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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001819-MR

COMMONWEALTH OF KENTUCKY APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NOS. 11-CR-000462 AND 11-CR-002576

GARRY W. NEWKIRK APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: This matter presents two substantive issues for our consideration, namely: (1) whether the Jefferson Circuit Court erroneously deemed inadmissible certain witness testimony describing the contents of a destroyed surveillance video, and (2) whether that court abused its discretion when it declined to grant the Commonwealth a continuance. Because the evidence suppressed by the circuit court is expressly admissible under Kentucky Rules of

Evidence (KRE) 402 and 1004, we reverse the court's September 14, 2011 order dismissing the case.

I. Facts and Procedure

An indictment returned by the Jefferson County Grand Jury stated Appellee Garry Newkirk, on November 7, 2010, committed second-degree burglary when he knowingly and unlawfully entered Pearlette Isaac's apartment and removed items belonging to her. Detective Kevin Lewis investigated.

A video surveillance system at the apartment complex captured the events. Isaac, Detective Lewis, and the apartment complex's manager viewed the surveillance video together. Detective Lewis observed on the tape a white male wearing blue jeans and a gray long-sleeve shirt using tools to pry open Isaac's window and gaining access to her apartment. The male entered the apartment through the window, remained inside for a short time, and left through the apartment complex's front door. The video did not clearly reveal facial features, scars, or tattoos.

Upon viewing, Isaac believed it possible that the man in the video was an acquaintance, Daniel Newkirk. Daniel Newkirk and Appellee Garry Newkirk are brothers. Detective Lewis interviewed Daniel. Daniel denied any involvement in the burglary, but admitted to being at the apartment complex earlier that same day with Garry. Daniel claimed that after visiting the apartment complex he and Garry went to a nearby Circle K gas station. They soon parted ways. Later that evening, Garry called Daniel to inquire whether Daniel wanted to purchase items

Garry supposedly took from Isaac's apartment. Garry admitted to Daniel that he "hit that house" by climbing through Isaac's window. Daniel informed Detective Lewis that, on the day of the burglary, Garry was wearing a gray long-sleeve shirt, light-colored blue jeans, and white Reebok-brand tennis shoes.

Detective Lewis obtained the surveillance video from the Circle K which corroborated Daniel's account that, shortly before the burglary, Daniel and Garry were together. The clothes Detective Lewis saw Garry wearing in the Circle K surveillance video matched the description given him by Daniel; both what Garry was wearing and what Daniel described were similar to the clothes worn by the man in the surveillance video burglarizing Isaac's apartment. Garry was subsequently indicted on the charge of second-degree burglary.

At a pretrial hearing on August 15, 2011, both Newkirk and the Commonwealth requested a speedy trial date. The circuit court obliged and set the case for trial beginning on September 6, 2011. Also at this hearing, the Commonwealth revealed to the court that the apartment complex's surveillance video was unavailable.[1] The Commonwealth explained Detective Lewis and Isaac had reviewed the video, but the surveillance system could not make a copy and the system then automatically recorded over the video after one week. Newkirk verbally objected to the admissibility of any testimony regarding the missing videotape.[2] The circuit court deferred this issue until trial.

[1] Prior to this hearing, Newkirk had made discovery requests for the apartment complex surveillance video.

[2] Newkirk states in his brief, and the circuit court indicated on the day of trial, "that the Commonwealth did not indicate until the morning of trial that it intended to introduce testimony

Newkirk never memorialized in writing what was effectively a motion *in limine*, nor did the Commonwealth ever submit anything in writing in opposition or stating its position on the admissibility of testimony about the missing video's contents.

On September 6, 2011, both parties announced ready for trial. The circuit court entertained several motions by Newkirk. One was the verbal motion *in limine* to exclude all testimony relating to the surveillance video. Newkirk attacked the admissibility of such testimony on several grounds including the Sixth Amendment's Confrontation Clause, hearsay, lack of personal knowledge, and improper opinion testimony. In response, the Commonwealth argued testimony of the video's contents did not constitute hearsay, no witness would offer lay opinion testimony but would simply recount what he or she saw in the video, and witness testimony was the best evidence available in light of the unavailable video. The circuit court sustained Newkirk's motion and excluded all testimony, and any conclusions that could be drawn therefrom, regarding the contents of the unavailable apartment complex surveillance video.

The parties then conducted individual *voir dire* of the jury panel.[3] This lasted approximately five hours. The next morning, September 7, 2011, the

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even though it had earlier confirmed that the video no longer existed." (Appellee's brief at 7). Clearly this is not entirely correct, otherwise there would have been no need for Newkirk, three weeks earlier on August 15, 2011, to verbally move to prohibit testimony regarding the videotape.

[3] Although not relevant to our review, concerns had arisen that the entire jury pool had been tainted by comments made by a deputy sheriff. To dispel the taint, the circuit court conducted individual *voir dire* of the specific jury panel assigned to this case. The circuit court ultimately concluded the jury panel was not tainted.

Commonwealth sought reconsideration of the circuit court's ruling prohibiting testimony about the videotape; that effort was unsuccessful. The Commonwealth then announced it had failed to secure an essential witness, Daniel Newkirk, and moved to continue the trial to allow time to secure the witness. Newkirk opposed any continuance. The circuit court denied the Commonwealth's motion.

Faced with going to trial lacking the defendant's brother as a witness and unable to present Detective Lewis's testimony about the videotape, the Commonwealth moved to dismiss the case without prejudice. The Commonwealth also asked the circuit court to put in writing its ruling regarding the admissibility of testimony about the videotape. The request was granted and the ruling was combined with the denial of the motion to continue the trial, and incorporated in the order granting the motion to dismiss without prejudice.

With regard to the evidentiary ruling, the order states only:

> The Commonwealth failed to cite any legal basis for its offering of testimony concerning the contents of a videotape that it failed to preserve for the purposes of trial and failed to produce despite repeated requests during discovery. For the reasons stated on the record, the Court ruled the absent tape and any testimony concerning its contents would not be admissible at trial.

(Order, September 14, 2011, at page 1). The Commonwealth appeals from this order.[4] We will set out the circuit court's reasoning, as well as the parties' arguments before the circuit court, as necessary in our analysis.

II. Standard of Review

We review evidentiary rulings for abuse of discretion. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 725 (Ky. 2009) (citation omitted). The circuit court's decision to deny a continuance is also reviewed for an abuse of discretion. *Slone v. Commonwealth*, 382 S.W.3d 851, 855 (Ky. 2012). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (citation omitted).

III. Analysis

The Commonwealth claims the circuit court erred in two respects: (1) by excluding witness testimony of the contents of the absent surveillance video; and (2) by denying the Commonwealth's motion for a continuance. We will address each argument in turn.

A. Excluding Evidence of the Destroyed Videotape

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[4] We pause to point out the Kentucky Supreme Court's longstanding rule "that a dismissal without prejudice is a final and appealable order[.]" *Commonwealth v. Sowell*, 157 S.W.3d 616, 617 (Ky. 2005) (footnote omitted). Such a final order readjudicates all interlocutory rulings including evidentiary rulings adverse to the Commonwealth. Kentucky Rules of Civil Procedure (CR) 54.02(2). Additionally, Kentucky Revised Statutes (KRS) 22A.020(4) authorizes the Commonwealth to appeal to this Court "in criminal cases from an adverse decision or ruling of the Circuit Court" provided that the appeal does not suspend the proceedings in the circuit court and the appeal is taken in accordance with rules of the Supreme Court. KRS 22A.020(4)(a) and (b). This Court is authorized to "reverse the decision of the Circuit Court" and order a trial so long as such reversal and order do not "violate any constitutional rights of the defendant." KRS 22A.020(4)(c).

To affirm the circuit court, we must know the basis of its ruling. The order states only that the evidence was inadmissible "[f]or the reasons stated on the record[.]" And so we turn to the record. What soon will be obvious is that there was no mention at the circuit court of the critical, applicable rule of evidence – KRE 1004. That rule states, in pertinent part: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ."

With that rule in mind, we examine what the court and the parties verbally discussed, for there is no written motion and no written response; the only written record regarding this evidentiary issue is the skeletal language of the order.

(1) The basis of the circuit court's evidentiary ruling.

The evidentiary issue arose four times in hearings on three separate days. The first of these occasions was during the prehearing conference on August 15, 2011. Newkirk expressed concern that the unavailability of the videotape "might create some other issues with respect to [the Commonwealth's] allegation that they think that person [on the missing videotape] might have looked like [Newkirk and] I don't think that their testimony that they thought that was him would be admissible." (VR 8/15/11; 10:27:30 - 10:28:03). Clearly, Newkirk wanted to exclude testimony about the videotape, but he offered no legal basis for ruling such testimony inadmissible. The circuit court stated that this issue could be

taken up on the morning of trial. This part of the record therefore offers no insight as to the basis for excluding the evidence.

Just as the court suggested, Newkirk renewed his motion to exclude the evidence on September 6, 2011, prior to *voir dire* of the jury. He argued testimony about the videotape would be inadmissible hearsay under KRE 801(c) and 802, improper opinion testimony not based on personal knowledge under KRE 701 and 702, and a violation of his rights under the Confrontation Clauses of the federal and Kentucky constitutions. The circuit court was initially persuaded by the Confrontation Clause argument; later, the circuit court would state that it was not basing its ruling on any of these rules. Nevertheless, the court granted the motion, basing its ruling on a variety of factors.

The circuit court first noted generally that allowing the proposed testimony would "open the door to all kinds of abuses [though] *it's not the case here*." (VR 9/06/11; 12:20:40; emphasis added). If KRE 1004 had been applied here, the evidence should have been ruled admissible because everyone agreed the original was lost or destroyed, and the circuit court concluded the proponent of the evidence – the Commonwealth – did not lose or destroy the original in bad faith. Refusing to admit the testimony, therefore, must have been based on a different evidentiary rule.

As noted, the circuit court was persuaded, for a time, by Newkirk's Confrontation Clause argument and stated:

> The legal basis upon which I'm going to exclude the testimony is the *right of confrontation*. . . . The idea of testifying about something that is not available, has never been available, to the defendant, a videotape that has been unavailable strikes me as *fundamentally unfair* and so I am not going to permit that.

(VR 9/06/11; 12:21:09 - 12:24:06; emphasis added).

Later that same afternoon, the Commonwealth questioned the viability of the Confrontation Clause as a basis for the ruling, and pressed the circuit court for a clearer answer. The court responded, stating:

> In essence, the ruling is this: The tape is not available, has not been made available to the defense because it is not in existence. But prior to the time that it went out of existence, the Commonwealth reviewed it (or its agents [reviewed it]). And the Commonwealth now is seeking to testify as to the contents [of] the review. The reason that I cannot allow that is because the tape itself was never made available to defense counsel, *through no fault of the Commonwealth*. But it was never made available so it puts the defense counsel in the unenviable position of cross-examining an individual who reviewed the tape without the benefit of actually reviewing the tape themselves. And so I don't see that situation, number one, I think it is entirely *inequitable*, it strikes me [that's] number one, number two, as to the *Confrontation Clause and what have you, I'm not quite sure that that would form the basis of my ruling*, but what would form the basis of it is that it was *not made available to the defense* through discovery and therefore will not be permitted to be admitted in this trial whether by virtue of the actual tape itself or by virtue of, secondarily by virtue of someone who has reviewed the tape and is ready to testify as to its contents.

(VR 9/06/11; 4:50:16 - 4:52:00; emphasis added). The circuit court thereby backed away from the Confrontation Clause as a basis for excluding the evidence,

relying on equity and the fact that the tape was not made available to the defense. Notably, the court continued in its view that this unavailability was "through no fault of the Commonwealth." Again, KRE 1004 authorizes testimony about the original videotape because the tape was lost or destroyed through no fault of the Commonwealth who proposed the testimony about the original videotape.

Apparently not fully comfortable with its ruling, the circuit court granted the Commonwealth leave to revisit the ruling the next day.

The next day, before the jury was empanelled, the Commonwealth raised the issue again. The circuit court again explained its ruling, stating:

> What was presented to me yesterday was that this officer had reviewed the tape, for whatever reason it wasn't preserved. And to come in then and claim that a tape was viewed and not preserved – and they want to testify about the review – doesn't seem to me to be something that is, that should be permissible under any circumstance . . . It seems to me it's akin to a case, in a murder case when somebody finds the murder weapon and says they reviewed it and, "Where's the murder weapon?" and [in response the prosecutor says] "Well, we lost it or we can't produce it but we want to testify about it and we want to testify about the fingerprints and everything else." I don't understand where that would be permissible. . . . If the officer reviewed the tape, it seems to me *the Commonwealth has some obligation to preserve the evidence* in the case. What obligation is there where the Commonwealth reviews the videotape, makes observations and intends to testify about it in court, and then says the tape is lost. And when the request is made, well in advance, in discovery for the tape, the response has always been the tape doesn't exist. And then to come back here and then claim, well, we want to give testimony about the very tape that wasn't produced, despite various requests, *I don't think that's equitable.* And that's the basis upon which I excluded

> that. It's particular to the circumstances of this case, but I'll tell you I don't understand any circumstance under which the Commonwealth would seek to introduce testimony about somebody watching – reviewing it, a videotape and then claim that the tape does not exist.

(VR 9/07/11; 10:48:54 -10:51:00; emphasis added). The circuit court thus continued to base its ruling on the belief that it would be inequitable to allow Detective Lewis's testimony about a videotape that the defendant did not have a chance to observe. By now, however, the court seemed to ascribe a measure of blame to the Commonwealth for not preserving the tape.

The Commonwealth pushed for a more specific basis for preventing the detective's testimony, asking, "So is that under KRE 403? Because [testimony about the videotape is] certainly probative and relevant. Is Your Honor saying that it is unduly prejudicial?" (VR 9/07/11; 10:51:00 - 10:51:12). In response, the circuit court seems to reject KRE 403, continuing instead to embrace equity and fundamental fairness as the basis of its ruling, stating:

> I know you're trying to pin me down on [KRE] 403, but what was presented to me yesterday was not an argument under [KRE] 403 or anything else. What was presented is, hey look we get to describe, have a detective come in and give testimony about a videotape that doesn't exist, and the context of it was that [defense counsel] made a motion to exclude this based upon her repeated request for the videotape itself and that the videotape . . . does not exist . . . . Rather than be pinned down, I can get something out – if you want something in writing, I can put something in writing as to my ruling yesterday, but I'll tell you the basis of my ruling is that there shouldn't be any case that comes in here where there has been a review of the videotape, and then the videotape has not been preserved, it's been deleted, and then there'd been

> repeated requests from the defense for the actual videotape – the videotape hasn't been produced and then on the day of trial the intention is to testify, have the detective testify about his review. To me that is *fundamentally not an equitable result* and it leads to abuses in the system because why would you ever, under any circumstances, produce a videotape? Why don't you just have a detective review it and get rid of it.

(VR 9/07/11; 10:51:15 - 10:53:00; emphasis added). At this point, the Commonwealth noted it is "under an obligation to present truthful testimony, so we wouldn't have our detectives lie about fake videotapes." (VR 9/07/11; 10:53:00 – 10:53:13). The circuit court quickly responded:

> I'm not saying anybody is lying. What I am saying is that his testimony about what he observed is subject to fair cross-examination, and to me it is unfair to the extent that the very tape that he has reviewed, that he is seeking to base his testimony on is unavailable to the defense and that's because it wasn't preserved. *He reviewed it, he should have preserved it and he didn't.* So that is ultimately the ruling. *What I'm trying to prevent is, in theory, abuses*, okay? If you review a tape, the Commonwealth reviews it, and they don't preserve it, I don't want to have anybody coming in here saying they want to argue it. You tell me why it wasn't preserved, you lay it out and lay out what you want to do. But on the day of trial to say that this very tape has been requested, I know, several times by [defense counsel] – that doesn't exist but we're going to testify as to its contents[. *That*] *strikes me as not being fair so that's the basis of the ruling*.

(VR 9/07/11; 10:53:14 -10:54:23; emphasis added).

The circuit court thus found fault with Detective Lewis for failing to preserve the videotape ("he should have preserved it"), and attributed Newkirk's inability to view the tape to that failure – a failure the court already ruled did not

occur in bad faith – and not a failure of the technology itself. Such circumstances, according to the circuit court, are unfair to the defendant, and that was the basis of the court's ruling.

Now we will examine whether such a ruling is sound enough to withstand appellate review. We conclude it is not.

(2) Fairness alone is not an evidentiary rule.

Fairness, or rather our understanding of that ambiguous concept, gave birth to the rules of evidence. Every rule of evidence "derives . . . from the concept of fundamental fairness[.]" *Ellis v. Ellis*, 612 S.W.2d 747, 748 (Ky. App. 1980); *Fitzhugh v. Louisville & N.R. Co.*, 300 Ky. 509, 189 S.W.2d 592, 593 (1945) ("All . . . rules . . . are supposed to be founded upon . . . what is fair[.]").

But the relationship between fairness and the evidentiary rules did not end at parturition. Dutiful offspring that they are, evidentiary rules exist to serve the parent. That is why, in addition to deriving from fairness, rules of evidence endure so that fairness remains a viable and real foundation of our justice system; for this purpose alone evidentiary rules are "construed to secure fairness[.]" KRE 102; *see also Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973) ("rules of . . . evidence [are] designed to assure . . . fairness[.]").

However, this close relationship belies the significant differences between the concept of fairness and the rules of evidence. The former is amorphous, general, and subjective; the latter are definite, specific, and objective. These distinguishing characteristics explain why our courts cannot successfully apply the

unstructured concept of fairness as an evidentiary rule in and of itself. Our Supreme Court said:

> The rules of evidence have evolved carefully and painstakingly over hundreds of years as the best system for arriving at the truth. They bring to the law its objectivity. Their purpose would be subverted if courts were permitted to disregard them at will because of an *intuitive perception that to do so will produce a better result in the case at hand*.

Fisher v. Duckworth, 738 S.W.2d 810, 813 (Ky. 1987) (emphasis added). This "intuitive perception," as the Court called it, is nothing more than a trial judge's subjective sense of "fairness." Similarly, in the case now under our review, the circuit court applied nothing more than its own intuitive perception of fairness to prohibit Detective Lewis's testimony about the missing videotape. That was insufficient in *Fisher v. Duckworth*, *supra*, and it is insufficient in this case.

Without reliance on any specific rule of evidence, a decision to exclude evidence solely on the basis of the judge's subjective sense of fairness is arbitrary and unsupported by sound legal principles, thereby constituting an abuse of discretion.

However, "the judgment of a lower court can be *affirmed* for any reason in the record." *Fischer v. Fischer*, 348 S.W.3d 582, 591 (Ky. 2011) (citations omitted). Therefore, in an effort to affirm the circuit court, we look to all rules of evidence cited by either party, and to all other rules we conclude bear on this issue. We will discover that, on this record, no rule of evidence prohibits the Commonwealth's proposed evidence.

<u>(3) All relevant evidence is admissible unless excluded by specific law or rule.</u>

The Kentucky Rules of Evidence reflect "the law's strong tilt toward admission over exclusion of evidence[.]" Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 11.30[1], at 863 (5th ed. 2013) (illustrating this "tilt" in the context of "the Bruton Rule"). Our Supreme Court acknowledged this when it stated that "the general inclusionary thrust of the Rules of Evidence [is one of the] core principles of Kentucky's evidence law[.]" *Woolum v. Hillman*, 329 S.W.3d 283, 288 (Ky. 2010). This is no more clearly demonstrated than in KRE 402, the "true cornerstone of the law of evidence, one that fully reflects the inclusionary thrust of the law that is fostered by virtually all evidence authorities." Lawson, *supra*, § 2.10, at 85; *id.* § 2.15[1], at 88 (Rules 401 and 402 "giv[e] the law of evidence a very powerful inclusionary thrust").

KRE 402 states in its entirety:

> All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible.

KRE 402; *see also Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 577 (Ky. 2009) ("[R]elevant evidence is always admissible at trial unless excluded by some other rule." (citing *Berryman v. Commonwealth*, 237 S.W.3d 175, 179 (Ky. 2007), and KRE 402)).

No one questions, nor could one question, the fact that testimony about the videotape is relevant.[5] Therefore, to affirm the circuit court's ruling prohibiting this testimony, we must find an evidentiary rule that will exclude it. KRE 402 limits our search to four categories of such rules: (1) the federal and Kentucky Constitutions; (2) Kentucky statutes; (3) the Kentucky Rules of Evidence; and (4) "other rules adopted by the Supreme Court of Kentucky." KRE 402. We will consider these categories in the order listed in the Rule.

(a) No U.S. or Kentucky Constitutional provision justifies excluding the evidence.

Newkirk initially argued the detective's testimony should be barred by the Sixth Amendment's Confrontation Clause. We will consider that provision even though the circuit court eventually rejected the argument. We, too, reject it.

Confrontation Clause cases "fall into two broad, albeit not exclusive, categories: 'cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination.'" *Kentucky v. Stincer*, 482 U.S. 730, 737, 107 S.Ct. 2658, 2663, 96 L.Ed.2d 631 (1987) (citation omitted). Newkirk's arguments fit neither category.

The applicable rule for the first category is that the Confrontation Clause "bars 'admission of *testimonial statements of a witness* who did not appear at trial . . . .'" *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006) (citation omitted; emphasis added). Obviously, the videotape itself is

[5] As stated in *Emberton v. GMRI*: "Under KRE 401, evidence is relevant if it has any tendency to render the existence of any consequential fact more or less probable, however slight that tendency may be." *Emberton*, 299 S.W.3d at 577 (citing *Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996), and KRE 401).

not a human being capable of confrontation. More to the point, the videotape did not memorialize the testimonial statement of a human being; rather, it recorded the crime itself.

A "video . . . recording of the actual [criminal act] falls within the realm of *non-testimonial evidence* [to be distinguished from] a video recording of a witness's testimony [which is] testimonial in nature . . . ." *Springfield v. Commonwealth*, 410 S.W.3d 589, 593 (Ky. 2013) (citing *McAtee v. Commonwealth*, 413 S.W.3d 608, 623-24 (Ky. 2013) (citing several cases addressing non-testimonial video and audio recordings)). Consequently, there is no violation of this first category of the Confrontation Clause.

There is no Confrontation Clause violation of the second category either. In this second category, a defendant's rights under the clause are generally "satisfied if defense counsel receives wide latitude at trial to question witnesses." *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 999, 94 L.Ed.2d 40 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (per curiam)). The United States Supreme Court has said:

> It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931-932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory.

U.S. v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988). The unavailability of the videotape does not deprive Newkirk the opportunity to cross-

examine Detective Lewis, or anyone else who viewed the videotape, on any of these points. Nor is there any indication in the record that the circuit court has any intention of "limit[ing] the scope or nature of defense counsel's cross-examination in any way." *Fensterer*, 474 U.S. at 19, 106 S.Ct. at 294.

Furthermore, federal case law is clear that not being able to use the videotape for impeachment purposes does not offend Newkirk's rights under the Confrontation Clause. The Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes." *Nevada v. Jackson*, --- U.S. ----, 133 S.Ct. 1990, 1994, 186 L.Ed.2d 62 (2013) (citation omitted). Consequently, we do not see how the unavailability of the videotape encroached upon Newkirk's right of confrontation if he had no constitutional right to introduce it for impeachment purposes anyway.[6]

Next, the unavailability of the videotape is not a restriction on the scope of cross-examination "imposed *by law* or by *the trial court*[.]" *Stincer*, 482 U.S. at 737, 107 S.Ct. at 2663 (emphasis added). The loss of videotape evidence is simply one circumstance of this case; the loss itself is unaffected by the law and beyond control of the trial court.

In nearly every respect, this case parallels *State v. Thorne*, 618 S.E.2d 790 (N.C. App. 2005), in which the criminal defendant complained:

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[6] We are not saying that if the videotape still existed the Confrontation Clause would prohibit its use for impeachment purposes. We hold nothing more than the Supreme Court holds – that the right to use extrinsic evidence for impeachment purposes is *not* a constitutional right grounded in the Confrontation Clause.

> "He could not show the tape to the jury during cross-examination, and ask the witness specific questions about the basis of the opinion, with the jurors watching both the tape and the witness."

Id. at 793 (quoting appellant). After analysis we need not repeat, the court said:

> [D]efendant's cross-examination [of the police officer] was *neither restricted by the law nor did the trial court limit the scope of such examination*. Instead, defendant's only limitation in cross-examining [the officer] was his inability to play the lost videotape to the jury. Nonetheless, defendant had ample opportunity to cross-examine [the officer] regarding the quality of the videotape [and] his viewing of the videotape . . . . Accordingly, defendant's confrontation rights under the Sixth Amendment were vindicated, and we find no error.

Id. at 794 (emphasis added); *see also State v. Zinsli*, 966 P.2d 1200 (Or. App. 1998) (citing *Fensterer*, *supra*, court held inadvertent erasure of videotape constituted no Confrontation Clause violation since officer would testify and his cross-examination would not be restricted by the law or by the trial court).

We are persuaded by these authorities and by our additional research that there was no Confrontation Clause violation of the second category or the first. For these same reasons, we reject Newkirk's argument in reliance on Kentucky's own confrontation clause contained in Section 11 of the Kentucky Constitution.[7]

However, Newkirk also relies on the Fourteenth Amendment of the United States Constitution, as well as Section 2 of the Kentucky Constitution,[8] for the

[7] In pertinent part, Section 11 of Kentucky's Constitution states, "In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face . . . ."

[8] The Fourteenth Amendment to the U.S. Constitution states, in part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

proposition that allowing testimony about the videotape would violate his "rights to a fair trial[.]" (Appellee's brief at 19).

This Court has indicated that a trial court runs the risk of violating Section 2 of Kentucky's Constitution if it applies a court rule that "lacks objective standards" or cannot be "objectively applied[.]" *Tohtz v. U.S. on Behalf of Dep't. of Housing and Urban Dev.*, 743 S.W.2d 45, 47 (Ky. App. 1988) (testing application of Kentucky Rules of Civil Procedure (CR) 11 against Section 2). In the case under review, the core rules the circuit court would have been applying if he admitted the detective's testimony are KRE 402 and KRE 1004. Both these rules and their virtually identical counterparts, enacted throughout the nation, have been objectively applied on innumerable occasions by trial courts in every jurisdiction, federal and state, under objective standards, and subjected to appellate review without successful constitutional challenge to the rules themselves. Therefore, what this Court said when considering the constitutionality of a trial court's application of CR 11 in *Tohtz* also applies here; the standards that inform and interpret KRE 402 and KRE 1004 "provide adequate safeguards against [their] being applied with wild abandon[,]" *i.e.*, arbitrarily in violation of Section 2 of Kentucky's Constitution.

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nor deny to any person within its jurisdiction the equal protection of the laws." Section 2 of the Kentucky Constitution states, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." The Kentucky Supreme Court has interpreted the state constitutional provision to encompass the same due process and equal protection interests reflected in the Fourteenth Amendment to the Constitution of the United States. *Commonwealth Natural Res. and Envtl. Prot. Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 724 (Ky. 2005).

Just as *Tohtz* concluded that a trial court's application of CR 11 does not violate Section 2, neither does its application of KRE 402 nor KRE 1004. Because Section 2 encompasses the same due process and equal protection interests reflected in the Fourteenth Amendment to the Constitution of the United States, admitting the testimony would not violate our own constitutional provision either. *Commonwealth Natural Res. and Envtl. Prot. Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 724 (Ky. 2005).

In his final constitutional argument, Newkirk implies that the videotape would have been exculpatory because, as his counsel stated, "[M]y client isn't on it." (VR 9/06/11; 12:13:45). Newkirk, in effect, "argues that the Commonwealth's failure to collect and preserve [evidence] violated his right to due process and fundamental fairness under the Kentucky Constitution." *Collins v. Commonwealth*, 951 S.W.2d 569, 571 (Ky. 1997). We disagree.

"[T]o make out a due process violation where evidence has been destroyed, the defendant must show . . . the State deliberately sought to suppress material, potentially exculpatory evidence." *McPherson v. Commonwealth*, 360 S.W.3d 207, 217 (Ky. 2012). An example is found in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), in which "the prosecutor's deliberate erasing of witness interview tapes so as to keep those statements away from the defense violated the Due Process Clause[.]" *McPherson, id.*

Our Supreme Court has "concluded that a showing of bad faith [on the Commonwealth's part] is requisite to finding a due process violation." *Collins*,

951 S.W.2d. at 572; *see also Swan v. Commonwealth*, 384 S.W.3d 77, 90 (Ky. 2012). There is no due process violation here because the record lacks any evidence of bad faith. *Id.* at 573 ("Appellant has failed to demonstrate . . . bad faith . . . . Thus we cannot conclude that Appellant was denied due process under the law.").

Other than the constitutional provisions discussed, we are aware of none that might touch upon the issue of the admissibility of Detective Lewis's testimony, or that of anyone who viewed the videotape. We conclude that no federal or Kentucky constitutional provision justified excluding the detective's testimony. Therefore, we move on to consider the second category of rules under KRE 402 that serve to exclude relevant evidence – Kentucky statutes.

(b) No Kentucky statute justifies excluding the evidence.

Neither party has suggested any Kentucky statute that would serve to exclude the detective's testimony. We know of none. Therefore, we move on to the third category – the Kentucky Rules of Evidence.

(c) No Kentucky Rule of Evidence justifies excluding the evidence.

Many who read this opinion may be unaware that the Kentucky Rules of Evidence are, in fact, statutes.[9] For purposes of this opinion, we elected not to treat

[9] KRE 101, Legislative Research Commission Note (7-1-92) states:

> Although denominated 'rules,' the elements of the Kentucky Rules of Evidence were enacted as statutes by the Kentucky General Assembly. . . . [On] May 12, 1992, the Kentucky Supreme Court "adopt[ed] so much of the Kentucky Rules of Evidence as enacted by HB 241 [1992 Ky. Acts ch. 324] as comes within the rule making power of the Court, pursuant to Ky. Const. sec. 116.

The Compiler's Notes to KRS 422A.0101 to 422A.1104 [Amended, renumbered and transferred.] state:

them as statutes in the previous section because the Rules of Evidence, as a whole, constitute a separate, unitary third category under KRE 402. We address them here.

On appeal, the parties cite the following Kentucky Rules of Evidence as pertinent to the discussion of the admissibility of Detective Lewis's testimony: KRE 403, 602, 701, 702, 801, 802, 1004 and 1008. To this list, we add KRE 1001 and 1002. As appropriate, we will discuss each of these rules.

We have already referenced the fact that the Rules of Evidence are inclusionary in nature and that KRE 401 and KRE 402, standing alone, would compel admission of the testimony. The next rule, KRE 403, serves as "an 'umbrella rule' spanning the whole of the . . . Rules of Evidence" and it is "designed as a guide for the handling of situations for which no specific rules have

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> In 1990 Ky. Acts, ch. 88 (HB 214) the General Assembly enacted the Kentucky rules of Evidence which was codified as KRS Chapter 422A as set out in the bound volume; section 93 of said act provided that such law would go into effect when the Kentucky Supreme Court entered an order adopting such law; however, the Supreme Court never entered such order and in 1992 said section 93 was repealed by § 31 of 1992 Ky. Acts ch. 324. In 1992 Ky. Acts ch. 324 (HB 241) the General Assembly amended certain sections of KRS Chapter 422A, and in § 34 of such Act directed that the Rules be codified as a separate part of the Kentucky Revised Statutes and not as a chapter thereof, and further directed the Reviser of Statutes to renumber the provisions of the KRS Chapter 422A into "this separate entity in a manner consistent with the numbering found in the Federal Rules of Evidence." Therefore, the Kentucky Rules of Evidence as enacted by 1990 Ky. Acts ch. 88, as amended by 1992 Ky. Acts ch. 324, have been renumbered by the Reviser of Statutes pursuant to § 32 of 1992 Ky. Acts ch. 324 as the Kentucky Rules of Evidence, KRE Rule 101 to Rule 1104. Said Rules became effective July 1, 1992 and are compiled in the August, 1992 Supplement to the Kentucky Rules Annotated 1992/1993 Edition.

While the 1990 Act incorporated all Federal Rules of Evidence in its enactment, the Supreme Court initially chose not to adopt Rules 406, 502, and 704. However, KRS 422A.0406 (1990 Ky. Acts ch. 88 (HB 214) § 16) became Kentucky Rule of Evidence 406 (Habit; routine practice) by Supreme Court Order 2006-06, eff. 7-1-06. KRE 406 History.

been formulated." Lawson, *supra*, § 2.15[1], at 88 (quoting *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343 (3rd Cir. 2002), and Fed. R. Evid. 403, Advisory Committee's Note, respectively).

As our evidentiary rules go, KRE 403 is perhaps the least compatible with any bright-line application. *Woolum*, 329 S.W.3d at 288-89 (rejecting a bright-line analysis in favor of "the flexible, case-by-case approach required by KRE 403"; internal quotation marks and citation omitted). In effect, KRE 403 is a sort of exclusionary rule of last resort.

For these reasons, and for the moment, we set aside our analysis under KRE 403 in favor of the specific rules of evidence that are offered as possible alternative reasons for affirming the circuit court. The first is KRE 602.

KRE 602[10] "limits a lay witness's testimony to matters to which he has personal knowledge[.]" *Mills v. Commonwealth*, 996 S.W.2d 473, 488 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010). The crux of KRE 602 is that, as a foundation, a witness must possess first-hand or personal knowledge of the facts of a matter to which he will testify. In other words, lay witness testimony must be based upon his own knowledge or perceptions. *See Young v. Commonwealth*, 50 S.W.3d 148, 170 (Ky. 2001).

Personal knowledge is that which the witness perceives through the use of his physical senses – that which is heard, felt, seen, smelled, or tasted. *See*

[10] KRE 602 states: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of KRE 703, relating to opinion testimony by expert witnesses."

Commonwealth v. Diebold, 202 Ky. 315, 259 S.W. 705, 706 (1923) (explaining "personal knowledge [is] received and experienced through one of the five senses[.]"). The parties vigorously dispute whether the detective cleared KRE 602's personal-knowledge hurdle.

Newkirk contends Detective Lewis was not standing outside near the window of the victim's apartment to personally observe, in real time, a Caucasian male wearing certain clothing enter Isaac's apartment on November 7, 2010. Newkirk posits that the Commonwealth cannot establish the requisite foundation of personal knowledge necessary under KRE 602 because the detective only observed the event after the fact on the apartment complex surveillance video.

In support, Newkirk cites *Harwell v. Commonwealth*, 2011 WL 1103112 (Ky. March 24, 2011)(2009-SC-000333-MR).[11] As in our case, *Harwell* dealt with a crime captured on surveillance videotape. Unlike our case, the videotape was available at trial. Three separate segments of videotape were part of the Commonwealth's case, but only segments one and two were offered into evidence. Two women – the victim and a witness – testified relative to the second and third segments of the videotape.[12] Neither was present when the recorded events occurred. *Harwell*, 2011 WL 1103112, at *9 - *10.

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[11] *Harwell* is cited pursuant to CR 76.28(4)(c) allowing citation to an unpublished decision "if there is no published opinion that would adequately address the issue before the court."

[12] We will discuss the Supreme Court's analysis of testimony offered by these women relative to the third segment of videotape below, in the section addressing the best evidence rule, KRE 1002.

The women's testimony regarding the second segment was deemed improper under KRE 602. There are actually two aspects to this ruling. The first is that neither woman had personal knowledge of the perpetration of the crime itself; therefore, under KRE 602, they could not testify as to that matter. Second, this same lack of personal knowledge also disqualified them from offering any *simultaneous commentary* regarding the second segment of videotape – evidence that was both available and admissible as proof. Only "a witness who was present when the recorded events occurred may 'narrate,' *i.e.*, testify from personal recollection while the tape plays[.]" *Id.* at *9 (citing *Gordon v. Commonwealth*, 916 S.W.2d 176, 179-80 (Ky. 1995)).

Applying this rationale from *Harwell* tells us only that Detective Lewis lacked the personal knowledge to present eyewitness testimony about the crime, and that he could not have provided simultaneous commentary to the videotape if it had been admitted into evidence. The Commonwealth did not offer testimony of this kind. Therefore, we find Newkirk's argument under this analysis unpersuasive.

That is not to say the line of simultaneous-commentary cases has nothing to offer our analysis. We infer from them an important principle – a witness's testimony about a videotape is admissible on grounds independent of those that make the videotape itself admissible. The only prerequisite beyond relevancy is that such testimony be based on personal knowledge and be in compliance with

KRE 701.[13] *Mills*, 996 S.W.2d at 488. With that principle in mind, we move on to the Commonwealth's argument.

The Commonwealth asserts that the matter about which Detective Lewis would testify is the personal knowledge he gained from observing and perceiving the videotape before it was destroyed. His testimony would simply be a recounting of the facts of his actual observation. According to the Commonwealth, he observed a video depicting a Caucasian male wearing blue jeans and a gray long-sleeve shirt who entered an apartment through a window the male pried open with tools. We cannot accept the illogic of Newkirk's position that the detective did not have personal knowledge of what he saw on the videotape. And yet there is a dearth of Kentucky case law directly on this issue.

The Commonwealth, however, cites a persuasive case on this point from a sister state – *State v. Rollins*, 257 P.3d 839 (Kan. App. 2011). In *Rollins*, the appellate court affirmed the trial court's order admitting testimony about a "destroyed videotape . . . which ha[d] not been able to be reviewed by the defense." *Id.* at 847. As in our case, defense counsel objected to admission of the evidence on hearsay and confrontation clause grounds, but, also as in our case, abandoned those arguments on appeal in favor of an argument that a proper foundation had not been laid. *Id.* The appellate court rejected that argument as we do, stating:

> [The witness] perceived or observed the surveillance videos through his own senses and remembered or

[13] See discussion of KRE 701, *infra*.

> recalled the observation or perception. The State established [the witness's] testimony was based on personal knowledge of the surveillance videos' contents and, consequently, a proper foundation was laid for [the witness's] testimony about what he observed on the videos.

Id. at 848. We note here that Newkirk, citing *Rollins*, acknowledges that "a few . . . jurisdictions upheld the admission of testimony concerning deleted surveillance videotape." (Appellee's brief at 15) (also citing *State v. Nelsen*, 183 P.3d 219, 225-26 (Or. App. 2008)).

After careful consideration, we find the Commonwealth's position persuasive. The detective personally viewed the surveillance videotape and, utilizing his senses, perceived the contents of the videotape; he is capable of expressing his observations to a jury.

Based on the foregoing, we hold that KRE 602 does not prohibit Detective Lewis from testifying to facts he perceived from his viewing of the surveillance video. This reasoning applies equally to other witnesses who may testify as to the surveillance video's contents, such as Isaac or the apartment complex's manager.

While KRE 602 addresses testimony about facts perceived by a witness, KRE 701[14] and 702[15] address opinion testimony of lay persons and experts, respectively. Newkirk offers these rules as an alternative reason for affirming the circuit court. We do not find the Commonwealth's proposed testimony in violation of either KRE 701 or 702.

First, the Commonwealth never indicated that Detective Lewis would be testifying as an expert; therefore, KRE 702 is inapplicable to our analysis. In fact, to be admissible under KRE 701, lay opinion testimony cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." KRE 701(c).

Furthermore, the Commonwealth indicates that it intends to elicit only fact testimony from the detective and not opinion testimony. To the extent the Commonwealth abides by that representation, any argument Newkirk makes under either KRE 701 or 702 is necessarily impotent.

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[14] KRE 701 states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(a) Rationally based on the perception of the witness;

(b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and

(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

[15] KRE 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case."

True, "[d]emarcation between fact and opinion evidence is often obscure, for many times it is difficult to say where fact leaves off and opinion begins." *Morton's Adm'r v. Kentucky-Tennessee Light & Power Co.*, 282 Ky. 174, 138 S.W.2d 345, 347 (1940). Fortunately, our Supreme Court's analysis of lay opinion testimony makes this demarcation between fact and lay opinion testimony less critical.

Under the common law, the rules regarding lay opinion were generally exclusionary in nature. *Arnett v. Dalton*, 257 S.W.2d 585, 586 (Ky. 1953) ("It is the general rule that a witness should confine his testimony to facts within his knowledge and that he should not be allowed to express an opinion."). That is no longer so. KRE 701 "reformulates [pre-Rules lay opinion law] and states the law as an inclusionary rule[.]" Lawson, *supra*, § 6.05[1][b], at 413. As our Supreme Court said:

> The adoption of KRE 701 in this Commonwealth signaled this Court's intention to follow the modern trend clearly favoring the admission of such lay opinion evidence. KRE 701 reflects the philosophy of this Court, and most courts in this country, to view KRE 701 as more inclusionary than exclusionary when the lay witness's opinion is rationally based on the perception of the witness and is helpful to the jury or trial court for a clear understanding of the witness's testimony or the determination of a factual issue.

Hampton v. Commonwealth, 133 S.W.3d 438, 440-41 (Ky. 2004) (quoting *Clifford v. Commonwealth*, 7 S.W.3d 371, 377 (Ky. 1999) (Johnstone, J., concurring)).

Rather than excluding lay opinion testimony, KRE 701, "read in conjunction with KRE 602," *Mills*, 996 S.W.2d at 488, actually prescribes the conditions which, if met, would allow the detective, or anyone who viewed the videotape before it was destroyed, to express a lay opinion. As the Supreme Court said, if lay witness

> testimony . . . comprise[s] opinions and inferences that were rationally based on [the witness's] own perceptions of which he had personal knowledge [and if that testimony is] helpful to the jury [such testimony does] not violate the limitations of KRE 701 and KRE 602.

Id. at 488-89.

Morgan v. Commonwealth, 421 S.W.3d 388 (Ky. 2014), demonstrates how a lay person who has viewed a videotape can express an opinion, based on personal knowledge as required by KRE 602, as to the identity of an individual whose image is captured on that videotape. In that case,

> three witnesses testified that, although they believed Morgan was the person depicted in the store surveillance video . . . , they were uncertain. . . .
>
> Morgan . . . asserts that the testimony of these three witnesses violated KRE 701 and KRE 602 by invading the province of the jury as the fact finder. . . . [T]hese three witnesses were not present during the robbery. Rather, they were Morgan's acquaintances who were familiar with his appearance at the time of the robbery.
>
> KRE 701 limits opinion testimony by a lay witness to that which is "[r]ationally based on the perception of the witness; [and] . . . [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue." KRE 701(a)-(b). In addition, KRE 602 requires a witness to have personal knowledge before being allowed

> to testify about a subject. . . . [T]he three witnesses merely identified Morgan as the man present in the surveillance video . . . . We conclude that this testimony was rationally based on the witnesses' personal knowledge from prior exposure to Morgan's physical appearance.

Morgan, 421 S.W.3d at 391-92; *see also Stopher v. Commonwealth*, 57 S.W.3d 787, 799-800 (Ky. 2001) (Under "KRE 701, . . . [witness's] observation of Appellant on television rather than in person was not germane to the question of admissibility. She certainly could have expressed the opinion that Appellant looked different than he normally looked."). Isaac would have testified that she believed the person in the videotape resembled Newkirk's brother, with whom she was acquainted. This identification led Detective Lewis to investigate the brothers' whereabouts on the day of the crime which, in turn, led to a second surveillance videotape from the Circle K convenience store. All of this testimony would have aided the jury in understanding how the detective's investigation led to charging Newkirk with a crime.

While no published Kentucky appellate opinion has addressed the permissible scope of opinion testimony regarding the contents of a lost or destroyed videotape,[16] several opinions do address the independent admissibility of testimony – even lay opinion testimony – presented while an available videotape is played for the jury. *See*, *e.g.*, *Cuzick v. Commonwealth*, 276 S.W.3d 260 (Ky.

[16] However, we do have the unpublished opinion of *Haley v. Commonwealth*, 2013 WL 4508177 (Ky. App. Aug. 23, 2013)(2011-CA-001987-MR). We discuss this opinion in the section addressing the applicability of the best evidence rule, KRE 1002.

2009); *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010); *Milburn v. Commonwealth*, 788 S.W.2d 253 (Ky. 1989). Such "simultaneous commentary" was deemed admissible despite the fact that, in part, "it comprised opinions and inferences that were *rationally based on the officer's own perceptions* of which he had personal knowledge . . . ." *Cuzick*, 276 S.W.3d at 265 (quoting *Mills*, 996 S.W.2d at 488 (brackets and internal quotation marks omitted; emphasis added)). As the Supreme Court said,

> the fulcrum of the matter upon which this issue [lay opinion testimony regarding a videotape] turns, is whether the witness has testified from personal knowledge and rational observation of events perceived and whether such information is helpful to the jury. In short, does the testimony comply with the rules of evidence?

Cuzick, 276 S.W.3d at 265. "[T]he common thread uniting our decisions on narrative-style testimony of audio and video evidence is that such testimony, like any other, must comport with the rules of evidence." *Id.* That same thread also runs through the decision we make in this case.

If a lay witness providing simultaneous commentary may draw inferences and express opinions, there is no reason to exclude the inferences and opinions of a lay witness testifying about a lost or destroyed videotape, as long as the ruling, in all other respects, "comport[s] with the rules of evidence." *Id.* Our reasoning and conclusion parallels that of *State v. Thorne*, 618 S.E.2d 790, 795 (N.C. App. 2005) (officer's opinion testimony "that he had observed defendant's gait [in person and]

on the videotape several times, and perceived the two gaits to be similar . . . was not barred by Rule 701").

We therefore conclude that neither KRE 701 nor 702 will serve as an alternative basis for affirming the circuit court's suppression of this evidence.

We now turn to Newkirk's argument that both the videotape and the detective's testimony about the videotape constitute inadmissible hearsay under KRE 801 and 802. We will consider KRE 801 and 802 in our quest to find an alternative basis for affirming the circuit court, despite the fact Newkirk has effectively abandoned his hearsay argument on appeal.

Hearsay is only mentioned in Newkirk's brief in response to the Commonwealth's citation to cases from Georgia and Indiana; he argues we should disregard them because "defense counsel *only* objected on hearsay grounds[.]" (Appellee's brief at 15; emphasis added). The cases are *Hammock v. State*, 715 S.E.2d 709 (Ga. App. 2011), and *Pritchard v. State*, 810 N.E.2d 758, 760-61 (Ind. App. 2004). We find them directly on point, instructive, and persuasive.

In *Hammock v. State*, the defendant was videotaped at a convenience store cashing a check, then stealing a car parked near the gas pump. *Hammock*, 715 S.E.2d at 710. The victim, the store manager, and a police officer watched the videotape that recorded the crime. "All three of them identified Hammock as the man shown on the videotape." *Id.* As in our case, the videotape was lost when it was recorded over and the officers had not been able to make a copy. *Id.*

Hammock argued the videotape was hearsay and so was the testimony of those who viewed it. *Id.* The Georgia court disagreed, saying:

> The argument is without merit because neither the videotape nor the witnesses' testimony about what they observed on the tape was hearsay.
> . . . .
> Here, the witnesses did not offer any testimony about what someone else said or wrote outside of court. Rather, they testified about their personal observations of the conduct that appeared on the videotape. *See Davis v. Civil Svc. Comm., etc. of Philadelphia*, 820 A.2d 874, 879, n. 3 (Pa. 2003) (store security videotape not hearsay because nonverbal conduct depicted not intended as an assertion); *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788, 794(II)(A) (1995) (surveillance videotape not a statement). Because this testimony did not ask the jury to assume the truth of out-of-court statements made by others, and instead "the value of [the] testimony rested on [the witnesses'] own veracity and competence, the testimony was not hearsay."

Id. at 710-11; *see also Pritchard*, 810 N.E.2d at 760-61 ("[O]nly question is whether . . . the video recording itself constitutes hearsay. We can only conclude that it does not."). Using language paralleling *Hammock*, and citing much of the same authority, our own Supreme Court said in *Harwell*, *supra*, that:

> A statement is defined in part as "nonverbal conduct of a person, if it is intended by the person as an assertion." KRE 801(a); Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.05(4) (4th ed.2003) . . . . In this case, [the defendant's] conduct was not intended as an assertion, and thus the videos were not hearsay. *Davis v. Civil Service Com'n of the City of Philadelphia*, 820 A.2d 874, 879 n. 3 (Pa. Commw. Ct. 2003) (holding a surveillance videotape of a store showing defendant stealing was not hearsay "because nonverbal conduct of a person is only hearsay if it is intended by the person as an assertion."); *McDougal v. McCammon*, 193 W.Va. 229,

> 455 S.E.2d 788, 794 (W.Va. 1995) (holding a surveillance videotape of a plaintiff was not a "statement" and thus was not hearsay).

Harwell, 2011 WL 1103112, at *9; *see also* KRE 801(a)(1), (2) (defining "statement" as "an oral or written assertion; or . . . [n]onverbal conduct of a person, if it is intended by the person as an assertion."). We have no doubt that the videotape is not hearsay.

Having thus concluded that the videotape is not hearsay, we are equally convinced that the detective's testimony about the videotape is not hearsay. KRE 801(c) defines hearsay as "a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis added). Since the videotape is not a statement, Detective Lewis's testimony about the videotape cannot be hearsay. As has been stated several times, the detective simply would be testifying to his own personal knowledge of the contents of the videotape.

Neither KRE 801 nor KRE 802 affords any alternative basis for affirming the circuit court's order.

Finally, we reach a rule of evidence designed for the circumstances of this case – the best evidence rule as codified in KRE 1002[17] and as qualified by

[17] KRE 1002 states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute."

KRE 1001,[18] 1004,[19] and 1008.[20] As a preliminary point, we note that the videotape, for purposes of the rule, is a photograph. KRE 1001(2)("'Photographs' include . . . video tapes . . . ."). Therefore, what our case law says about photographs relative to the best evidence rule also applies to videotapes.

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[18] KRE 1001 states:

> For purposes of this article the following definitions are applicable:
>
> (1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
>
> (2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
>
> (3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
>
> (4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

[19] KRE 1004 states:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
>
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
>
> (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing.

[20] KRE 1008 states:

> When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of KRE 104. However, when an issue is raised:

The best evidence rule only comes into play because the Commonwealth desires to introduce proof of the videotape's contents. Lawson, *supra*, § 11.05[3][b], at 833 (quoting Evidence Rules Study Committee, Kentucky Rules of Evidence – Final Draft, pp. 109-110 (Nov. 1989)) ("The rule is not often applicable to photographic [and therefore videotape] evidence – only when an offering party is trying to prove the contents of photographs [or videotape] . . . ."). "To prove the content of a . . . photograph [including a videotape], the original . . . photograph is required . . . ." KRE 1002. When in *Harwell* our Supreme Court rejected testimony about a videotape that was available but not offered into evidence, KRE 1002 was the reason.

The reader will recall from our earlier discussion of *Harwell* that two women testified about the second and third segments of videotape that captured the images of a crime. *Harwell*, 2011 WL 1103112, at *9 - *10. The third segment was available, but was never offered into evidence. Testimony of the witnesses who viewed the videotape was held inadmissible as violative of the best evidence rule. As the Supreme Court saw it:

> Testimony regarding the third segment of the video violated the best evidence rule where the Commonwealth sought to prove the contents of the video. . . .

> (a) Whether the asserted writing ever existed;
> (b) Whether another writing, recording, or photograph produced at the trial is the original;
> (c) Whether other evidence of contents correctly reflects the contents,the issue is for the trier of fact to determine as in the case of other issues of fact.

> The best evidence rule requires a proponent who seeks to *prove the contents* of a . . . photograph to produce the original. KRE 1002 (emphasis added). The contents of a photograph are "sought to be proved when it has probative value that is independent of the testimony of witnesses and thus is offered as a 'silent witness.' For example, the rule would apply to . . . photographs used to prove details of objects, scenes, or events not directly observed by the naked eye of witnesses." Lawson, *supra* § 11.05(3). . . . [the victim] . . . testified about the contents of that segment . . . and, per the best evidence rule, the video should have been produced. Lawson, *supra*.

Harwell, 2011 WL 1103112, at *9 - *10.

The bottom line is this: when an original photograph or videotape is available, the original is the evidence that must be admitted; alternative or substitute proof of an available photograph or videotape is inadmissible.[21]

Fortunately for the Commonwealth in this case, there are exceptions to the best evidence rule. KRE 1002 ("original . . . is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute"). The exception applicable to the circumstances of this case is found in KRE 1004(1) which says "[t]he original is not required, and other evidence of the contents of a . . . photograph [including a videotape] is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" KRE 1004(1). A few requirements must be satisfied before this exception will apply.

[21] We decline to discuss duplicate copies as irrelevant in this case.

First, the originals must have been lost or destroyed. This is "a condition of fact . . . for the court to determine in accordance with the provisions of KRE 104[22] ." KRE 1008. On this record, Newkirk has not challenged the Commonwealth's representation that the videotape has been written over, *i.e.*, destroyed. Furthermore, the circuit court has effectively determined this condition of fact by stating: "In essence, the ruling is this: The tape is not available . . . ." (VR 9/06/11; 4:50:16).

A second condition of fact for the court to determine, prior to admitting other evidence of a videotape's contents, is whether "the proponent lost or destroyed them in bad faith[.]" KRE 1004(1). As we discussed earlier, there is nothing in the record to suggest the Commonwealth engaged in bad faith with regard to this evidence, and the circuit court said as much, stating that the

[22] KRE 104 is captioned "Preliminary questions" and states:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) of this rule. In making its determination it is not bound by the rules of evidence except those with respect to privileges.
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
> (c) Hearing of jury. Hearings on the admissibility of confessions or the fruits of searches conducted under color of law shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.
> (d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.
> (e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility, including evidence of bias, interest, or prejudice.

videotape was unavailable "through no fault of the Commonwealth." (VR 9/06/11; 4:50:30).

When this case is again in the circuit court, if "an issue is raised [by Newkirk w]hether the asserted [original videotape] ever existed [or w]hether other evidence of contents[, *e.g.*, Detective Lewis's testimony] correctly reflects the contents [of the original videotape], the issue is for the trier of fact[, *i.e.*, the jury] to determine as in the case of other issues of fact." KRE 1008(a), (c).

Our description of the workings of the best evidence rules is plainly illustrated in an unpublished opinion of this Court, *Haley v. Commonwealth*, 2013 WL 4508177 (Ky. App. Aug. 23, 2013)(2011-CA-001987-MR). *Haley* was decided under the palpable error analysis of Kentucky Rules of Criminal Procedure (RCr) 10.26. However, the facts and legal analysis are consistent with our opinion today. Because they are, and because there is no other authority on point, we have considered and are persuaded by the reasoning in *Haley*.

In *Haley*, a Kentucky State Trooper viewed a videotape recorded by a surveillance camera mounted in a pawn shop where stolen property was recovered. The trooper could identify the appellant, Haley, in the videotape, but the video was subsequently recorded over. The circuit court allowed the trooper's testimony as other evidence of the contents of the videotape, specifically Haley's presence in the pawn shop. Haley contended:

> that the circuit court erred by admitting into evidence certain testimony of Kentucky State Trooper Greg Dukes. Appellant claims it was prejudicial error for

> Trooper Dukes to testify concerning the contents of a surveillance videotape taken at the Logan County pawn shop where the stolen rings were recovered. Appellant argues that the videotape was not produced at trial and that Trooper Dukes' testimony was inadmissible per Kentucky Rules of Evidence (KRE) 1002. Under KRE 1002, appellant asserts that the contents of a recording may only be proved by the original recording or a copy of the recording. . . .
>
> Under KRE 1004(1), the original videotape recording is not required if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" Here, the evidence revealed that the original surveillance videotape was destroyed before a copy could be made. It appears that the original surveillance videotape was inadvertently rewound and copied over by the pawn store. Thus, the destruction of the original surveillance videotape was not due to bad faith but rather was a mistake.
>
> . . . .
>
> Upon the whole, we are unable to conclude that the admission of Trooper Dukes' testimony as to the surveillance videotape violated a substantial right resulting in manifest injustice per RCr 10.26. We, thus, reject this contention of error.

Haley v. Commonwealth, 2013 WL 4508177, at *2 - *3.

Haley is consistent with other jurisdictions applying evidentiary rules indistinguishable from our own. Illustrative of those other jurisdictions is Oregon. Newkirk himself cites an Oregon case, *State v. Nelsen*, 183 P.3d 219 (Or. App. 2008), which he admits supports the Commonwealth's argument that "the trial court erred in preventing the state from introducing testimony about the contents of a lost recording." (Appellee's brief at 15) (citing *Nelsen*, 183 P.3d at 225-26). In

Nelsen, as in our case, the police were "unable to make a copy [and] the video footage was no longer available because, apparently, the video system had automatically recorded over the footage" of a robbery at a laundromat. *Nelsen*, 183 P.2d at 445. Similar to the facts of our case, in *Nelson* "the state sought to introduce . . . the testimony of Rees [the victim] and Byram [the police officer], who would have described what they had seen on the video. Defendant moved *in limine* to exclude . . . the testimony" and the trial court granted the motion. *Id.* at 221. The appellate court reversed saying, "We conclude, contrary to the trial court's understanding, that, because the original videotape was recorded over while in the possession of a third party (the laundromat owner, Rees), who did not act at the state's direction or was not otherwise an agent of the state, the state did not lose or destroy the videotape." *Id.* at 223 (emphasis omitted). "Consequently, [Rule] 1004(1) applies, and the best evidence rule does not preclude Byram's and Rees's testimony describing the contents of the surveillance videotape." *Id.* at 224.

Nelsen is but one of many cases to apply this best evidence rule exception to similar facts; they uniformly reach the conclusion we reach today.[23]

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[23] Among other things to be learned from the following cases is that accidental overwriting of surveillance video footage is not an infrequent occurrence. *Harney v. City of Chicago*, 702 F.3d 916, 922 (7th Cir. 2012) (citing FRE 1004, court found that though defendants were "unable to produce the original or copy of the compilation video [witness] viewed . . . , [witness] himself was competent to testify as to the portions of the two original videotapes he viewed[.]"); *U.S. v. Ortiz*, 2013 WL 101727 (E.D. Pa. Jan. 7, 2013)(No. 11-251-08), *3 ("[I]f the Court finds that the Helen Street pole-camera footage was lost, and not by the bad faith of the Government, testimony regarding the footage is not barred by the Best Evidence Rule."); *State v. Timothy P.*, 2013 WL 6662708 (N.M. App. Nov. 21, 2013)(No. 32,130), *8 (applying Rule 1004, "officers' testimony regarding [misplaced video's] content was not admitted in error."); *U.S. v. Clark*, 2011 WL 6019313 (A.F. Ct. Crim. App. Aug. 15, 2011) (ACM 37494) , *2 ("military [trial] judge found no bad faith . . . in the loss of the video surveillance recordings and permitted secondary evidence in the form of testimony[.]"; affirmed); *People v. White*, 2007 WL 778136 (Mich. App.

We conclude, pursuant to KRE 402 and 1004(1), that the testimony of Detective Lewis (and anyone who viewed the videotape) is admissible other evidence of the contents of the destroyed videotape. Only one other rule of evidence need be considered – KRE 403.

Newkirk says nothing more in his brief about KRE 403[24] than that "the testimony [of Detective Lewis] would have been unduly prejudicial under KRE 403." (Appellee's brief at 13). Before the circuit court, Newkirk said even less; in fact, he said nothing at all. The Commonwealth asked the circuit court whether its ruling was based on KRE 403 and the court refused to "be pinned down" on KRE 403. (VR 9/07/11; 10:51:15).

March 15, 2007) (No. 266555) ,*2 ("original video recording was destroyed [and] testimony regarding the contents of the video recording was admissible under [Rule] 1004."); *State v. Thorne*, 618 S.E.2d 790 (N.C. App. 2005) ("[O]riginal [videotape] is lost or destroyed [and officer's] testimony[] is expressly permitted under Rule 1004[.]"); *Domingo v. Boeing Employees' Credit Union*, 98 P.3d 1222, 1226 (Wash. App. Div. 1, 2004) ("[V]ideotape was unavailable and thus other evidence of its contents – in this case, [witness's] testimony about what it contained – is admissible under [Rule] 1004."); *Commonwealth v. Dent*, 837 A.2d 571, 590 (Pa. Super. 2003) ("unable to produce the videotape at trial because the store surveillance system was computerized and recycled itself automatically[, store manager's] testimony regarding the videotape . . . was properly admitted at trial[.]"); *Wood v. State*, 18 S.W.3d 642, 647 (Tex. Crim. App. 2000) (after defendant's brother "destroyed the [video]tape with a blow torch . . . the State was authorized to prove its contents through 'other evidence.' *See* Tex.R.Crim. Evid. 1004. . . . [T]rial court did not abuse its discretion in admitting [witness's] testimony describing what he had viewed on the tape."); *State v. Johnson*, 704 So.2d 1269, 1273-74 (La. App. 2 Cir. 1997) ("incident was captured by an in-store camera on videotape, which was accidentally erased after being viewed by three non-party witnesses who testified at trial to seeing these events clearly on the videotape [and therefore] other evidence of the contents of a writing, recording or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.").

[24] KRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

From our reading of the record, the circuit court expressly declined to rule on the basis of KRE 403. We believe there was good reason for that because, on this record, we see no basis for finding that the probative value of the detective's testimony "is *substantially outweighed* by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403 (emphasis added). As many courts have said "[e]xclusion of evidence under Rule 403 . . . is an *extraordinary remedy* that should be used *sparingly*." Lawson, *supra*, § 2.15[2][b], at 90 (citation and internal quotation marks omitted).

Newkirk made a prejudice argument under the Confrontation Clause that we rejected, and we reject a prejudice argument to the extent it was presented under KRE 403 as well. "[T]he jurors' inability to view the lost videotape does not, *per se*, result in a violation of Rule 403." *Thorne*, 618 S.E.2d at 795. If that were not so, the express authorization in KRE 1004 to admit other evidence of the videotape would be meaningless.

Furthermore, it is obvious to us that the probative value of the detective's testimony is great. What he observed on the videotape initiated his investigation, led to Newkirk's brother, then to the Circle K videotape, and eventually to Newkirk's indictment. To *substantially outweigh* the probative value of this evidence, the prejudicial effect would have to be great indeed. There has been no showing on this record approaching that degree of prejudice. Therefore, we cannot affirm the circuit court's order on the alternative basis of KRE 403.

We know of no other section of the Kentucky Rules of Evidence upon which we could affirm the circuit court's order. Therefore, we turn to the fourth category of rules that exclude otherwise admissible evidence – "other rules adopted by the Supreme Court of Kentucky." KRE 402.

(d) No other rule adopted by our Supreme Court justifies excluding the evidence.

Evidence otherwise admissible pursuant to KRE 402 may also be deemed inadmissible "by other rules adopted by the Supreme Court of Kentucky." KRS 402.

The Supreme Court adopts rules of different sorts. Other than the Kentucky Rules of Evidence which we have already addressed, the Court is responsible for adopting and amending the Kentucky Rules of Criminal Procedure (RCr), the Kentucky Rules of Civil Procedure (CR), and Rules of the Supreme Court (SCR). We have not been directed to any of those rules as a basis upon which testimony about the videotape should be excluded. Neither has our own search of those rules yielded such a basis.

In our attempt to find a basis for affirming the circuit court, we have considered another way the Supreme Court has concluded it may promulgate rules. In an entirely different context, our Supreme Court has interpreted a phrase from KRS 22A.020(2) – "rules promulgated by the Supreme Court" – as including "rulings of the Supreme Court of Kentucky announced in published decisions." *Commonwealth v. Farmer*, 423 S.W.3d 690, 694 fn2 (Ky. 2014) (citation and internal quotation marks omitted). That analysis was undertaken in the context of

the jurisdiction of the Court of Appeals to hear interlocutory appeals. However, the Supreme Court has already held in *Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001), that this kind of "rulemaking" cannot affect admissibility determinations under KRE 402.

In *Garrett*, after quoting KRE 402 in its entirety, the Supreme Court said:

> This general rule of inclusion [KRE 402] contains no exception for preexisting case law. The Commentary [to the Kentucky Rules of Evidence] explains that the phrase "other rules adopted by the Supreme Court of Kentucky" refers to "rules of court promulgated by the Supreme Court of Kentucky," *i.e.*, the Civil and Criminal Rules of Procedure. Commentary to KRE 402, Evidence Rules Study Commission (Final Draft 1989). . . . [T]he United States Supreme Court analyzed the effect of the adoption of the Federal Rules on preexisting case law [and] concluded that when there is an adopted Rule of Evidence that speaks to the contested issue, the adopted Rule occupies the field and supersedes the former common law interpretation.[25] [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587-89, 113 S.Ct. at 2794, 125 L.Ed.2d 469 (1993)]. Preexisting common law remains only as a body of knowledge existing "in the somewhat altered form as a source of guidance in the exercise of delegated powers." *Id.* at 588, 113 S.Ct. at 2794 (quoting E. Cleary, [Reporter for the FRE Advisory Committee and principal drafter of the Federal Rules of Evidence], *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L.Rev. 908, 915 (1978)). *See also* [R.] Lawson, [*Interpretation of the Kentucky Rules of Evidence—What Happened to the Common Law?* 87 Ky. L.J. 517, 560-61 (1999)].

Garrett, 48 S.W.3d at 13-14.

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[25] "The Kentucky Rules of Evidence were drafted with the intent of conformance with the Federal Rules." *Garrett*, 48 S.W.3d at 13.

We conclude, therefore, that no common law rule can prohibit the admission of the testimony offered by the Commonwealth.

Having found the circuit court's order arbitrary and unsupported by sound legal principles, and further having found no alternative grounds for affirming the court's ruling to exclude other evidence of the destroyed videotape, we reverse the circuit court's order dismissing the case.

B. The Commonwealth's Request for a Continuance

The Commonwealth also argues the circuit court abused its discretion when it declined to grant the Commonwealth a continuance. In view of our reversal of the case on the basis of the circuit court's erroneous evidentiary ruling, we find this question moot and decline to address it.

IV. Conclusion

We find the circuit court's ruling regarding the admissibility of testimony about the lost or destroyed videotape was error and we reverse the circuit court's ruling and, therefore, reverse the September 14, 2011 order dismissing the case.

ALL CONCUR.

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