as required by KRE 403. The court did not see any prejudice to Hughes to even compare with any probative value. In addition, the court did not state what probative value the

photographs had.

The court failed to realize that the issue was not fatherhood at all. The issue was whether CH successfully passed herself off to Hughes as being 16 years old, as she told him she was. Whether she gave birth, or even became pregnant as a result of the sexual encounter, is not an element of the crime with which Hughes was charged, had no relevance, and was beyond doubt extremely prejudicial.

The majority Opinion of the Court of Appeals merely gave lip service to the weight rule, simply concluding that since CH was nine months older in the picture, "If anything, a photograph taken that much later could only have benefitted Hughes because of the added maturity of nearly another year of age." This perceived truism is belied by the photo and the facts. The dissenting Opinion states the problem perfectly:

Hughes was charged with second-degree rape. While Hughes presents several issues which may have resulted in error, I address only the admissibility of a photograph of C.H. in the hospital holding a child because of its clear inadmissibility and resultant reversible error.

I agree with Hughes that the relevance is minimal (lack of make-up and in a hospital bed holding her child) and that the prejudice resulting from introduction of the photograph is extreme and reversible error. First, if the intent of introducing the photograph was to show how C.H. appeared on the date she and Hughes had sex, then the lack of make-up would certainly be a relevant factor. Curiously, make-up often has the effect of making the old look younger and the young look older. C.H. wearing makeup on the date in question would likely make her appear older and the introduction of a photograph to the jury of C.H. without makeup would, in all likelihood, give her a younger appearance. This is particularly relevant in light of the defense put forth by Hughes concerning his belief of C.H.'s age on the date of their encounter. *If the purpose of the photograph was to show how C.H. appeared when encountered by Hughes, the photo presented a picture of C.H. that could only be viewed as far from the truth.* Thus, both its relevance and probative value was minimal. This photograph should have been excluded because of minimal relevance and because the probative value was clearly outweighed by the extreme undue prejudice to Hughes; failure to do so resulted in reversible error.

Second, C.H.'s newborn child is included in the photograph. There is no contention that a sex act did not occur, so how could the fact that a child was born from said act be relevant to the elements of a rape charge? To the contrary, I do understand how a jury would be extremely prejudiced toward Hughes as a result of a child born of their brief encounter. (Dissenting opinion, page 15. Emphasis added)

In fact, the law is quite clear that pregnancy resulting from a charge of rape is not relevant to prove that a rape occurred when that is not the issue. In *Romans v.*

*Commonwealth* 547 S.W.2d 128, 130 (Ky. 1977), this Court stated:

It was prejudicial error also to allow proof that as a result of the rape upon her Doris Burnett had conceived and given birth to a child. No one questioned the fact that she had been raped. The question being tried was whether Romans was the guilty party. That pregnancy ensued from it was utterly irrelevant and obviously calculated to incite the jury, a plain case of reckless overkill.

The same is true here. The only question for the jury to determine was whether he was believed that CH was 16 at the time of the sexual encounter. That pregnancy ensued from the sexual encounter was "utterly irrelevant and obviously calculated to incite the jury, a plain case of reckless overkill." *Id.* The definition of relevant, as set forth in *KRE 401*, is that "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. (Emphasis added) Clearly, whether or not CH became pregnant, or gave birth, was of no consequence to the determination of whether Hughes believed that CH was 16 years of age 9 months before the birth. The fact that CH became pregnant and especially that she gave birth, does not make it more or less likely that Hughes did not believe that CH was 16 years old at the time of the sexual encounter. *Romans, supra.* The trial court, and the majority opinion of the Court of Appeals, failed to appropriately consider the rules of evidence as they

applied in this case.

The 14<sup>th</sup> amendment to the United States Constitution specifically requires that every accused person is entitled to a “fundamentally fair trial,” and the failure to so provide is reversible error. Hughes was clearly denied a fundamentally fair trial when the jury was shown the highly prejudicial photograph of CH very shortly after having given birth, which included the picture of the newborn child as the fruits of the sexual encounter.

The concept of fundamental fairness has been applied in many cases, both criminal and civil. The simplest statement of fundamental fairness as a constitutional concept is stated in *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 816 (Ky. 1991):

Fundamental fairness is part and parcel of the concept underlying the rights guaranteed to us by our Constitution; and, conversely the various sections in it protecting individual rights from legislative interference cannot be understood or applied without reference to fundamental fairness.

For example, in *Perry v. Commonwealth*, 390 S.W.3d 122 (Ky. 2012), this Court held the requirements of due process and fundamental fairness in certain circumstances can require that a criminal defendant be allowed to have a witness against him independently examined by a psychiatrist or psychologist. Discussion of this concept is also found in *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993), where this Court held that the defendant was entitled, as a matter of “due process and fundamental fairness,” to have a psychological or psychiatric examination of the prosecuting witness under the facts of that case.

The same concept of fundamental unfairness is discussed in *Clark v.*

*Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007), where this Court stated that generally a defendant's prior bad acts are inadmissible because fundamental fairness requires that the accused be tried only for the particular crime for which he is charged. Essentially, fundamental fairness in this area requires that a jury's verdict be predicated on the particular crime charged in the indictment and not prior bad conduct dovetailed to the charged offense with the effect of emphasizing a general criminal disposition. See *Payne v Tennessee*, 501 US 808, 825 (1991) citing *Darden v. Wainwright*, 477 US 168, 179 – 183 (1986) for the proposition that when a state court admits evidence "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the 14th amendment provides a mechanism for relief."

There can be no doubt that the photograph herein was so unduly prejudicial that the trial was fundamentally unfair and the due process clause requires reversal.

### **ARGUMENT TWO**

**HUGHES WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE REFUSAL OF THE TRIAL COURT TO PERMIT HIM TO CALL AN IMPORTANT, RELEVANT WITNESS, THEREBY DENYING HUGHES HIS RIGHT TO PRESENT A DEFENSE**

This issue was preserved for review by a discussion in chambers where the court and the Commonwealth asked Hughes what the witness would say, and ultimately the court refused to permit Hughes to call the witness to testify. VR No. 1: 1/27/12; 2:44:50.

When CH testified, she admitted that she had told Hughes that she was 16 but denied telling anyone else that she was 16. During a recess after the Commonwealth closed, the attorneys and the judge went into chambers. Counsel for Hughes stated there

were some things to which he thought the Commonwealth might object. VR No. 1:  
1/27/12; 02:39:02. The Commonwealth then brought up a police detective who had first investigated another boy, Brian Reynolds, with respect to the fatherhood of the child involved herein, and asked if Hughes intended to call that detective. Counsel for Hughes explained the detective would testify that CH had admitted to him (the detective) that she had told the other boy that she was 16. A lengthy discussion ensued after which the court prohibited Hughes from calling the officer to testify.

COMMONWEALTH: I see that you have Detective Billy Summers here, and Detective Summer investigated a case involving –

DEFENSE: Brian Reynolds.

COMMONWEALTH: Brian Reynolds, who was another perv who had allegedly had sexual intercourse with CH. And it goes to my motion that you've already ruled on, judge. [The rape shield law]

DEFENSE: But what I'm asking about is not any of the sexual stuff – it's that C.H. told; C.H. said earlier I've not told anyone else I was sixteen. He's going to testify that she told him [that] she did tell Brian Reynolds that she was sixteen. It goes to (1) her credibility that she testified to on the stand, and (2) that she's going around telling everybody that she's sixteen to appear older. Id. 02:40:00.

COMMONWEALTH: Here's the deal, judge. She admitted that she – what the detective will testify to is she, she turned in this thing, I think this was all the paternity, *that he was the first name she gave, was this Brian Reynolds*. And, uh, he started investigating into it and he said, my god, you're only twelve years old, and she said, *well I told him I was sixteen*. The same as she said in this case. Id. 02:40:32. She told...in her testimony she admitted that she told the defendant she was sixteen.

JUDGE: So, how are you going to be able to get that in without bringing in why he was investigating?

DEFENSE: It doesn't matter why he was investigating, well it might, but

Judge: (inaudible) investigating a sexual act?

DEFENSE: Well I'm not going to ask about that.

JUDGE: Tell me how you're going to ask it. Id. 02:40:58.

DEFENSE: Did – have you previously spoken with C.H.- and he has- and did she tell you that she told Brian [Reynolds] that she was sixteen? And she did, and that's all I'm going to ask him, is that she told Brian she was sixteen, and she told it to law enforcement. She admitted that.

Judge: And you're not going to ask anything about why he was investigating?

DEFENSE: Not why he was investigating or – maybe why she was- why she was talking about it, or any of those –Id. 02:41:34.

COMMONWEALTH: And you're going to leave that jury guessing, judge. Why he's involved, they're going to say who's Brian [Reynolds], what's he got to do with all this? They're not going to understand it. I mean she already admitted – I don't understand why it's such an important part for the defense. She already admitted she told Ethan she was sixteen. I just think it's-

Judge: So what's really the relevance of her telling somebody else she was sixteen? Other than – *well she did testify that she didn't tell anybody else* – Id. 02:42:04.

COMMONWEALTH: He just wants the jury to know she slept around. I mean that's it.

DEFENSE: You can't ask him that.

COMMONWEALTH: Well I know but –

JUDGE: (inaudible) *he gets to impeach her.*

DEFENSE: There's a lot to impeach her with.

COMMONWEALTH: What are you trying to impeach her on?

DEFENSE: Well that she – that she never tells anyone else that she's sixteen. And if she's going around telling people she's sixteen –

COMMONWEALTH: Why is that even relevant if she admitted that she told him she was sixteen?

DEFENSE: Well I just – it further reinforces the impression that she is in fact sixteen, at least as far as Ethan –

JUDGE: The defense is what he actually believed. She said she told him she was sixteen. So why would it matter what she told somebody else? How is that relevant? Id. 02:43:00.

DEFENSE: Well she, she didn't testify – it's also relevant to her credibility today.

COMMONWEALTH: I can give you that judge, I think she's lying. And I think she lied about –

JUDGE: So you think she lied when she told him she was sixteen?

DEFENSE: (laughing) She didn't lie about that.

COMMONWEALTH: That's what I think. And I think she's lying about saying she saw this other boy and told him she was sixteen. She's trying to protect him. Like she tried to protect her momma.

JUDGE: (sighs) Id. 02:43:50.

COMMONWEALTH: I'm just very concerned about the jury starting to speculate about her prior sexual history when he's not impeaching her on a crucial point.

JUDGE: Based on the fact that the defense is what he actually believed and she's admitted, or testified, that she told him she was sixteen, and there's no other connection between him and this Brian [Reynolds], you're not going to have any witnesses say Brian [Reynolds] told him that she told him she was sixteen, correct? There's no other connection other than what she told Detective Summer she told him, Brian [Reynolds]. Id.

02:44:50. Now, I'm going to have to rule that you cannot present that. Unduly prejudicial, has no relevance to this issue. So what's next?

The court's last comment, that it has no relevance to this issue, is difficult to understand. As everyone in the court system knows, the jury does not have to believe the testimony of any one person, and can believe anything it chooses. "It is the privilege of the jury to believe the unbelievable if the jury so wishes." Taylor v. Commonwealth, 995 S.W.2d 355, 361 (Ky. 1999).

The Court of Appeals agreed with the trial court, stating:

The jury was aware that police had conducted an investigation into the case after social services discovered that C.H. was pregnant at the age of twelve. Under those circumstances, testimony by an officer related to interviewing a young man other than Hughes would clearly imply promiscuity on her part—the very result that is forbidden by the statute.

Furthermore, C.H., Hughes, and several other witnesses testified that C.H. had told Hughes that she was sixteen. C.H. was not on trial. The issue was Hughes's belief. Whether C.H. had told others that she was sixteen was irrelevant to his belief. One of Hughes's witnesses testified that she believed C.H. was sixteen, and another of his witnesses testified that C.H. often told people that she was sixteen. The substance of the testimony was, in effect, presented to the jury without any implications that C.H. was sexually active other than her relationship with Hughes. Opinion, page 2. (emphasis added)

This reasoning is flawed on several points. First, of major significance, the Opinion totally missed the fact that the detective would testify that CH was the one who told him (the detective) that she had told the other boy she was 16, not that the other boy had told the detective. Nor was Hughes planning to call the other boy. The jury would never have known that the detective had interviewed the other boy. Therefore the conclusion reached by the Court of Appeals was fatally flawed by its inaccurate

statement of the facts.

Second, that it was a police officer who testified that she had told him she had told someone she was 16 could be handled carefully to avoid the conclusion everyone assumed the jury would reach. No one needed to ask why the detective was questioning her. A general question could have been asked concerning whether she had admitted to him that she had ever told anyone that she was 16.

In addition, it is common knowledge that the police talk to victims and potential witnesses when a charge is brought. There is no basis to assume that the jury would somehow make the impossible leap that the detective was trying to determine who the father was, rather than simply investigating this charge against Hughes. The clear implication would have been that the detective was simply checking out Hughes's already stated defense. The Commonwealth always calls police officers to testify in criminal trials, so the fact that the police were interviewing a victim where the defense was a belief she was 16 would have zero implications of her having sex with everyone she had told she was 16.

Furthermore, the Court of Appeals, like the lower court and the Commonwealth, emphasized that others had testified that CH had told them she was 16 with no sexual implications. Yet no one seemed to recognize the inconsistency of that fact with the assumption that the jury would necessarily jump to the conclusion that she had sex with the other boy if she had told him she was 16. In fact, the jury may have concluded, and rightly so, that she merely attempted to pass herself off as 16 with everyone, boy or girl. Yet, both courts and the Commonwealth focused on sex as the only conclusion the jury would reach if the jury was told that she had told another boy she was 16. Clearly, that

conclusion is unjustified.

It is also important to recognize that jurors, in general, accept the testimony of police officers much more readily than that of teen age friends of either Hughes or CH. Therefore, the fact that there was testimony from other young people that she had said she was 16 does not offset the importance of having a police officer testify to the fact that she told him she had told someone other than Hughes that she was 16. It is a virtual certainty that a police detective would have more credibility with the jurors than the other teenagers who contradicted CH.

The point is that Hughes had the right to impeach CH, to show that she lied under oath to this jury. Both courts ignored the significance of impeaching her. It could well have affected the jury's deliberations in other areas, such as the photo discussed in the previous argument. She admitted that she was wearing no makeup in the hospital photo. Of great significance, however, is her testimony that she was wearing only eye makeup when she met Hughes. The majority Opinion pointed that out in discussing the admissibility of the photo. Opinion page 4.

However, the jury could well have questioned her truthfulness about how much makeup she was wearing on the night they met, if they had proof, through the detective, that she had lied in her testimony that she had told no one else she was 16. For someone who appeared to routinely try to pass herself off as 16, it is more than possible, and highly likely, that she did wear more makeup than eye shadow most of the time.

However, the elephant in the room on the rape shield issue is her own succinct testimony of what happened on the very night she met Hughes for the first time. Testifying that her mother was in a nearby room, CH told the jury that she left her own

bed, went to the couch to sit with Hughes and "One thing led to another and we had sexual intercourse." She further testified that it happened two or three times during the weekend, with her mother present in the home during the entire time.

Those facts, and the simplicity with which she discussed them, certainly suggests to any juror who was not asleep that CH was absolutely, positively, sexually active. The fact that the jury found Hughes guilty, and sentenced him to the maximum penalty of 10 years, shows beyond the shadow of a doubt that it did not matter to the jury that CH was sexually active before Hughes came on the scene. That was never the issue, and the jury, at least, understood it even if the Commonwealth, the trial court, and the Court of Appeals did not. The failure to permit Hughes to call his witness deprived him of the opportunity to properly impeach the primary witness against him, and therefore denied Hughes the right to present his defense in violation of the due process clause.

For the Court of Appeals to rule that it was irrelevant for Hughes to support his testimony with that of a police officer is beyond credulity. Both the Commonwealth and the court argued that since CH admitted that she told Hughes she was 16, nothing else was relevant. Never mind the fact that she denied having told anyone else she was 16, a point on which even the court acknowledged Hughes had the right to impeach her with this testimony. Id. 02:42:30. Then the trial court's reasoning shifted to the conclusion that the evidence was unduly prejudicial to the Commonwealth. In fact, impeaching the Commonwealth's most essential witness is neither "unduly prejudicial" nor irrelevant.

As shown in the dialogue quoted above, the trial court offered three separate theories in support of its nonetheless erroneous ruling: (1) that it was cumulative, since CH had already admitted that she told Hughes that she was 16. In essence, the court was

saying that Hughes could say nothing else on the subject, and present no witnesses to support his testimony. Such a ruling is impossible to support. In fact, the DNA evidence in this case was completely cumulative, and was not admissible under the theory used by the Commonwealth or the court. Fatherhood was not part of the offense. Sex with a minor under 14 was the offense. Both admitted it. The Commonwealth was permitted unfettered use of prejudicial, cumulative evidence, while Hughes was permitted none: (2) that it was unduly prejudicial to the Commonwealth. A trial is a battle, a war between two factions, each trying to parry and thrust throughout the proceedings with the intent of harming the other side with its evidence, ultimately with the goal on each side to win the war. It is true that it would hurt the Commonwealth for Hughes to have a police detective support his position that CH had told other boys that she was 16. This would lend credulity to the fact that she routinely passed herself off as being 16, and further that it was apparently believable to more than just Hughes.

(3) That it was not relevant evidence. It certainly was relevant for Hughes to establish that CH lied under oath in court, and that she routinely passed herself off as being 16 years old. This testimony would have significantly impacted the jury's decision whether Hughes believed that she was 16 years old. The possible harm expressed by the Commonwealth and the court was that this evidence might make the jury speculate that perhaps she was sexually active.

Of course, neither the court nor the Commonwealth could understand that passing one's self off as being older than one truly is does not prove sexual activity. There are many reasons why people do just that. She may have simply wanted to be accepted by older persons of her acquaintance. She had several older female friends whose ages she

gave as 17, 18, and 19. Id. 01:35:40. The first time she spoke to Hughes on the telephone she was with an 18-year-old girl, Brittany, who was actually a witness in the trial.

Many younger people attempt to fit in with an older, perhaps "cooler," crowd. Another common practice in trying to prove one is 16 years old is to be permitted to drive a car and even to get a driver's license. It is well known that college students, as well as young military personnel, try to prove they are 21 years old in order to purchase and drink alcoholic beverages. No one attempts to obtain ID showing their age as 16 so that a boy will have sex with them. There are many reasons why a young person may try to appear more mature in the presence of older people, other than being sexually active.

Both the trial court and the Court of Appeals failed to recognize a defendant's right to impeach a witness. This Court in *Holt v. Commonwealth*, 250 S.W.3d 647, 653 (Ky. 2008), made it very clear that impeachment is very important, saying:

Assuredly, witness credibility is always a probative issue in any case. The right to impeach a witness to show bias or prejudice is fundamental to a fair trial. *Williams v. Commonwealth*, 569 S.W.2d 139, 145 (Ky.1978) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). Likewise, the right of a criminal defendant to disprove the testimony of an unfavorable witness is a practical analog to the right of confrontation. See *Adcock v. Commonwealth*, 702 S.W.2d 440, 441 (Ky.1986). In that vein, the United States Supreme Court has held that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."

*Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) (quoting *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111).

Here, the jury needed to be exposed to the fact that CH had lied to them about not

telling anyone else, other than Hughes, that she was 16 years old. It was a crucial part of the defense case that CH attempted to pass herself off as being 16 years old; and precluding Hughes from impeaching her on this point was a denial of due process and denied him a fundamentally fair trial, as stated in *Holt, supra*, and the cases cited therein.

The fallacy in the reasoning of the court and the Commonwealth is easily seen by comparing the ruling *not to permit* Hughes to call Detective Summer to testify, with the trial court's ruling to *permit* Hughes to call his other potential witness, a juvenile with the moniker Stretch McNary, who was deposed in chambers.

Unfortunately, the jury never got to hear Stretch testify because the court and Commonwealth apparently scared Hughes's counsel into thinking Stretch would help the Commonwealth. Neither the court nor the Commonwealth had a problem with Stretch testifying that CH told him she was 16 years old, despite the fact that both the court and the Commonwealth had said just moments earlier that to have the detective testify that CH had admitted that she had told another boy that she was 16 years old (not Stretch) would suggest that she was sexually active. Following the pseudo-deposition of Stretch conducted in chambers, the following discussion occurred:

COMMONWEALTH: I'm not absolutely jumping up and down opposing him, your honor. I think he helps the Commonwealth, to be honest with you.

JUDGE: Well, I think I'm going to let him testify, since she did – *he's going to testify that she told him she was sixteen. It goes to credibility. You know, based on what he said here, he doesn't say anything about having relations*, that was a one-time thing, he was intoxicated, he does say it, but he talked to her and he thought she was younger. I can see it could be a double-edged sword. But that's your call. Let you call him if you want to. It'll be your decision. VR No. 1: 1/27/12; 03:10:31.  
(Emphasis added.)

Neither was the police officer going to testify that the other boy had sex with CH,

but the reasoning by the Commonwealth and the court was exactly the opposite for the two witnesses. However, the attorney for Hughes simply decided not to call Stretch to testify, apparently based upon the conclusions of the court and the Commonwealth that Stretch might help the Commonwealth.

This demonstrates that the basis for the Commonwealth's objection, and for the court's ruling, was simply that in their view one witness would have hurt the Commonwealth (the detective), and the other (Stretch McNary) might help the Commonwealth. While it is understandable that the Commonwealth would try to help itself by whatever means necessary to keep a witness off the stand who might hurt its case, the court is supposed to be a neutral party. By ruling that Hughes could *not* call the detective to say essentially the same thing as Stretch, only minutes before the Commonwealth said it thought Stretch might help the Commonwealth and had no objection to his testimony, the court prevented Hughes from presenting a defense. When the court evaluated the testimony of Stretch that CH had told him she was sixteen, the court stated it "goes to credibility," which was contrary to its reasoning moments before concerning Detective Summer's testimony. Further, the court stated that the fact that this witness (Stretch) "doesn't say anything about relations" meant that the jury would not think she was sexually active just because she lied about her age. This reasoning was completely absent when the court and Commonwealth considered the testimony of the detective, which would have been virtually identical to that of Stretch McNary.

It has long been a violation of the Fourteenth Amendment to the United States Constitution to prevent a defendant from presenting a defense. The United States Supreme Court discussed it in Washington v. State of Texas, 388 U.S. 14, 19 (1967),

holding:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, *is in plain terms the right to present a defense, the right to present the defendant's version of the facts* as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. (Emphasis added.)

A few years later Chambers v. Mississippi, 410 U.S. 284, 294 (1973) further explained the right to present a defense with more discussion of what it entails:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948), identified these rights as among the minimum essentials of a fair trial:

'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'

Yet, what does it mean to a defendant who is required to subject his witness to, in essence, a deposition in chambers including swearing in of the witness-VR No. 1:

1/27/12; 02:54:38- and cross-examination by the Commonwealth in order to prove his right to call the witness?

Here the court virtually hamstrung Hughes's defense by first requiring counsel to explain to the Commonwealth and the court in chambers exactly what each person would say, then requiring Hughes's next potential witness to submit to a virtual deposition in chambers so that his testimony could be evaluated by the court and Commonwealth.

There is simply no provision in the law for that procedure. It was done under the guise of

questioning how counsel for Hughes could call these witnesses without causing the jury to think that maybe CH had a sexual history.

In Holmes v. South Carolina, 547 U.S. 319, 325 (2006), the United States

Supreme Court summed it up nicely:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' (citations omitted).

There can be no doubt that in the instant case Hughes was not given "a meaningful opportunity to present a complete defense" because the court prevented one of his witnesses from testifying (Detective Summer), and required a pseudo-deposition of the other witness in chambers which allowed the Commonwealth, out of the presence of the jury, to develop a weakness in the testimony of the witness. The rape shield law, which the Commonwealth used to preclude Hughes from bringing out the sexual history of CH, cannot be used as a weapon to prevent the calling of a witness for other, legitimate, reasons, such as impeachment. The court teamed up with the Commonwealth to question how Hughes could call a witness (Detective Summer) to say that she passed herself off as being 16 without creating the thought in a juror's mind that she may have been sexually active. Yet moments later, the court and the Commonwealth team up to save that Stretch McNary could testify to the same evidence, because his testimony was deemed helpful to the Commonwealth.

In the case *sub judice*, the virtual deposition in chambers revealed possible weaknesses in the testimony of the witness which the Commonwealth thought might be helpful to its side, so the court ruled that Hughes could call the witness. However, his

relevant testimony was essentially the same as that of the detective, that CH had told him she was 16 years old. There is no significant distinction between the testimony of Stretch and Detective Summers, and the fact that the court and Commonwealth thought the testimony of Stretch might be helpful to the Commonwealth is not a legal basis to permit his testimony, yet deny the testimony of the detective.

Hughes was clearly denied due process of law by the entire procedure dreamed up by the court and the Commonwealth to screen Hughes's witnesses under the façade of preventing a violation of the rape shield law. The refusal of the court to permit Hughes to call his witnesses to the stand to testify in the normal way instead of forcing Hughes to explain the testimony of each witness in advance, followed by a deposition in chambers and the arbitrary choice to prevent one witness but allow another to testify is a clear violation of the due process clause under Holmes, supra, Washington, supra and Chambers, supra. The court thereby deprived Hughes of his Constitutional right to fully present his defense. Reversal is required.

### **ARGUMENT THREE**

**HUGHES WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE COURT'S CONDUCTING A PSEUDO-DEPOSITION IN CHAMBERS OF A DEFENSE WITNESS WITHOUT THE PRESENCE OF HUGHES.**

This error was not preserved by contemporaneous objection, but Hughes requests this Court to treat it as a palpable error under RCr 10.26.

As mentioned in the previous argument, after the discussion of whether Detective

Summer could testify, the court permitted the Commonwealth to conduct a pseudo-deposition in chambers of another of Hughes's planned witnesses, a juvenile referred to as Stretch McNary. However, Hughes was not brought in for the pseudo-deposition. When McNary was brought into chambers and the questioning began, it was absolutely required that Hughes be present. The entire pseudo-deposition was conducted without his presence and obviously completely without his knowledge since it was done at the suggestion of the court, *sua sponte*, after the attorneys were already in chambers. It became crucial beyond question when the Commonwealth and the court suggested McNary might be helpful to the Commonwealth, leaving it up to Hughes's counsel to decide whether to call the witness, without consultation with Hughes who had not heard any of the questioning and was not given any input into the decision.

McNary, who was present at CH's home for part of the night in question, would also have testified that she told him she was 16 years old. However, after the court permitted the Commonwealth to conduct a complete cross examination of McNary in chambers, complete with swearing in of the witness, the Commonwealth decided that McNary might be helpful to its side and did not object to his testimony. The court therefore agreed to permit it, since it would be helpful to the Commonwealth. Part of McNary's pseudo-deposition was his testimony that he believed CH when she first told him that she was 16, but when he found out later that she was younger he had nothing further to do with her. He denied ever having sex with her, and neither the Commonwealth nor the court was at all concerned about his testimony that she told him she was 16. The only difference in Stretch's testimony and that of Detective Summer was that the court and Commonwealth thought the former's testimony, for other reasons, might be helpful to the

Commonwealth.

Counsel then chose not to call McNary, obviously out of the fear that the court and Commonwealth had instilled in him that McNary might help the Commonwealth. Since Hughes was not present during the questioning and therefore did not hear any of the testimony, and was not even present when his attorney made the decision on his own not to call McNary, Hughes was not able to discuss the matter with his attorney nor even offer any input into the decision. This constitutional violation was catastrophic to Hughes's chances at trial.

Section 11 of the Kentucky Constitution and the Sixth Amendment of the U.S. Constitution provide that a defendant in a criminal case has the constitutional right to be present at all crucial stages of his case. **RCr 8.28(1)** requires that a defendant "shall be present at every critical stage of the trial." In **Caudill v. Commonwealth**, 120 S.W.3d 635 (Ky. 2003), the Kentucky Supreme Court held that presence of the defendant was not required where merely legal arguments were made in pretrial hearings. However, the Court qualified its holding by saying:

Thus, no evidentiary hearing was held and all of the issues addressed were resolved by legal argument. A defendant is not required to be present during the argument of legal issues between court and counsel...A defendant's absence means little when, as in the present case, the trial court's communication merely involves a question of law rather than fact. In such a case, a defendant's presence can be of no help to the defense. *Id.*, at 652.

Here, there was an evidentiary hearing which was the issue in **Caudill**, and not merely legal arguments. It was virtually a full blown deposition, at which Hughes was required to be present. His presence would have been extremely helpful in the hearing, and the decision whether to call McNary to testify.

Had this been the usual deposition taken prior to trial, no one would have imagined conducting it without notifying and securing the presence of the defendant. Of course, the pseudo-deposition-in-chambers to allow the Commonwealth to grill the witness in advance was completely improper in the first place, but leaving Hughes in the courtroom instead of in chambers where the questioning was conducted was an even more egregious error. The United States Supreme Court has explained that a defendant has a right to be present “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge...and it is a condition of Due Process to the extent that a fair and just hearing would be thwarted by his absence.” Watkins v. Commonwealth, 105 S.W.3d 449, 452,453 (Ky. 2003). Certainly a fair and just hearing was thwarted by Hughes’s absence.

McNary was Hughes’s friend, and Hughes obviously knew McNary better than his attorney did. He should have been present during the pseudo-deposition so he would be in a position to assist his attorney in making the decision whether to call McNary to testify. With two pairs of ears listening, the testimony could have been better analyzed.

Rejecting Hughes’s argument that he was required to be present during the pseudo-deposition, the Opinion of the Court of Appeals stated, page 4:

However, McNary's testimony directly contradicted Hughes's arguments. McNary said that C.H. did not act as if she were sixteen and that he thought she might have been fifteen at the most. Therefore, Hughes's counsel declined to present McNary to the jury for the obviously prejudicial impact that it would have produced. **Hughes does not offer any proof of how his presence would have caused a different outcome.**  
(Emphasis added)

It is true that Hughes cannot *offer proof* to this Court that his presence would have caused a different outcome. This holding by the Court of Appeals essentially

overrules the Constitutions of both Kentucky and the United States. If that is the test to be followed in cases relating to a defendant's presence at crucial stages there would never be a reason to bring a defendant to court for an arraignment, preliminary hearing, or virtually anything short of a trial. Rarely, if ever, could *proof* be offered on appeal, following conviction by a jury, to show a difference in the outcome would have resulted had the accused been brought to his arraignment, his preliminary hearing, or even an actual deposition.

This Court in *Price v. Commonwealth*, 31 S.W.3d 885, 892 (Ky. 2000), stated the law clearly:

This right [of a defendant to be present at all critical stages] is protected not only by RCr 8.28, but also by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Section 11 of the Constitution of Kentucky. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970) (“[o]ne of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial”); *Snyder v. Massachusetts*, 291 U.S. 97, 107–08, 54 S.Ct. 330, 333, 78 L.Ed. 674 (1934), overruled on other grounds, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), (“the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence”); *Carver v. Commonwealth*, Ky., 256 S.W.2d 375, 377 (1953) (“[t]his court has long recognized the importance of the constitutional right of the accused to be present with his counsel at all stages of a trial”).

The bill of rights declares “That in all criminal prosecutions the accused hath the right to be heard by himself and counsel.” The right ... necessarily embraces the right to be present himself ... at every step in the progress of the trial, and to deprive him of this right is a violation of that provision of the fundamental law just quoted.

The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but

also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor.

The pseudo-deposition in this case was as critical a stage as it gets, including the trial itself. McNary was Hughes's friend, and Hughes knew him better than his attorney, the Commonwealth, or the judge and should have been present during the formal questioning. It was the same as being present when a witness testifies in a trial. If Hughes must now offer proof that it would have made a difference in the outcome, how many actual trials would have different outcomes with the defendant being present for the trial as opposed to being left at the jail? Here Hughes would have been in a position to assist his attorney in both questioning the witness and making the decision whether to call McNary to testify. It is certainly a reasonable conclusion that his presence could have made a significant difference. Contrary to the statement by the Court of Appeals in its Opinion, McNary did not "directly contradict" Hughes merely by saying CH didn't act 16, and he thought she might have been 15 at the most. That testimony, taken out of context and ignoring other testimony of McNary, would actually have been very helpful to Hughes in showing that CH did not always look like the photo discussed in argument

1.

#### **ARGUMENT FOUR**

**HUGHES WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY INSTRUCTION NUMBER III WHICH IMPROPERLY TOLD THE JURY THAT THE BURDEN OF PROOF FOR THIS DEFENSE WAS ON HUGHES.**

This error was not preserved for appeal but Hughes requests this court treat it under

the palpable error rule of RCr 10.26. Instruction Number III provided:

Although you may believe from the evidence beyond a reasonable doubt that Ethan Hughes engaged in sexual intercourse with [CH] and that [CH] was less than fourteen (14) years old, and would otherwise be guilty of rape in the second degree under instruction number II, if you believe from the evidence that he believed she was at least sixteen (16) years of age, then you shall find him not guilty. You shall consider what he actually believed and not whether it was a reasonable belief. *The burden of proof for this defense is on the defendant.* TR 124. (Emphasis added.)

Except for the final sentence, the above instruction is the instruction provided in

Cooper, Kentucky Instructions to Juries, (Criminal) sec. 4.33 (rev. 4<sup>th</sup> ed. 1999).

However, the final sentence which tells the jury specifically that "the burden of proof for this defense is on the defendant" is not included in Cooper's and is not appropriate.

The Court of Appeals, in its opinion, virtually ignored the emphasis placed on the burden of proof by the addition in the instruction telling the jury that the burden of proof was on Hughes. The court simply stated that the instructions followed the commentary, then concluded, "The jury had the choice to believe him or not to believe him, and they chose not to believe him. There was no error committed by the court." Opinion, page 5, 6.

It is true that the jury did not believe him, but it is also true that the jury did not believe CH either when CH stated that she thought Hughes believed her when she told him she was 16. A guilty verdict from a jury generally means that the jury did not agree with the defense theory of the case, whether it was testimony of the defendant, his witnesses, or merely arguments. That does not mean there can be no error committed in a case merely because the jury did not believe the defense or its witnesses. The Court of Appeals did not address why it was necessary or correct to add the final sentence to the instruction, when it is not in Cooper's model instruction.

KRS 510.030 entitled "Defenses" provides:

In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old, mentally retarded, mentally incapacitated or physically helpless, the defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent.

The error of putting into the instruction that the burden of proof is on the

defendant is exacerbated by the focus throughout the trial by the Commonwealth on this point. The Commonwealth began in the voir dire to emphasize Hughes's burden of proof for his defense. VR No. 1: 1/27/12; 10:02:00. Following the improper instruction, the burden of proof became the entire theme of the Commonwealth's closing argument from the opening minute. After pointing out that the evidence for its own burden of proof was completely undisputed, it switched to Hughes's burden of proof and continued unabated on that theme. Id. 06:17:04. Typical was this closing comment, made while pointing at a photograph of CH projected on the screen (see Argument 1): "I mean really, guys. Think about it, that's his burden. Don't put that burden on us. That's his burden to prove that he thought that girl was 16." Id. 06:21:40.

The prejudice from the continued harping on Hughes's burden of proof is ultimately demonstrated by a note sent out by the jury in which it asked if the burden of proof for Hughes's defense was beyond a reasonable doubt. Id. 07:26:23. After discussion with the attorneys, the court informed the jury that the burden of proof was a "preponderance of the evidence" and this was a lesser burden of proof than reasonable doubt. Id. 07:28:45.

However, the proper instruction for the jury as provided by Cooper's would not have included the last sentence quoted above which told the jury that the burden of proof

was on Hughes. This improper sentence buttressed the improper statements by the Commonwealth throughout, including his entire closing argument, and ultimately was responsible for the verdict.

There is no authority for the inclusion in the instruction on this defense to tell the jury that Hughes has the burden of proof for the defense. The instruction in Cooper's, which the court followed until improperly adding the egregious final sentence, simply tells the jury "if you believe from the evidence that he believed she was at least sixteen (16) years of age, then you shall find him not guilty." Cooper's, *supra*. The instruction should have ended at that point, and the jury could have determined "from the evidence" whether it "believed" that Hughes "believed" that CH was at least 16 years of age.

The question of the burden of proof in various defenses has been brought up in many cases. In Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977), the Court discussed a distinction between statutes which simply provide a defense, and statutes which provide that a defendant may prove such element in exculpation of his conduct:

Whatever may be its other infirmities, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), does not stand for the proposition that the prosecution is required to produce evidence negating every fact and circumstance that could serve either to reduce the degree of or to raise an absolute defense to the crime charged. Once there is evidence sufficient to create a doubt, yes then the state has the burden of proof and there must be an instruction so casting it. This is true of every defense excepting those which the statutes provide may be proved by the defendant "in exculpation of his conduct." KRS 500.070. When a defense is presented in the form of an instruction on a lesser offense, there is an instruction to the effect that if the jury finds the defendant guilty but has a reasonable doubt as to the degree, it must find him guilty of the lesser. *Under no circumstances does a defendant have the burden of proof, as in the instance of the Maine statute involved in Mullaney.* (Emphasis added)

The matter of burden of proof and defenses is set forth in KRS 500.070:

- (1) The Commonwealth has the burden of proving every element of

the case beyond a reasonable doubt, except as provided in subsection (3). This provision, however, does not require disproof of any element that is entitled a "defense," as that term is used in this code, unless the evidence tending to support the defense is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal.

(2) No court can require notice of a defense prior to trial time.

(3) The defendant has the burden of proving an element of a case only if the statute which contains that element provides that the defendant may prove such element in exculpation of his conduct.

Despite the fact that subsection (3) states that the defendant has the burden of proving an element where the statute provides that he "may prove such element in exculpation of his conduct," how that burden is dealt with in the courtroom is a different matter. The commentary explains:

The second type of defense that will be given general use in the code is described in subsection (3). In addition to requiring that the defendant raise a defense that is so designated, this subsection requires that he establish it to the satisfaction of the jury. With this procedural device, it is possible to cast upon a defendant a reasonable burden of proof in situations where it would be inequitable to require the state to disprove a fact beyond a reasonable doubt. An example of such a defense is insanity, as defined in KRS 504.020.

This section does not change prior law. Previously there were elements of a case upon which a defendant had merely the burden of going forward with evidence, i.e., a duty to introduce such elements as issues in the case. Subsection (1) does not attempt to deal with the matter of when that duty is satisfied. Similarly, there were elements of a case upon which a defendant had the burden of proof, i.e., a duty to persuade the jury that the elements exist. ***Subsection (3) does not affect the manner in which juries are instructed as to such elements.*** This is a matter peculiarly for the courts to resolve, as has been the case under pre-existing law.

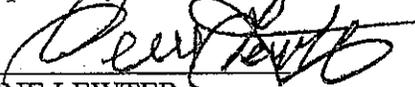
Clearly, the commentary shows that juries are not to be instructed about the shift in the burden of proof for such defenses, which is consistent with the instruction in Cooper's. If the jury had never been informed, either in the voir dire by the Commonwealth, in the closing arguments, or in the instructions, the jury could simply have determined in its collective mind whether it "believed" that Hughes "believed" that

CH was 16. By introducing the concept of burden of proof, the jury was completely misled on the issue. The instruction in Cooper's unmistakably shows it is simply a matter of whether the jury "believes" that Hughes thought she was 16, based on the evidence presented. There can be no question that it was palpable error under RCr 10.26, since the jury showed its importance by asking the question concerning the burden of proof. It was a denial of Due Process to so inform the jury, and must result in reversal.

**CONCLUSION**

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

Respectfully submitted,



GENE LEWTER  
ASSISTANT PUBLIC ADVOCATE

**APPENDIX**

<b>Tab Number</b>	<b>Item Description</b>	<b>Record Location</b>
1	Order Granting Motion for Discretionary Review	N/A
2	<i>Hughes v. Commonwealth</i> , 2012-CA-628 Opinion Affirming	N/A
3.	Final Judgment	TR Vol. I, pgs. 147-149

