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(FILE NO. 2009-SC-0376-D)

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000105-MR

MARK WILLIAM ADKINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULZ GIBSON, JUDGE  
ACTION NO. 06-CR-002208

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND THOMPSON, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

THOMPSON, JUDGE: Mark William Adkins was convicted of second-degree unlawful imprisonment and three counts of first-degree sexual abuse and sentenced to a total of six-years' imprisonment. On appeal, he alleges that the trial court

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<sup>1</sup> Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

erred when it excluded evidence that two of the victims were subjected to abuse by another family member. We conclude that the evidence was precluded by Kentucky Rules of Evidence (KRE) 412 and, therefore, affirm.

The convictions were the result of Adkins's sexual abuse of three female children, K.M., H.M. and A.A., who are related to Adkins. The abuse occurred from July 12, 2003, to May 1, 2006, when Adkins resided in the same household with the children.

K.M. first reported the abuse when she was fifteen years old during a visit with a physician. During a physical examination, she experienced "flashbacks" and recalled incidents of sexual abuse by Adkins. After being informed by K.M. that Adkins had abused her and her two cousins, her mother telephoned H.M. and A.A.'s mother, who confirmed that they had also been sexually abused by Adkins.

The girls were then questioned by a representative from Family and Children First. During the interview, A.A. reported abuse by Adkins but also indicated that another family member, "Uncle Nicky," had abused her.<sup>2</sup> However, the alleged abuse by "Uncle Nicky" was in addition to that committed by Adkins and unrelated to his abuse.

The trial court granted the Commonwealth's motion to prohibit any reference to the alleged abuse committed by "Uncle Nicky." During Adkins's

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<sup>2</sup> Although the relative is identified in the briefs as "Uncle Nicky," he could not be K.M.'s uncle because K.M. is not A.A.'s and H.M.'s sister. For our purposes, we accept the title attributed to Nicky and identify him as "Uncle Nicky."

trial, his requests to question witnesses on the possibility that the girls had been abused by “Uncle Nicky” were denied by the trial court on the basis that KRE 412 prohibited any testimony concerning sexual contact between “Uncle Nicky” and the children. Despite his repeated attempts to question the witnesses regarding “Uncle Nicky,” Adkins did not file a motion describing the evidence and the purpose for which it was to be offered fourteen days prior to trial as required by KRE 412(c) nor did he introduce the proposed testimony by avowal.

K.M. testified that Adkins began abusing her when she was eight years old and continued until the age of fourteen. The abuse included fondling and biting her breasts which resulted in scarring of her breasts.

A.A., who was seven years old on the date of trial, testified that the abuse would begin with “wrestling” with all the girls in the basement and escalated to the touching of the breast and crotch area. A.A. stated that Adkins threatened physical violence if she told about the abuse.

H.M., who was eleven years old on the date of trial, gave similar testimony to that given by K.M. and A.A. She recalled that Adkins would take the children to the basement and touch their bodies, including their breasts.

We begin with the premise that the trial court has broad discretion when determining the admissibility of evidence, and we will not reverse its decision unless it constitutes an abuse of discretion. *Capshaw v. Commonwealth*, 253 S.W.3d 557, 564 (Ky.App. 2007). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by

sound legal principles.” *Id.*, quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

KRE 412 was adopted for the purpose of protecting the interests of the victim from the admission of evidence that is neither material nor relevant to the charge made. *Anderson v. Commonwealth*, 63 S.W.3d 135 (Ky. 2001). To further that objective, it provides in part:

a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

Exceptions to the rule are:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

KRE 412. The rule further provides that if a party intends to introduce evidence of the victim's sexual conduct, notice must be given fourteen days prior to trial and an *in camera* hearing held to determine the admissibility of the proposed evidence.

The trial court relied on this Court's decision in *Hall v. Commonwealth*, 956 S.W.2d 224 (Ky.App. 1997), in which the Court had the opportunity to address KRE 412. In *Hall*, the Court held that when, as in this case, the defendant seeks to introduce evidence of unrelated sexual accusations by the victim against a third-party to prove fabrication of the charges against him, the question becomes whether the accusations can be considered reasonably true. If so, the unrelated accusation is inadmissible on the basis that it is irrelevant to the charge against the defendant. If the other allegations are proven or admitted to be false, then such evidence may be relevant to the issue of fabrication by the victim, and in that instance, is subject to a balancing test to determine whether the probative value of the evidence outweighs the prejudicial effect. *Id.* at 227. *See also, Capshaw*, 253 S.W.3d at 564.

In addition to failing to comply with the notice requirements of KRE 412, Adkins made no attempt to offer any evidence to establish that the accusations against "Uncle Nicky" were untrue. Moreover, because no avowal testimony was taken, we are without any basis to review the content of the testimony sought to be elicited from the witnesses. "Appellate courts review records; they do not have crystal balls." *Commonwealth v. Ferrell*, 17 S.W.3d 520, 525 n.10 (Ky. 2000).

In an attempt to avoid the consequences of KRE 412, Adkins contends that the rule is not applicable because the statements concerning "Uncle Nicky" and his abuse of the children were relevant to his defense that an alternative perpetrator committed the acts charged. He suggests that he sought to cross-

examine the children regarding “Uncle Nicky’s” alleged abuse to establish that “Uncle Nicky” was the perpetrator, not that the children fabricated that they were sexually abused.

The right of an accused in a criminal trial to defend against the charges is firmly entrenched in our legal jurisprudence. *See e.g., Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002); *Holloman v. Commonwealth*, 37 S.W.3d 764, 767 (Ky. 2001). Consistent with that right, evidence that the crime was committed by another is admissible unless the defense theory is so speculative and far-fetched so as to confuse or mislead the jury. *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 (Ky. 2003). However, it is also recognized that the right of cross-examination is not absolute, and the trial court has the discretion to set limitations on its scope and subject. *Capshaw*, 253 S.W.3d at 566-67.

Key to the application of the “alternative perpetration defense” is that the evidence must tend to prove that someone other than the accused committed the crime. The facts as alleged by Adkins, even if true, simply do not present a viable defense. Assuming as Adkins suggests, “Uncle Nicky” abused all or some of the three children, that fact would not exonerate Adkins from his criminal acts. The abuse inflicted on the children was not restricted to a single event but occurred over a span of years. Unfortunately, during that time it is quite possible that all or some of the children were abused not only by Adkins, but were also subjected to unrelated abuse by someone else. While the evidence may have tended to prove

there was an additional perpetrator, it would not tend to establish there was an alternative perpetrator.

In conclusion, the Jefferson Circuit Court properly held that evidence concerning the alleged abuse of the children by “Uncle Nicky” was not admissible. The judgment is affirmed.

ALL CONCUR.

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