

Supreme Court of Kentucky

2023-SC-0312-D
(2022-CA-0218)

KATHERINE BARRETT

MOVANT

V.

OHIO CIRCUIT COURT
19-CR-00002

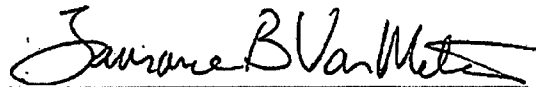
COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is
denied.

ENTERED: October 18, 2023.


CHIEF JUSTICE

APPENDIX “B”



Commonwealth of Kentucky
Court of Justice www.courts.ky.gov

PRETRIAL SERVICES
SUPERVISED RELEASE
ORDER

County OHIO

Case Number 19-CR-2
18-F-00335

Defendant Name: KATHERINE JAMIE BARRETT

Charges: INTIMIDATING A PARTICIPANT IN LEGAL PROCESS, SEXUAL ABUSE, 1ST DEGREE;

\$25000 - UNSECURED on 3/5/2019

Release Type

DOB: [REDACTED] 977

Conditions of Release:

- ☒ No further violations of law
- ☒ Not to consume any alcohol or illegal drugs
- ☒ No contact with minor children/victim/witness
- ☒ Curfew: no weapons in home
- ☒ Other: make all court date, updated contact in
- ☒ Call-in to Pretrial Services: Every 1st Wed

- ☒ Random Drug Testing
- ☐ Electronic Monitoring
- ☒ Home Restriction
- ☒ Seek/Maintain Employment
- ☒ Report to Pretrial Services Office (Below)
as ordered

of the month

Details:

HOME INCARCERATION WITH THE EXCEPTION OF WORK, SEEKING WORK, COURT APPEARANCES, ATTORNEY VISITS, DOCTOR APPOINTMENTS, MEDICAL EMERGENCIES, CHURCH, AAVNA MEETINGS, CAN NOT BE AROUND MINOR CHILDREN THIS MAY EXCLUDE CHURCH FROM ABOVE ANY OTHER MEETINGS/EVENTS MUST BE PRESENTED BY YOUR ATTORNEY TO THE JUDGE ON MOTION DAY

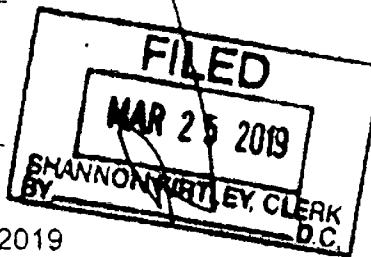
By signing this contract, the defendant acknowledges and accepts the conditions of release and understands that violation of the terms of this contract will result in the revocation of the defendant's release/bail bond. Should electronic monitoring or home restriction be a condition of bail, failure to comply with the condition imposed by the court may result in additional charges related to escape. The terms and conditions of this contract will remain in effect until dismissal, conviction or acquittal of the criminal case against the defendant.

Katherine Barrett
Defendant

3-7-19
Date

Celia Barker
Pretrial Officer

3-7-19
Date



Court Dates: CIRCUIT COURT on 3/19/2019

Non-Compliance: _____

Action taken by court: _____

APPENDIX “C”

RENDERED: JUNE 9, 2023; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0218-MR

KATHERINE BARRETT

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE TIMOTHY R. COLEMAN, JUDGE
ACTION NO. 19-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: EASTON, GOODWINE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Katherine Barrett brings this appeal from a January 26, 2022, Trial Order and Judgment and a Formal Sentencing Order of the Ohio Circuit Court upon a jury verdict finding Katherine guilty of two counts of complicity to commit sexual abuse in the first degree and sentencing her to five-years' imprisonment. We affirm.

Katherine Barrett is the biological mother of the victim, K.V. K.V. lived with her mother, Katherine, and her stepfather, Jason Barrett. In addition to

K.V., the Barrett household included four of K.V.'s half siblings – one older sister and three younger siblings. K.V.'s three younger siblings are the biological children of both Katherine and Jason.

When K.V. was fifteen years old, Jason began sexually abusing her. K.V. documented some of the incidents of sexual abuse perpetrated by Jason in a diary she kept on her iPod. K.V. eventually told her boyfriend about the sexual abuse and then shared screenshots of her diary entries with him. Upon learning about the sexual abuse, K.V.'s boyfriend insisted that K.V. tell an adult. So, K.V. decided to tell her mother. Unfortunately, Katherine did not believe K.V.'s allegations of sexual abuse were true and did not report the allegations or take any action to protect K.V. from Jason. As Katherine did nothing to protect K.V., K.V.'s boyfriend told a teacher about the sexual abuse. The teacher then reported the sexual abuse to the Cabinet for Health and Family Services (Cabinet).

Upon receiving the report, the Cabinet came to the Barrett's home on two occasions to conduct welfare checks on K.V. K.V. denied the sexual abuse on both occasions out of fear that she and her siblings would be placed in foster care. K.V. was also interviewed at home by a social worker with the Cabinet. Prior to the interview, Katherine instructed K.V. not to mention anything about Jason "touching" her. Thereafter, a police detective investigated the allegations of sexual

Caseworker never came to my house.

abuse and interviewed K.V. outside of the Barrett's home. At that time, K.V. revealed to the detective that Jason had been sexually abusing her.

Jason was subsequently indicted upon nine counts of sexual abuse in the first degree.¹ Katherine was indicted upon five counts of complicity to commit sexual abuse in the first degree and four counts of tampering with a witness. A joint jury trial ensued. A directed verdict of acquittal was granted in favor of Katherine as to three of the five counts of complicity to commit sexual abuse and as to all four counts of tampering with a witness. However, Katherine was found guilty of two counts of complicity to commit sexual abuse in the first degree and was sentenced to a total of five-years' imprisonment. This appeal follows.

Katherine asserts the trial court erred by denying her motion for a directed verdict of acquittal upon the remaining two counts of complicity to commit sexual abuse. More particularly, Katherine contends there was insufficient proof that Katherine intended to promote or facilitate Jason's sexual abuse of K.V. to support a guilty verdict upon the two counts of complicity to commit sexual abuse in the first degree.

Our standard of review upon a motion for directed verdict in a criminal action was articulated by the Kentucky Supreme Court in *Commonwealth*

¹ Jason Barrett was found guilty of nine counts of sexual abuse in the first degree and was sentenced to a total of twenty-years' imprisonment.

v. Benham, 816 S.W.2d 186 (Ky. 1991). Therein, the Court noted that the inquiry is whether “under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Id.* at 187 (citation omitted); *see* Kentucky Rules of Civil Procedure (CR) 50.01.

First-degree sexual abuse is codified in Kentucky Revised Statutes (KRS) 510.110(1), which provides, in relevant part, that a person is guilty of sexual abuse in the first degree when:

- (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact

KRS 510.110(1)(d). And, complicity is defined in KRS 502.020, which provides, in relevant part:

- (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

. . . .

- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

KRS 502.020(1)(c).

Relevant to this case, Jason was found guilty of sexual abuse in the first degree. To be guilty of first-degree sexual abuse, the jury necessarily found that Jason was in a position of authority or special trust and subjected K.V., a person less than eighteen years of age, to sexual contact. KRS 510.110(1)(d). So, to find Katherine guilty of being complicit in Jason's crime of sexual abuse, there must be evidence that Katherine, with the intention of promoting or facilitating the commission of sexual abuse, failed to prevent it despite having the legal duty to do so. KRS 502.020(1)(c).

In the case *sub judice*, there was evidence that Katherine did not report the sexual abuse to authorities when K.V. revealed it to her. And, Katherine failed to protect K.V. by permitting Jason to remain in the home where he continued to abuse K.V. Katherine's failure to protect K.V. after she reported Jason's acts of sexual abuse to Katherine resulted in two additional incidents of abuse being perpetrated upon K.V. Considering said evidence, we believe that it was not clearly unreasonable for the jury to find Katherine guilty of two counts of complicity to commit sexual abuse. *See Benham*, 816 S.W.2d 186. Thus, the trial court did not err in denying Katherine's motion for a directed verdict of acquittal upon the two counts of complicity to commit sexual abuse.

Katherine next contends the trial court committed error during closing argument by permitting the Commonwealth to misstate the law regarding the

presumption of innocence. More particularly, Katherine asserts the misstatement seriously diluted the Commonwealth's burden of proof to the jury.

The comments made by the Commonwealth Attorney during closing argument were as follows:

So then we get to the instructions concerning Jason Barrett. By the way, the presumption of innocence, at this point in time, you've heard the proof. You've heard the evidence. You've heard this child tell you in details that I didn't want to have to get into in mixed company, but we have to hold these people accountable. *And that presumption of innocence, I would submit to you, is gone because you've heard the proof beyond a reasonable doubt.* There is no reasonable doubt what happened in this case because this child told you the truth.

Commonwealth's Brief at 10. Although the above statements were made regarding the jury instructions as to Jason, Katherine argues that the Commonwealth invited the jury to believe that the presumption of innocence ended before the jury even began its deliberation.

Katherine acknowledges that this issue was not properly preserved and requests review under the palpable error rule of Kentucky Rules of Criminal Procedure (RCr) 10.26. Pursuant to RCr 10.26, palpable error occurs if a defendant's substantial rights are affected and a manifest injustice would occur.

Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006). More particularly, where a defendant fails to object to an act of prosecutorial misconduct, the Court "will reverse only where the misconduct was flagrant and was such as to render the trial

fundamentally unfair.” *Murphy v. Commonwealth*, 509 S.W.3d 34, 49 (Ky. 2017) (citations omitted). To determine whether a prosecutor’s impropriety rises to the level of flagrant misconduct, the following four factors are considered: (1) whether the comments tended to mislead the jury or prejudice the defendant, (2) whether the comments were isolated or extensive, (3) whether the comments were deliberately or accidentally made before the jury, and (4) whether the evidence against the defendant was overwhelming. *Mayo v. Commonwealth*, 322 S.W.3d 41, 56 (Ky. 2010) (citation omitted). And, we must view the allegations of prosecutorial misconduct “in the context of the overall fairness of the trial” and will reverse only when the misconduct is so egregious that it undermined the fundamental fairness of the trial. *Murphy*, 509 S.W.3d at 49.

As to the first factor, we must consider whether the jury was misled or the defendant was prejudiced by the Commonwealth’s comment in closing argument regarding the presumption of innocence. Essentially, it appears that the Commonwealth was merely pointing out that after hearing the evidence presented, it should be obvious to the jury that proof beyond a reasonable doubt had been presented to demonstrate that Jason had committed these acts of sexual abuse against K.V. The comment did not rise to the level of misleading the jury or prejudicing the defendant. Therefore, we view the first factor as weighing in favor of the Commonwealth.

As to the second factor, we must consider whether the Commonwealth's comment was isolated or extensive. In this instance, the comment was one very brief and isolated incident. Given that the single comment was brief and constituted an isolated event, the second factor also weighs in favor of the Commonwealth.

As to the third factor, our inquiry is whether the Commonwealth's comment was deliberately or accidentally made in the presence of the jury. In this instance, the Commonwealth made the brief comment directly to the jury during closing argument. Therefore, the third factor weighs in favor of Katherine.

Finally, as to the fourth factor, we must determine whether the evidence presented against Katherine was overwhelming. K.V.'s detailed and consistent direct testimony certainly constituted overwhelming evidence of Katherine's guilt. Thus, the fourth factor weighs in favor of the Commonwealth.

Given application of the four factor test, we do not believe that the nonprejudicial and isolated comment made by the Commonwealth in closing argument constituted flagrant misconduct that undermined the fundamental fairness of the trial; nor do we believe that it affected Katherine's substantial rights or constituted a manifest injustice. *See Martin*, 207 S.W.3d 1. Therefore, we do not believe that the Commonwealth's comment made during closing argument constituted reversible error.

Katherine next asserts the trial court erred by permitting K.V. to read from diary entries she made on her iPod regarding the incidents of sexual abuse Jason perpetrated upon her. More particularly, Katherine asserts that neither the Commonwealth nor the trial court identified the particular rule of evidence that permitted K.V. to read from the diary entries during her testimony. In fact, Katherine claims that K.V.'s testimony was inadmissible hearsay. As no objection to this testimony was made at trial, Katherine claims that the error constituted palpable error per RCr 10.26.

During K.V.'s direct examination, the Commonwealth asked K.V. to testify about the specific occasions when Jason had sexually abused her. The Commonwealth asked K.V. how old she was on each occasion, what was going on at the time, and in what room the abuse occurred. K.V. described each act of abuse in detail. The Commonwealth went through all the acts that formed the basis for each of the sexual abuse charges upon which Jason and Katherine were ultimately convicted. Then, near the end of K.V.'s testimony, K.V. picked up some papers at the direction of the Commonwealth. K.V. explained that she had kept a diary on her iPod and that she had documented some of the incidents of abuse. Then, K.V. read from these papers that were printouts of screenshots from her iPod diary entries.

Kentucky Rules of Evidence (KRE) 801A(a)(2) governs prior consistent statements made by a witness and provides:

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

....

(2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

Initially, it must be noted that the general prohibition against the admissibility of hearsay evidence is found in KRE 802. *Edmonds v. Commonwealth*, 433 S.W.3d 309, 313 (Ky. 2014). On the other hand, KRE 801A(a)(2) “excludes certain statements from the hearsay rule, so long as they meet its requirements.” *Id.* at 313. In other words, KRE 801A(a)(2) is not a bar to the admission of testimony; rather, it provides “authority for the admission of evidence despite the hearsay prohibition in KRE 802.” *Id.* at 313. Particularly relevant to the issue raised herein, KRE 801A(a)(2) permits an out-of-court statement by a witness, which would be otherwise excluded by the hearsay rule, “to be admissible as long as it is ‘offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.’”

Murray v. Commonwealth, 399 S.W.3d 398, 403 (Ky. 2013) (quoting KRE 801A(a)(2)).

In the case *sub judice*, the Commonwealth argues it introduced K.V.'s testimony regarding the diary entries to rebut the express claim that K.V. had recently fabricated these allegations of sexual abuse against Jason. According to the defense theory at trial, K.V. fabricated the allegations of sexual abuse because Katherine told K.V. that she could not move in with her new boyfriend in Georgetown, Kentucky. K.V. apparently intended to stay with her boyfriend following Christmas of 2018. However, the dated diary entries demonstrated that the sexual abuse dated back to March 10, 2017, which was well before K.V. discussed moving in with her boyfriend. Therefore, under the circumstances presented, the trial court properly allowed K.V. to read from her diary entries pursuant to KRE 801A to rebut Katherine's claim that K.V. had recently fabricated the allegations of sexual abuse against Jason. *See Edmonds*, 433 S.W.3d 309.

For Katherine's next argument, she contends that the trial court erred by not granting her jail-time credit for the time she spent on home incarceration. Again, this error is unpreserved, and Katherine has requested review pursuant to the palpable error rule of RCr 10.26.

KRS 532.245(1) provides that a person is entitled to jail-time credit for time spent on home incarceration. However, KRS 532.120(3) provides that

“[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the Department of Corrections toward service of the maximum term of imprisonment in cases involving a felony sentence[.]” The language of KRS 532.120(3) has placed the duty of ensuring proper application of presentencing custody credits in felony cases “solely under the purview of the Department of Corrections.” *Caraway v. Commonwealth*, 459 S.W.3d 849, 855 (Ky. 2015). Accordingly, a defendant must first pursue and exhaust his administrative remedies with the Department of Corrections before the trial court may address the issue of presentencing custody credits. *Id.* at 855.

Katherine’s final argument is that she is entitled to a new trial under a theory of cumulative error. However, as we have found no individual error in this case, we likewise, can discern no cumulative error. *Furnish v. Commonwealth*, 267 S.W.3d 656, 668 (Ky. 2008).

For the foregoing reasons the Trial Order and Judgment and Formal Sentencing Order of the Ohio Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Robert C. Yang
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky
Frankfort, Kentucky

Robert Baldrige
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR
APPELLEE:

Jenny L. Sanders
Assistant Attorney General
Frankfort, Kentucky

APPENDIX “D”

SUPREME COURT OF KENTUCKY
FILE NUMBER 2023-SC-_____

To review Court of Appeals No. 2022-CA-0218-MR

KATHERINE JAMIE BARRETT

MOVANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE TIMOTHY R. COLEMAN, JUDGE
ACTION NOS. 2019-CR-00002

COMMONWEALTH OF KENTUCKY

RESPONDENT

**MOVANT'S MOTION FOR DISCRETIONARY REVIEW
OF THE DECISION OF THE COURT OF APPEALS OF KENTUCKY**

Katherine J. Barrett, by counsel, pursuant to RAP 44, asks this Court to grant discretionary review of the decision of the Kentucky Court of Appeals in *Barrett v. Commonwealth*, File Number 2022-CA-0218, affirming her conviction in the Ohio Circuit Court of two counts of complicity to commit sexual abuse.

THE JURISDICTIONAL FACTS

1. Movant's name is Katherine J. Barrett. Counsel for Movant is Robert C. Yang, Assistant Public Advocate, Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, Kentucky 40601.

2. Respondent is the Commonwealth of Kentucky. Counsel for Respondent are Hon. Daniel Cameron, Attorney General, and Hon. Jenny L. Sanders, Assistant Attorney General, Commonwealth of Kentucky, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

3. The Court of Appeals affirmed the trial court's judgment on June 9, 2023, also the date of final disposition. (Opinion, attached in Appendix, Tab 1).

4. No request for supersedeas bond or bail on appeal has been executed.

5. Neither Movant nor Respondent has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

MATERIAL FACTS OF THE CASE

Katherine J. Barrett (Katherine), Movant, was found guilty in a jury trial in Ohio Circuit Case 19-CA-00002, involving two counts of complicity to commit sexual abuse in the first degree and sentenced to five-years' imprisonment. Slip Opinion at 1; *see also* Final Judgment, TR II, 153-155, attached as Appendix, Tab 2.

The case involved a joint trial with Katherine and Katherine's husband, Jason Barrett. (Slip Opinion at 1-2). Jason allegedly sexually abused Katherine's daughter/his stepdaughter, K.V., on nine occasions. (Slip Opinion at 2-3). K.V. told Katherine after the seventh incident, but "Katherine did not believe K.V.'s allegations of sexual abuse were true and did not report the allegations or take any action to protect K.V. from Jason." (Slip Opinion at 2). After that, K.V. was in the kitchen washing dishes and as she bent over to put away some dishes in the bottom cabinet when Jason "smacked her butt." (VR: 10/14/21; 9:42). Then, K.V. was in the living room when Katherine called for K.V. from Katherine's room and as K.V. walked past Jason, he "grabbed her butt." (VR: 10/14/21; 9:43). _____

On direct appeal, Ms. Barrett raised five issues: 1) the trial court erred in not granting a directed verdict (Slip Opinion at 3); 2) prosecutorial misconduct by telling the jury in closing “that presumption of innocence...is gone” (Slip Opinion at 5); 3) improper reading of diary entries by the victim without a proper foundation (Slip Opinion at 9); 4) the failure of the trial court to grant jail-time credit for time spent on home incarceration (Slip Opinion at 11); 5) and cumulative error (Slip Opinion at 12).

In the Commonwealth’s response brief, the Commonwealth argued that Jason’s appeal is currently pending before this Court. Commonwealth’s Response Brief, page 6, Footnote 3; *see* attached Appendix, Tab 3 (“Jason’s appeal is currently pending before the Kentucky Supreme Court. *See Jason Barrett v. Commonwealth*, 2022.SC-0068-MR”). Further, both Katherine’s and Jason’s case shared two issues. *Id.* (“Jason also argues in his appeal before the Supreme Court that the trial court committed palpable error by permitting the prosecutor to misstate the law on the presumption of innocence during closing argument and allowing Katie to read from her diary entries.”). Of note, the Commonwealth argued, “Because the Supreme Court’s resolution of these issues will be binding on [the] Court [of Appeals], SCR 1.030(8)(a), judicial economy would favor delaying an opinion on this case until the Kentucky Supreme Court renders an opinion on Jason’s appeal.” *Id.*

The Court of Appeals affirmed Katherine’s conviction in its opinion, which ruled on those two shared issues, and now Katherine asks this Court to review the lower court’s opinion, including those two shared issues with Jason’s case.

QUESTIONS PRESENTED

- I. Is the Commonwealth correct that this Court's decision in Jason's case is binding on the Court of Appeals?**
- II. Is it flagrant prosecutorial misconduct to say at closing, "that presumption of innocence...is gone?"**
- III. Is it a palpable error for a victim to read from diary entries without a proper foundation?**
- IV. Should the trial court have granted a directed verdict when Katherine did not believe K.V.'s allegations of sexual abuse?**

REASONS FOR GRANTING REVIEW

- I. This Court's opinion on the shared issues will be binding on the Court of Appeals, so this Court should grant review to have consistent opinions between the two cases.**

If this Court agrees that there was palpable error in Jason's appeal on either the prosecutorial misconduct or the victim reading from her diary issue, that will mean the Court of Appeals got the issue wrong in Katherine's case. Accordingly, Katherine asks for review to ensure the Court of Appeals' opinion is consistent with this Court's.

- II. Katherine did not have a duty to act when she did not believe K.V.'s allegations.**

If this Court decides to grant review on the two shared issues, then Katherine further asks this Court to review the directed verdict issue. The Court of Appeals found that "Katherine did not report the sexual abuse to authorities when K.V. revealed it to her." Slip Opinion at 5. However, the Court of Appeals also found

that, “Unfortunately, Katherine did not believe K.V.’s allegations of sexual abuse were true and did not report the allegations or take any action to protect K.V. from Jason.” Slip Opinion at 2.

To find Katherine guilty of complicity, the jury had to find that she intended for Jason to sexually abuse K.V. As the Court of Appeals noted, Katherine did not believe K.V.’s allegations. Was Katherine required to report or take any action even though she did not believe K.V.? Regardless, there was no reasonable belief that Katherine intended Jason to sexually abuse K.V. Accordingly, the trial court should have granted a directed verdict on the two complicity counts. Even if this Court believes review is not warranted on the above shared issues, review is appropriate for this issue.

Based on the arguments above, Ms. Barrett urges this Court to grant her motion for discretionary review.

CONCLUSION

The Court of Appeals’ opinion on the two shared issues will be pre-empted by this Court’s opinion in Jason’s case. Plus, the remaining directed verdict issue should be reviewed based on judicial economy or as a standalone issue. Accordingly, Katherine requests that this Court grant discretionary review.

Respectfully submitted,

/s/ Robert C. Yang
Robert C. Yang

NOTICE and CERTIFICATE OF SERVICE

Please take notice that this motion will be electronically filed in the Office of the Clerk of the Kentucky Supreme Court on this 7th day of July 2023. I hereby certify that a true and correct copy of the foregoing Motion has been served by state messenger service to: Hon. Kate Morgan, Clerk of the Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; Hon. Daniel Cameron, Attorney General and Hon. Jenny L. Sanders, Assistant Attorney General, Commonwealth of Kentucky, 1024 Capital Center Drive, Frankfort, KY 40601, on this 7th day of July 2023.

/s/ Robert C. Yang _____
Robert C. Yang

SUPREME COURT OF KENTUCKY
FILE NUMBER 2023-SC-_____

To review Court of Appeals No. 2022-CA-0218-MR

KATHERINE JAMIE BARRETT

MOVANT

v. APPEAL FROM OHIO CIRCUITCOURT
HONORABLE TIMOTHY R. COLEMAN, JUDGE
ACTION NOS. 2019-CR-00002

COMMONWEALTH OF KENTUCKY

RESPONDENT

APPENDIX

Tab Number	Item Description	Record Location
1	Court of Appeals' Slip Opinion	N/A
2	Final Judgment	TR II, 153-155
3	Commonwealth's Response Brief, page 6	N/A

**SUPREME COURT OF KENTUCKY
FILE NUMBER 2023-SC-_____**

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Commonwealth of Kentucky
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K.V., the Barrett household included four of K.V.'s half siblings – one older sister and three younger siblings. K.V.'s three younger siblings are the biological children of both Katherine and Jason.

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Upon receiving the report, the Cabinet came to the Barrett's home on two occasions to conduct welfare checks on K.V. K.V. denied the sexual abuse on both occasions out of fear that she and her siblings would be placed in foster care. K.V. was also interviewed at home by a social worker with the Cabinet. Prior to the interview, Katherine instructed K.V. not to mention anything about Jason "touching" her. Thereafter, a police detective investigated the allegations of sexual

abuse and interviewed K.V. outside of the Barrett's home. At that time, K.V. revealed to the detective that Jason had been sexually abusing her.

Jason was subsequently indicted upon nine counts of sexual abuse in the first degree.¹ Katherine was indicted upon five counts of complicity to commit sexual abuse in the first degree and four counts of tampering with a witness. A joint jury trial ensued. A directed verdict of acquittal was granted in favor of Katherine as to three of the five counts of complicity to commit sexual abuse and as to all four counts of tampering with a witness. However, Katherine was found guilty of two counts of complicity to commit sexual abuse in the first degree and was sentenced to a total of five-years' imprisonment. This appeal follows.

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- (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact

KRS 510.110(1)(d). And, complicity is defined in KRS 502.020, which provides, in relevant part:

- (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

. . . .

- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

KRS 502.020(1)(c).

Relevant to this case, Jason was found guilty of sexual abuse in the first degree. To be guilty of first-degree sexual abuse, the jury necessarily found that Jason was in a position of authority or special trust and subjected K.V., a person less than eighteen years of age, to sexual contact. KRS 510.110(1)(d). So, to find Katherine guilty of being complicit in Jason's crime of sexual abuse, there must be evidence that Katherine, with the intention of promoting or facilitating the commission of sexual abuse, failed to prevent it despite having the legal duty to do so. KRS 502.020(1)(c).

In the case *sub judice*, there was evidence that Katherine did not report the sexual abuse to authorities when K.V. revealed it to her. And, Katherine failed to protect K.V. by permitting Jason to remain in the home where he continued to abuse K.V. Katherine's failure to protect K.V. after she reported Jason's acts of sexual abuse to Katherine resulted in two additional incidents of abuse being perpetrated upon K.V. Considering said evidence, we believe that it was not clearly unreasonable for the jury to find Katherine guilty of two counts of complicity to commit sexual abuse. *See Benham*, 816 S.W.2d 186. Thus, the trial court did not err in denying Katherine's motion for a directed verdict of acquittal upon the two counts of complicity to commit sexual abuse.

Katherine next contends the trial court committed error during closing argument by permitting the Commonwealth to misstate the law regarding the

presumption of innocence. More particularly, Katherine asserts the misstatement seriously diluted the Commonwealth's burden of proof to the jury.

The comments made by the Commonwealth Attorney during closing argument were as follows:

So then we get to the instructions concerning Jason Barrett. By the way, the presumption of innocence, at this point in time, you've heard the proof. You've heard the evidence. You've heard this child tell you in details that I didn't want to have to get into in mixed company, but we have to hold these people accountable. *And that presumption of innocence, I would submit to you, is gone because you've heard the proof beyond a reasonable doubt.* There is no reasonable doubt what happened in this case because this child told you the truth.

Commonwealth's Brief at 10. Although the above statements were made regarding the jury instructions as to Jason, Katherine argues that the Commonwealth invited the jury to believe that the presumption of innocence ended before the jury even began its deliberation.

Katherine acknowledges that this issue was not properly preserved and requests review under the palpable error rule of Kentucky Rules of Criminal Procedure (RCr) 10.26. Pursuant to RCr 10.26, palpable error occurs if a defendant's substantial rights are affected and a manifest injustice would occur. *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006). More particularly, where a defendant fails to object to an act of prosecutorial misconduct, the Court "will reverse only where the misconduct was flagrant and was such as to render the trial

fundamentally unfair.” *Murphy v. Commonwealth*, 509 S.W.3d 34, 49 (Ky. 2017) (citations omitted). To determine whether a prosecutor’s impropriety rises to the level of flagrant misconduct, the following four factors are considered: (1) whether the comments tended to mislead the jury or prejudice the defendant, (2) whether the comments were isolated or extensive, (3) whether the comments were deliberately or accidentally made before the jury, and (4) whether the evidence against the defendant was overwhelming. *Mayo v. Commonwealth*, 322 S.W.3d 41, 56 (Ky. 2010) (citation omitted). And, we must view the allegations of prosecutorial misconduct “in the context of the overall fairness of the trial” and will reverse only when the misconduct is so egregious that it undermined the fundamental fairness of the trial. *Murphy*, 509 S.W.3d at 49.

As to the first factor, we must consider whether the jury was misled or the defendant was prejudiced by the Commonwealth’s comment in closing argument regarding the presumption of innocence. Essentially, it appears that the Commonwealth was merely pointing out that after hearing the evidence presented, it should be obvious to the jury that proof beyond a reasonable doubt had been presented to demonstrate that Jason had committed these acts of sexual abuse against K.V. The comment did not rise to the level of misleading the jury or prejudicing the defendant. Therefore, we view the first factor as weighing in favor of the Commonwealth.

As to the second factor, we must consider whether the Commonwealth's comment was isolated or extensive. In this instance, the comment was one very brief and isolated incident. Given that the single comment was brief and constituted an isolated event, the second factor also weighs in favor of the Commonwealth.

As to the third factor, our inquiry is whether the Commonwealth's comment was deliberately or accidentally made in the presence of the jury. In this instance, the Commonwealth made the brief comment directly to the jury during closing argument. Therefore, the third factor weighs in favor of Katherine.

Finally, as to the fourth factor, we must determine whether the evidence presented against Katherine was overwhelming. K.V.'s detailed and consistent direct testimony certainly constituted overwhelming evidence of Katherine's guilt. Thus, the fourth factor weighs in favor of the Commonwealth.

Given application of the four factor test, we do not believe that the nonprejudicial and isolated comment made by the Commonwealth in closing argument constituted flagrant misconduct that undermined the fundamental fairness of the trial; nor do we believe that it affected Katherine's substantial rights or constituted a manifest injustice. *See Martin*, 207 S.W.3d 1. Therefore, we do not believe that the Commonwealth's comment made during closing argument constituted reversible error.

Katherine next asserts the trial court erred by permitting K.V. to read from diary entries she made on her iPod regarding the incidents of sexual abuse Jason perpetrated upon her. More particularly, Katherine asserts that neither the Commonwealth nor the trial court identified the particular rule of evidence that permitted K.V. to read from the diary entries during her testimony. In fact, Katherine claims that K.V.'s testimony was inadmissible hearsay. As no objection to this testimony was made at trial, Katherine claims that the error constituted palpable error per RCr 10.26.

During K.V.'s direct examination, the Commonwealth asked K.V. to testify about the specific occasions when Jason had sexually abused her. The Commonwealth asked K.V. how old she was on each occasion, what was going on at the time, and in what room the abuse occurred. K.V. described each act of abuse in detail. The Commonwealth went through all the acts that formed the basis for each of the sexual abuse charges upon which Jason and Katherine were ultimately convicted. Then, near the end of K.V.'s testimony, K.V. picked up some papers at the direction of the Commonwealth. K.V. explained that she had kept a diary on her iPod and that she had documented some of the incidents of abuse. Then, K.V. read from these papers that were printouts of screenshots from her iPod diary entries.

Kentucky Rules of Evidence (KRE) 801A(a)(2) governs prior consistent statements made by a witness and provides:

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

....

(2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

Initially, it must be noted that the general prohibition against the admissibility of hearsay evidence is found in KRE 802. *Edmonds v. Commonwealth*, 433 S.W.3d 309, 313 (Ky. 2014). On the other hand, KRE 801A(a)(2) "excludes certain statements from the hearsay rule, so long as they meet its requirements." *Id.* at 313. In other words, KRE 801A(a)(2) is not a bar to the admission of testimony; rather, it provides "authority for the admission of evidence despite the hearsay prohibition in KRE 802." *Id.* at 313. Particularly relevant to the issue raised herein, KRE 801A(a)(2) permits an out-of-court statement by a witness, which would be otherwise excluded by the hearsay rule, "to be admissible as long as it is 'offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.'"

Murray v. Commonwealth, 399 S.W.3d 398, 403 (Ky. 2013) (quoting KRE 801A(a)(2)).

In the case *sub judice*, the Commonwealth argues it introduced K.V.'s testimony regarding the diary entries to rebut the express claim that K.V. had recently fabricated these allegations of sexual abuse against Jason. According to the defense theory at trial, K.V. fabricated the allegations of sexual abuse because Katherine told K.V. that she could not move in with her new boyfriend in Georgetown, Kentucky. K.V. apparently intended to stay with her boyfriend following Christmas of 2018. However, the dated diary entries demonstrated that the sexual abuse dated back to March 10, 2017, which was well before K.V. discussed moving in with her boyfriend. Therefore, under the circumstances presented, the trial court properly allowed K.V. to read from her diary entries pursuant to KRE 801A to rebut Katherine's claim that K.V. had recently fabricated the allegations of sexual abuse against Jason. *See Edmonds*, 433 S.W.3d 309.

For Katherine's next argument, she contends that the trial court erred by not granting her jail-time credit for the time she spent on home incarceration. Again, this error is unpreserved, and Katherine has requested review pursuant to the palpable error rule of RCr 10.26.

KRS 532.245(1) provides that a person is entitled to jail-time credit for time spent on home incarceration. However, KRS 532.120(3) provides that

“[t]ime spent in custody prior to the commencement of a sentence as a result of the charge that culminated in the sentence shall be credited by the Department of Corrections toward service of the maximum term of imprisonment in cases involving a felony sentence[.]” The language of KRS 532.120(3) has placed the duty of ensuring proper application of presentencing custody credits in felony cases “solely under the purview of the Department of Corrections.” *Caraway v. Commonwealth*, 459 S.W.3d 849, 855 (Ky. 2015). Accordingly, a defendant must first pursue and exhaust his administrative remedies with the Department of Corrections before the trial court may address the issue of presentencing custody credits. *Id.* at 855.

Katherine’s final argument is that she is entitled to a new trial under a theory of cumulative error. However, as we have found no individual error in this case, we likewise, can discern no cumulative error. *Furnish v. Commonwealth*, 267 S.W.3d 656, 668 (Ky. 2008).

For the foregoing reasons the Trial Order and Judgment and Formal Sentencing Order of the Ohio Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Robert C. Yang
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky
Frankfort, Kentucky

Robert Baldrige
Assistant Attorney General
Frankfort, Kentucky


ORAL ARGUMENT FOR
APPELLEE:

Jenny L. Sanders
Assistant Attorney General
Frankfort, Kentucky

Appendix

Tab 2

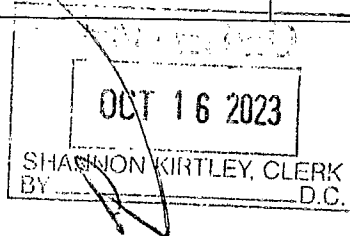
JD 10-13-23

REV. 10-18 PAGE 1 OF 3 COMMONWEALTH OF KENTUCKY COURT OF JUSTICE www.courts.ky.gov KRS 453.190; CR 5.05(6)	 ORDER OF COURT	CASE NO: 19-CR-000022 COURT: CIRCUIT COUNTY: OHIO DIVISION: CRIMINAL
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COMMONWEALTH OF KENTUCKY

VS

KATHERINE J. BARRETT



PLAINTIFF

DEFENDANT

ORDER

This case having come on the Court's docket on a Motion, and after careful consideration, IT IS HEREBY ORDERED AND ADJUDGED that the Motion is hereby:

☐

GRANTED.

Defendant, Katherine J. Barrett is to receive Jail Credit in the amount of

_____ days for Home Incarceration time spent.

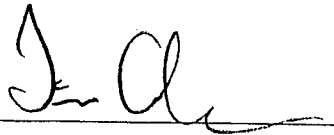
OR

☒

DENIED.

10/16/23


Date



Judge's Signature

CC: **CLERK OF COURT
COMMONWEALTH ATTORNEY
DEFENDANT: KATHERINE J BARRETT**

TD 10-13-23

AOC-026 REV. 10-18 PAGE 1 OF 3 COMMONWEALTH OF KENTUCKY COURT OF JUSTICE www.courts.ky.gov KRS 453.190; CR 5.05(6)	 MOTION FOR WAIVER OF COSTS AND FEES AND TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT; FINANCIAL STATEMENT; AND ORDER	CASE NO: 19-CR-00002 COURT: CIRCUIT COUNTY: OHIO DIVISION: CRIMINAL
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ORDER

This case having come on the Court's docket on a motion for waiver of fees and costs associated with this action and to proceed in forma pauperis pursuant to KRS 453.190, and the Court having reviewed the foregoing Affidavit and Financial Statement, and being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGE that the Motion to Proceed In Forma

Pauperis is:



GRANTED. (Doc Code:OFP) Affiant is a poor person pursuant to KRS 453.190(2) as follows:



Affiant is unable to the costs and fees associated with this action without depriving himself or herself or his or her dependents of the necessities of life, including food, shelter, or clothing. **OR**



Affiant's income is at or below 100% on the sliding scale of Indigency established by the Kentucky Supreme Court.

OR

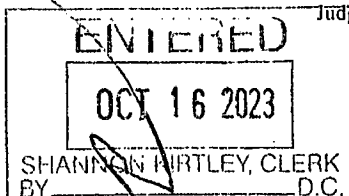


DENIED. (Doc Code: OFD) Affiant is not a poor person pursuant to KRS 453.190(2). Affiant shall have thirty (30) days to pay any required fees or costs to appeal this decision. If Affiant fails to pay the required fees or costs, or fails to seek review, the matter shall be treated as though not timely filed. CR 5.05(4)

Date

10/16/23

Judge's Signature



COMMONWEALTH OF KENTUCKY
OHIO CIRCUIT COURT
ACTION NO. 19-CR-00002

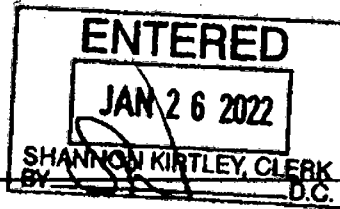
COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

KATHERINE J. BARRETT

DEFENDANT



FORMAL SENTENCING ORDER

This matter having come on for a hearing before the Circuit Court, after conducting a hearing in open court, and the Court having afforded the defendant an opportunity to make statements on his behalf and to present any information in mitigation of punishment; and the Court being of the opinion that:

- _____ the defendant is eligible for probation;
- _____ the defendant is ineligible for probation or conditional discharge because of the applicability of KRS 532.045; KRS 532.080; KRS 533.060 or other applicable statute;
- _____ imprisonment is necessary for the protection of the public because:
 - _____ there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge;
 - _____ the defendant is in need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution;
 - _____ probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime;

and the Court finding that the alternative sentencing procedures of the Kentucky Revised Statutes are () are not () applicable and being asked if there was any legal cause which be had as to why

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sentences should not now be pronounced, and the Defendant and his/her Counsel answering in the negative, and the Court being otherwise sufficiently advised;

IT IS THEREFORE ORDERED AND ADJUDGED by the Court that the Defendant is hereby sentenced to:

- A. Five (5) years in the custody of the State Department of Corrections on the charge of Complicity to Sexual Abuse in the First Degree.
- B. Five (5) years in the custody of the State Department of Corrections on the charge of Complicity to Sexual Abuse in the First Degree.

All sentences shall run concurrently for a total sentence of five (5) years in the custody of the State Department of Corrections.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant is eligible for ____ days of jail credit. This Order is effective as of the 21st day of December, 2021.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to KRS 532.043 (2) upon release from incarceration or parole, the Defendant being guilty of a felony under KRS Chapter 510, 530.020, 530.064 or 531.310 is sentenced to a five year period of conditional discharge.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to KRS 17.510(2), Defendant has been convicted of a sex crime and has been informed of his duty to register with the local probation and parole office.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to KRS 17.170, the Defendant, having been convicted of a felony under KRS Chapter 510 (sexual offenses) or KRS 530.020 (incest), have a sample of blood taken by the Department of Corrections for DNA law enforcement identification purposes and inclusion in law enforcement identification data bases. ____

IT IS FURTHER ORDERED AND ADJUDGED, that:

_____ Probation is GRANTED pursuant to the terms and conditions of the Probation Order filed herewith.

☒ _____ Probation is DENIED.

THIS ORDER IS ENTERED *nunc pro tunc* to December 21, 2021.

SO ORDERED AND ADJUDGED, this the 26 day of January, 2022.



TIMOTHY R. COLEMAN, JUDGE
OHIO CIRCUIT COURT

Clerk send copies to:

Counsel of Record

FORMAL SENTENCING DATE: December 21, 2021

Appendix

Tab 3

ARGUMENT

On appeal, Katherine argues the trial court erred by denying her motion for a directed verdict. (Appellant Br. 9-13.) She also contends the trial court committed palpable error by permitting the prosecutor to misstate the law on the presumption of innocence during closing argument, allowing Katie to read from her diary entries, and failing to award her jail credit. (*Id.* at 13-23.) Finally, Katherine argues her conviction should be reversed on the cumulative-error doctrine.³ (*Id.* at 23.) All of Katherine's arguments lack merit.

I. The trial court correctly denied Katherine's motion for a directed verdict.

Katherine does not dispute there was sufficient evidence to find that Jason continued to sexually assault Katie after she told her mother about the abuse. Instead, she contends that there was no evidence that she intended for Katie to be subjected to sexual contact; therefore, the trial court should have entered a directed verdict on both counts of complicity to first-degree sexual

³ Jason's appeal is currently pending before the Kentucky Supreme Court. See *Jason Barrett v. Commonwealth*, 2022-SC-0068-MR. Jason also argues in his appeal before the Supreme Court that the trial court committed palpable error by permitting the prosecutor to misstate the law on the presumption of innocence during closing argument and allowing Katie to read from her diary entries. Because the Supreme Court's resolution of these issues will be binding on this Court, SCR 1.030(8)(a), judicial economy would favor delaying an opinion on this case until the Kentucky Supreme Court renders an opinion on Jason's appeal.

APPENDIX “E”

CHAPTER 132

(HB 310)

AN ACT relating to home incarceration.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔ Section 1. KRS 532.245 is amended to read as follows:

- (1) Time spent in pretrial home incarceration pursuant to KRS 431.517 shall be credited against the maximum term of imprisonment assessed to the defendant upon conviction. *Notwithstanding KRS 532.200, a defendant who spent time in pretrial home incarceration pursuant to KRS 431.517 shall not be required to have participated in a global positioning monitoring system program to receive credit.* Time credited under this section shall be calculated in accordance with KRS 532.120.
- (2) Violation of the terms of pretrial home incarceration shall be deemed an interruption of the defendant's home incarceration. The interruption shall begin at the time of the violation and shall continue until a court revokes home incarceration or otherwise acts on the violation. Time spent in pretrial home incarceration prior to the violation shall be credited against the maximum term of imprisonment assessed to the defendant upon conviction for the original charge.
- (3) This section shall apply to defendants sentenced on or after July 12, 2012.

Signed by Governor April 8, 2022.