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**COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-SC-000467**

JEREMY RUSSELL BREWER

APPELLANT

**APPEAL FROM COURT OF APPEALS
FILE NO. 2012-CA-000622-MR
v. APPEAL FROM FAYETTE CIRCUIT COURT
HON. JAMES D. ISHMAEL, JR., JUDGE
INDICTMENT NO. 11-CR-000622**

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, JEREMY RUSSELL BREWER

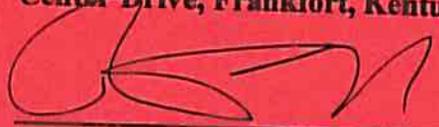
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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. James D. Ismael, Jr., Judge, 551 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; the Hon. Benjamin D. Willis, Assistant Commonwealth's Attorney, 116 N. Upper Street, Lexington, Kentucky 40507; the Hon. Shannon Brooks English, Assistant Public Advocate, 111 Church Street, Lexington, Kentucky 40507; and to be served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on May 23, 2014.



BRANDON NEIL JEWELL

INTRODUCTION

The Appellant, Mr. Brewer, entered a conditional guilty plea to fourth-degree assault (domestic violence, third or greater offense within five years). Final judgment was entered and Mr. Brewer was sentenced to two and a half (2 ½) years imprisonment probated for five (5). Mr. Brewer appealed to the Kentucky Court of Appeals as a matter of right. The Court of Appeals affirmed and Mr. Brewer filed a motion for discretionary review in this Court which was granted.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument if this Court believes it would be helpful to the resolution of the case.

CITATIONS TO THE RECORD

The record will be cited to in conformance with CR 98. The Court of Appeals Opinion (Brewer v. Commonwealth, 2012-CA-000622-MR) will be cited to as "Brewer v. Commonwealth, slip opinion" with the page number immediately following. The Commonwealth's Appellee Brief that was filed in the Court of Appeals will be cited to as "Commonwealth's COA Brief" with the page number immediately following.

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STATEMENT OF THE CASE

Mr. Brewer was indicted by a Fayette County grand jury on one (1) count of fourth-degree assault (domestic violence, third or greater offense within five years). TR 15. Fourth-degree assault is a Class A misdemeanor. KRS¹ 508.030. Fourth-degree assault can be enhanced to a Class D felony when it is the third or greater offense within five years and the victim of each offense was a family member or member of an unmarried couple, as defined in KRS 403.720.² KRS 508.032.

After Mr. Brewer was indicted, the Commonwealth moved the trial court to permit introduction of Mr. Brewer's two prior guilty plea convictions of fourth-degree assault (domestic violence), the details surrounding those convictions, and three other uncharged, alleged crimes during the Commonwealth's case-in-chief through the testimony of Ms. Hall-Turner, the alleged victim. TR 32-36, VR 11/2/11; 1:56:40-2:02:10, 2:52:40. The Commonwealth filed written notice of its intent to introduce KRE³ 404(b)⁴ evidence and defense counsel filed a written response in opposition. TR 32-45. The issue was also orally argued before the trial court. VR 11/2/11; 1:52:30-3:11:50.

¹ Kentucky Revised Statutes.

² Under KRS 403.720(2), "'Family member' means a spouse, including a former spouse, a grandparent, a parent, a child, a stepchild, or any other person living in the same household as a child if the child is the alleged victim." Under KRS 403.720(4), "'Member of an unmarried couple' means each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together."

³ Kentucky Rules of Evidence.

⁴ KRE 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

After hearing arguments on the matter, the trial court ruled that Mr. Brewer's two prior fourth-degree assault convictions (domestic violence), as well as the circumstances surrounding those convictions, were admissible.⁵ TR 54. VR 11/2/11; 3:00:53-3:11:50.

Thereafter, Mr. Brewer entered a conditional guilty plea to fourth-degree assault (domestic violence, third or greater offense within five years). VR 12/02/11; 3:19:45-3:28:13. The issue Mr. Brewer reserved the right to appeal was as follows: "Defendant reserves the right to appeal Court's ruling on Commonwealth's 404(b) motion. Particularly[, the] Court's ruling on admission of details of two prior convictions and convictions themselves in [the Commonwealth's] case in chief." TR 68.

Final judgment was entered on March 23, 2012, and Mr. Brewer was sentenced to two and a half (2 ½) years imprisonment probated for five (5) years with a litany of conditions of probation (see final judgment attached). TR 96-99. Mr. Brewer appealed to the Kentucky Court of Appeals as a matter of right. Ky. Const. 115.

On appeal, Mr. Brewer argued that evidence of Mr. Brewer's two prior convictions for fourth-degree assault (domestic violence), and the details and circumstances regarding those convictions, should not be admissible in the guilt phase of a trial. The Court of Appeals affirmed the trial court. The trial court's ruling, and the Court of Appeals' Opinion, turned to the one published case dealing with fourth-degree assault (domestic violence, third or greater offense within five years): Lisle v. Commonwealth, 290 S.W.3d 675 (Ky. App. 2009). VR 11/2/11; 3:00:53-3:11:50, Brewer v. Commonwealth, slip opinion pg. 2-3.

⁵ While the Commonwealth also argued that uncharged, alleged crimes and alleged drug activity should be admissible during the Commonwealth's case-in-chief, the trial court ruled that such would not be admissible and this ruling is not an issue on appeal.

The trial court and the Court of Appeals believed that Lisle permitted prior fourth-degree assault (domestic violence) convictions to be introduced in the guilt phase of trials on fourth-degree assault (domestic violence, third or greater offense within five years) charges. Id. However, Lisle does not hold, find, or conclude that prior fourth-degree assault (domestic violence) convictions can be introduced in the guilt phase of a trial on fourth-degree assault (domestic violence, third or greater offense within five years) charges. While Lisle dealt with fourth-degree assault (domestic violence, third or greater offense within five years), Lisle did not deal with whether prior convictions are admissible in the guilt or penalty phase of a trial. That is the issue on which Mr. Brewer asked this Court to provide guidance in his motion for discretionary review. That motion was granted on March 20, 2014.

The order granting discretionary review stated that briefing should include discussion of the impact of Galloway v. Commonwealth, 424 S.W.3d 921 (Ky. 2014). In Galloway, the case was trifurcated. During the first phase, the jury convicted Galloway of fourth-degree assault. During the second phase, the jury convicted Galloway of fourth-degree assault, third offense based on two prior convictions of fourth-degree assault. This Court stated that this was a reasonable approach. Id. at 921 n. 1.

ARGUMENT

I.

Evidence of Mr. Brewer's two prior convictions for fourth-degree assault (domestic violence) would not have been admissible in the guilt phase of a trial.

This issue is preserved. TR 68, VR: 11/2/12; 1:52:30-3:11:50.

An issue in the trial court and on appeal in the Court of Appeals was whether Mr. Brewer's two prior convictions for fourth-degree assault, as well as the details of those convictions, would have been admissible in the guilt phase of a trial. Id.

KRS 508.030 (Assault in the fourth degree) states:

- (1) A person is guilty of assault in the fourth degree when:
 - (a) He intentionally or wantonly causes physical injury to another person; or
 - (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument
- (2) Assault in the fourth degree is a Class A misdemeanor.

KRS 508.032 (Assault of family member or member of an unmarried couple; enhancement of penalty) states:

- (1) If a person commits a third or subsequent offense of assault in the fourth degree under KRS 508.030 within five (5) years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720, then the person may be convicted of a Class D felony. If the Commonwealth desires to utilize the provisions of this section, the Commonwealth shall indict the defendant and the case shall be tried in the Circuit Court as a felony case. The jury, or judge if the trial is without a jury, may decline to assess a felony penalty in a case under this section and may convict the defendant of a misdemeanor. The victim in the second or subsequent offense is not required to be the same person who was assaulted in the prior offenses in order for the provisions of this section to apply.
- (2) In determining the five (5) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered by a court of competent jurisdiction.

Again, the issue herein is whether Mr. Brewer's two prior convictions for fourth-degree assault (domestic violence), as well as the details of those convictions, would have

been admissible in the guilt phase of a trial for fourth-degree assault (domestic violence, third or greater offense within five years). Id. The answer is no.

“When a prior misdemeanor conviction is used to enhance a subsequent offense to a felony, [] the jury must make the finding with respect to the prior conviction during the penalty phase.” Stewart v. Commonwealth, 306 S.W.3d 502, 508 (Ky. 2010) (dealing with possession of drug paraphernalia as a subsequent offense elevated from a misdemeanor to a felony) (citing Commonwealth v. Ramsey, 920 S.W.2d 526-529 (Ky. 1996) (dealing with DUI as a subsequent offense elevated to a felony)). The reasoning here is clear. Unavoidable prejudice will result from the early introduction of evidence regarding a defendant’s previous convictions. Ramsey, 920 S.W.2d at 528.

Prior fourth-degree assault (domestic violence) convictions are not essential to the Commonwealth’s case-in-chief in a prosecution of fourth-degree assault (domestic violence, third or greater offense within five years) just as prior DUI convictions are not essential to the Commonwealth’s case-in-chief in a prosecution for DUI as a subsequent offense elevated to a felony. See Ramsey, 920 S.W.2d at 528. DUI and fourth or subsequent DUI charges are analogous to fourth-degree assault (domestic violence) and fourth-degree assault (domestic violence, third or greater offense within five years) charges. Under KRS 189A.010, DUI’s are normally misdemeanor offenses, however, a fourth or subsequent offense within a five (5) year period is a Class D felony if the prior DUI convictions are proven during a phase subsequent to the guilt phase.

Such DUI cases are indicted and tried in Circuit Court. Id. The jury determines whether the defendant is guilty of a misdemeanor DUI in Circuit Court and, if so, then in a subsequent phase the jury determines if the prior convictions enhance the present

offense to a felony DUI. Ramsey, 920 S.W.2d at 528. This Court has found this procedure to be appropriate and there is no reason not to follow this same procedure in fourth-degree assault (domestic violence, third or greater offense within five years) cases.

Similarly, in drug cases, when a subsequent offense is charged, the trial is to be bifurcated and no reference to the prior offense is to be made until after the guilt phase. Clay v. Commonwealth, 818 S.W.2d 264, 265 (Ky. 1991) (overruled on other grounds in Bratcher v. Commonwealth, 424 S.W.3d 411 (2014)).

Furthermore, in Galloway v. Commonwealth, 424 S.W.3d 921 (Ky. 2014), the defendant was charged with fourth-degree assault (domestic violence, third or greater offense within five years) and the case was trifurcated. Id. at 925. During the first phase, the jury convicted Galloway of fourth-degree assault. Id. During the second phase, the jury convicted Galloway of fourth-degree assault, third offense based on two prior convictions of fourth-degree assault. Id. This Court stated that this “was a reasonable approach, because the jury had to first determine whether Galloway was guilty of fourth-degree assault before it could determine whether he was guilty of fourth-degree assault, third offense.” Id. n. 1.

Such an approach is not only reasonable, but is also the only fair way to try such a case. There are reasons against introducing evidence of the prior convictions in the guilt phase of a fourth-degree assault (domestic violence, third or greater offense within five years) case. As previously stated, unavoidable prejudice will result from the early introduction of evidence regarding a defendant’s previous convictions. Ramsey, 920 S.W.2d at 528. “The recognition of this prejudice is the foundation on which KRE 404(b) rests.” Ramsey, 920 S.W.2d at 528. KRE 404(b) states:

Other Crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

This rule of evidence codified a long held, “well known fundamental rule that evidence that a defendant on trial committed other offenses is never admissible unless it comes within certain exceptions.” *Id.* (quoting Jones v. Commonwealth, 303 Ky. 666, 198 S.W.2d 969, 970 (1947)). Previous fourth-degree assault convictions do not fall within either the exceptions outlined by KRE 404(b) or those recognized by this Court.

Moreover, as this Court has previously held:

Ultimate fairness mandates that an accused be tried only for the particular crime for which he is charged. An accused is entitled to be tried for one offense at a time, and evidence must be confined to that offense. The rule is based on the fundamental demands of justice and fair play.

O’Bryan v. Commonwealth, 634 S.W.2d 153, 156 (Ky. 1982).

The trial court’s ruling in the case at bar, as well as the Court of Appeals Opinion, was based on a misinterpretation of Lisle v. Commonwealth, 290 S.W.3d 675 (Ky. App. 2009). VR 11/2/11; 3:00:53-3:11:50; Brewer v. Commonwealth, slip opinion pg. 3-4. The trial court and Court of Appeals believed that Lisle permitted prior fourth-degree assault (domestic violence) convictions to be introduced in the guilt phase of trials on fourth-degree assault (domestic violence, third or greater offense within five years) charges. *Id.* However, Lisle simply does not stand for such.

The Commonwealth misrepresented Lisle in the trial court in its motion to introduce KRE 404(b) evidence when it stated:

According to [Lisle v. Commonwealth], it is not only permitted for the Commonwealth to introduce evidence of the previous qualifying assaults as part of the case-in-chief, it is a requirement that these prior convictions be entered into evidence prior to the sentencing phase as essential elements. Lisle v. Commonwealth, 290 S.W.3d 675, 679 (Ky. Ct. App. 2009).

TR 33-34. Again, Lisle does not say this anywhere. The Commonwealth simply added words into Lisle that were not there. Moreover, as explained below, in Lisle, evidence of Lisle's prior fourth-degree assault convictions were not introduced until after the guilt phase.

In Lisle, the jury (which was in the same trial court as the case at bar)⁶ convicted Lisle of fourth-degree assault in the guilt phase and then, in a subsequent phase, convicted him of the enhanced offense of fourth-degree assault, third offense. The briefs filed in Lisle in the Court of Appeals Clerk's Office clearly stated this. Moreover, a logical reading of the Lisle Opinion reveals that the prior fourth-degree assault convictions were not introduced in the guilt phase.

The Lisle Opinion states that the proceedings were trifurcated and that the first phase consisted of a trial on both fourth-degree assault and violation of a domestic violence order and that he was later convicted of PFO. 290 S.W.3d at 677, 680. This only accounts for two stages; meaning, the remaining stage must have been for the enhancement of the fourth-degree assault conviction. Moreover, the underlying conviction for fourth-degree assault (misdemeanor) was affirmed, but the enhanced conviction for fourth-degree assault, third offense (felony) was reversed. Id. at 678. This

⁶ VR: 11/2/12; 2:13:40 (trial court expressing dissatisfaction with the Court of Appeals for reversing him in Lisle).

could not have occurred if the jury had convicted Lisle of fourth-degree assault, third offense (felony) during the guilt phase as opposed to first convicting him of fourth-degree assault (misdemeanor) in the guilt phase and then convicting him by finding the elements necessary for enhancement to fourth-degree assault, third offense (felony) in a subsequent phase.⁷

In the case at bar, the Court of Appeals jumped to the conclusion that evidence of the prior fourth-degree assault convictions are admissible in the guilt phase of a trial because the Lisle Court labeled the prior conviction as an “essential element” of the felony assault offense rather than as a “sentencing enhancement.” Brewer v. Commonwealth, slip opinion pg. 3-4. The wording used in Lisle is irrelevant. By using the term “essential element,” Lisle was pointing out that, unlike a DUI enhancement which only requires proof of prior DUI convictions, KRS 508.032 requires proof of “[a] separate element, other than the prior conviction...: proof of the identity of the victim and the nature of the relationship between the perpetrator and the victim.” Labeling the proof required for the enhancement of a fourth-degree assault as a misdemeanor to a felony offense as “elements” in no way necessitates that such proof must be introduced in the guilt phase of a trial as opposed to a subsequent phase.

⁷ In its reply to Mr. Brewer’s Opening Brief in the Court of Appeals, the Commonwealth argued that defense counsel waived any issue concerning the admissibility of Mr. Brewer’s two prior convictions of fourth degree assault during the guilt phase of a trial. Commonwealth’s COA Brief pg. 3-4. While the trial court and defense counsel may have felt the Commonwealth’s misinterpretation of Lisle was correct, defense counsel still told the trial court that prior to reading it, she had intended to ask the court to treat this case like a DUI enhancement and that it is more appropriate to introduce evidence of prior convictions during sentencing as opposed to during the Commonwealth’s case-in chief. VR: 11/2/12; 2:12:20. She also stated that she did not think a defendant could get a fair shake with prior offenses being introduced in the guilt phase in a trial on fourth degree assault, third offense and specifically reserved this issue for appeal. Id. at 2:13:21 and TR 68. There was no waiver.

As the elements for enhancement should not be introduced until the penalty phase, evidence regarding Mr. Brewer's prior convictions would have been irrelevant under KRE 401. KRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Such evidence would not address a "fact of consequence." Additionally, under KRE 403, relevant evidence can be excluded if its probative value is substantially outweighed by the danger of undue prejudice. Even if relevant, the fact that Mr. Brewer had prior convictions for the exact same offense required exclusion under KRE 403 during the guilt phase because, for the reasons outlined above, the danger of undue prejudice substantially would outweigh any probative value. It would have solely, and improperly, gone to show Mr. Brewer's propensity to commit the offense.

Introducing irrelevant and unduly prejudicial evidence of Mr. Brewer's prior convictions in the guilt phase of trial would have also violate Mr. Brewer's right to Due Process and a fair trial by an impartial jury as well as his right to be presumed innocent. The right to fundamental fairness and a fair trial by an impartial jury is guaranteed by Section Eleven of the Kentucky Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Irvin v. Dowd, 366 U.S.717, 721-722 (1961). The Due Process Clause of the Fourteenth Amendment also affords criminal defendants "fundamental fairness" at trial. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503 (1976). The United States Supreme Court has declared that when a

state court admits evidence that is “so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” Payne v. Tennessee, 501 U.S. 808, 825 (1991) (citing, Darden v. Wainwright, 477 U.S. 168, 179-183 (1986)).

ARGUMENT

II.

In a phase subsequent to the guilt phase, evidence of Mr. Brewer’s two prior fourth degree assault (domestic violence) convictions must be limited to proof (1) that Mr. Brewer has been convicted of two or more fourth-degree assaults under KRS 508.030, (2) that the offenses underlying those convictions occurred within five years of the current offense that the Commonwealth is seeking to enhance to a felony, and (3) that the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720.

This issue is preserved. TR 68.

Evidence of Mr. Brewer’s prior convictions would have been admissible in a penalty phase or a phase subsequent to the guilt phase. Regarding the admissibility of the details or circumstances of Mr. Brewer’s two prior fourth-degree assault (domestic violence) convictions in such a circumstance, KRS 508.032 provides for what is admissible. KRS 508.032 (Assault of family member or member of an unmarried couple; enhancement of penalty) states:

- (1) If a person commits a third or subsequent offense of assault in the fourth degree under KRS 508.030 within five (5) years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720, then the person may be convicted of a Class D felony. If the Commonwealth desires to utilize the provisions of this section, the Commonwealth shall indict the defendant and the case shall be tried in the Circuit Court as a felony case. The jury, or judge if the trial is without a jury, may decline to assess a felony penalty in a case under this section and may convict the defendant of a misdemeanor. The victim in the second or

subsequent offense is not required to be the same person who was assaulted in the prior offenses in order for the provisions of this section to apply.

- (2) In determining the five (5) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered by a court of competent jurisdiction.

In order to enhance a fourth-degree assault to a felony offense under KRS 508.032, the Commonwealth need only prove (1) that a defendant has been convicted of two or more fourth-degree assaults under KRS 508.030, (2) that the offenses underlying those convictions occurred within five years of the current offense that the Commonwealth is seeking to enhance to a felony, and (3) that the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720. Under KRS 403.720(2), "'Family member' means a spouse, including a former spouse, a grandparent, a parent, a child, a stepchild, or any other person living in the same household as a child if the child is the alleged victim." Under KRS 403.720(4), "'Member of an unmarried couple' means each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together."

Testimony from Ms. Hall-Turner would not have been necessary to prove the elements that needed to be proven to successfully enhance the fourth-degree assault charge at issue.

Regarding elements (1) and (2), just as with any other enhanced offense, the final judgments from the prior convictions would state the offenses Mr. Brewer was convicted of and the dates on which the offenses were committed. Ms. Hall-Turner's testimony would not have been needed to prove such.

Regarding element (3), Ms. Hall-Turner's testimony would not have been necessary to prove that the prior fourth-degree assault convictions were committed against a family member or an unmarried couple. The final judgments from the prior fourth-degree assault convictions should have stated that the offenses were committed against a family member or an unmarried couple as defined in KRS 403.720. Without such documentation, the Commonwealth would not have known, nor would the Commonwealth have had competent evidence, that the fourth-degree assault charge at issue was an offense subject to enhancement.

Moreover, the prior fourth-degree assault convictions did not have to have been committed against Ms. Hall-Turner in order to enhance the fourth-degree assault conviction at issue. The plain language of the statute states "[t]he victim in the second or subsequent offense is not required to be the same person who was assaulted in the prior offenses in order for the provisions of this section to apply." KRS 508.032. Again Ms. Hall-Turner's testimony would have been unnecessary and it also would have been improper. KRS 532.055(2)(a) permits the prosecution to introduce evidence related to sentencing during the penalty phase, including "the nature of prior offenses for which he was convicted." In Robinson v. Commonwealth, this Court held that pursuant to KRS 532.055, only a general description of the nature of the prior offense is allowed in sentencing. 926 S.W.2d 853, 854 (Ky. 1996). In Robinson, this Court stated, "[w]e will look to the definition of 'nature' found in Black's Law Dictionary, 1027 (6th ed. 1990): 'kind, sort, type, order; general character.' Nature, then, is more generic than specific." 926 S.W.2d at 855. Accordingly, in Hudson v. Commonwealth, this Court remanded Hudson's case for a new sentencing phase because the prosecution read

information regarding the factual circumstances of his convictions from the uniform citations at sentencing and this exceeded a “general description.” 979 S.W.2d 106, 110 (Ky. 1998).

In Mullikan v. Commonwealth, this Court clarified the rule and held:

... the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed. We suggest this be done either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statue itself. Said recitation for the jury’s benefit, we feel, is best left to the judge. The description of the elements of the prior offense may need to be customized to fit the particulars of the crime, i.e., the burglary was of a building as opposed to a dwelling. The trial court should avoid identifiers, such as naming of victims, which might trigger memories of the jurors who may—especially in rural areas—have prior knowledge about the crimes.

341 S.W.3d 99, 109 (Ky. 2011). In Mullikan’s penalty phase, an officer gave information acquired from police reports or other witnesses concerning where Mullikan’s offenses occurred and that Mullikan had put his hands around an elderly woman’s neck. Id., at 108. This Court held this information “was unduly prejudicial because it was not only inadmissible hearsay, but went beyond the statutory language of KRS 532.055(2)(a).” KRE 803(8)(A) explicitly states that police reports do not fall within the public records exception to the hearsay rule.

In Galloway v. Commonwealth, 424 S.W.3d 921 (Ky. 2014), the defendant was convicted of fourth-degree assault (domestic violence) in the guilt phase and found to be guilty of fourth-degree assault (domestic violence, third or greater offense within five years) in a subsequent phase. Id. at 924. The Commonwealth attempted to prove the enhancement elements through the testimony of a detective. The detective testified about the contents of certified copies of two misdemeanor convictions Galloway received for

fourth-degree assault. The copies were not sent to the jury as exhibits. Nothing in the detective's testimony provided any information about the relationship between Galloway and the victims in those assaults. The detective only testified that Galloway had two prior convictions from 2008 and 2010 for "assault fourth degree, domestic violence." Id. at 926. This Court found that Galloway was entitled to a directed verdict on the fourth degree-assault, third offense charge because there was no "proof of the identity of the victim[s] and the nature of the relationship between the perpetrator and the victim[s]." Id. at 926-927.

In his concurrence in which Justice Cunningham and Venters joined, Justice Scott expanded on the reason there was insufficient proof that the relationship between the perpetrator and the victim in each of the offenses met the definition of family member or member of an unmarried couple, as defined in KRS 403.720:

Galloway's prior fourth-degree assault convictions were labeled "domestic violence" as part of a Uniform Offense Reporting (UOR) code associated with the offense. UOR codes are owned and assigned by the Kentucky State Police. No proof was introduced to establish that the persons involved with creating and using this UOR code label were referencing KRS 403.070 and its definition of "domestic violence and abuse." It is therefore possible that an offense coded "assault fourth-degree, domestic violence," references something broader than the definition of KRS 403.720, such as two individuals who are mere roommates. Given this lack of authoritative connection, the Commonwealth offered insufficient proof that Galloway's prior victims were necessarily family members or members of an unmarried couple.

Id. at 930.

In the event that a final judgment from a prior conviction for fourth-degree assault (domestic violence) does not definitively state that the conviction is for domestic violence (meaning the relationship between the perpetrator and the victim in the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS

403.720), then testimony from the prior victim may be appropriate. However, if a prior victim testifies, such testimony should be strictly limited to establishing that the relationship between the victim and the defendant met the definition of a family member or member of an unmarried couple as defined in KRS 403.720. Allowing any further testimony would violate the requirement of KRS 532.055(2)(a) that evidence be limited to describing the “nature of prior offenses” and would introduce the prejudice that the statute and Mullikan intended to prevent.

CONCLUSION

For the reasons set forth herein, this case must be reversed and remanded to the Fayette Circuit Court in accordance with RCr 8.09 which allows a defendant to withdraw his guilty plea upon prevailing on appeal and with instructions that Mr. Brewer’s prior fourth-degree assault (domestic violence) convictions are not to be introduced until a phase subsequent to the guilt phase if he is found guilty and that in such an event the evidence of the prior convictions be limited to the elements laid out herein.

Respectfully submitted,



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APPENDIX

<u>Tab Number</u>	<u>Item Description</u>	<u>Record Location</u>
1	Order Granting Discretionary Review	
2	<u>Brewer v. Commonwealth</u> Kentucky Court of Appeals 2012-CA-000622-MR Opinion Affirming	
3	Final Judgment Sentence Of Probation	TR 85-88