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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2021-SC-0441-MR

REPLY BRIEF

RICO LAMONT CAVANAUGH

APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HON. C.A. WOODALL III, JUDGE
INDICTMENT NO. 19-CR-00057

COMMONWEALTH OF KENTUCKY

APPELLEE

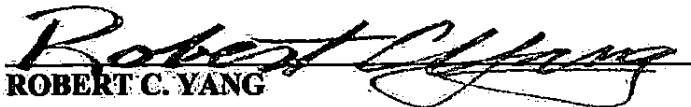
REPLY BRIEF FOR APPELLANT, RICO LAMONT CAVANAUGH

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to Hon. C.A. Woodall III, Chief Circuit Judge, Lyon County Judicial Center, P.O. Box 790, Eddyville, KY 42038-0790; Hon. Carrie Ovey-Wiggins, Commonwealth's Attorney, 248 Commerce Street, P.O. Box 679, Eddyville, KY 42038; to Hon. Michael L. Thompson, 15744 Fort Campbell Blvd, Oak Grove, KY 42262; and to be served by state messenger mail to Hon. Brett R. Nolan, Principal Deputy Solicitor General, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601 on July 26, 2022. The record on appeal has not been checked out from the Clerk of this Court for the preparation of this Reply Brief.


ROBERT C. YANG

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Purpose of Reply Brief

The purpose of this reply brief is to respond to arguments set forth in Appellee's brief. Any issue not specifically addressed herein should not be construed as an adoption of or concession to Appellee's position. Rather, Appellant believes his original brief has sufficiently and correctly addressed the matter.

Argument 1:

The Commonwealth cites to Ky. Const. § 26A that the victim's rights, including the right to be present, must "be respected and protected by law in a manner no less vigorous than the protections afforded to the accused." (Appellee's Brief at 9). Yet, the Commonwealth should have, but failed to, discuss the defendant's presumption of innocence, a right so fundamental, it's been discussed in biblical and Greco-Roman terms. *Coffin v. U.S.*, 156 U.S. 432, 453-454 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law[,] and "Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens[,] and "Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration..."). In comparison, there is no comparable victim's right to the defendant's presumption of innocence. The reason is clear. From time immemorial, courts have recognized that "it was better to let the crime of a guilty person go unpunished than to condemn the innocent." *Coffin*, 156 U.S. at 455.

Further, the right to be present for a defendant is not absolute. In *Commonwealth v. McGorman*, 489 S.W.3d 731, 738-739 (Ky. 2016), this Court acknowledged that constitutional right is waivable. While unstated in

the opinion, the Commonwealth undoubtedly agreed with the Court's holding that a defendant's right to be present was not absolute. As such, a victim's right to be present is equal to the defendant's, *i.e.*, not absolute.

Instead, the Commonwealth urges this Court to make it absolute and follow Alaskan law that held "victims may be allowed to testify after observing trial *even if* there was evidence that the witness had 'tailor[ed] her testimony to corroborate the testimony of a previous witness.'" (Appellee's Brief at 9, quoting (*Proctor v. State*, 236 P.3d 375, 379 (Alaska Ct. App. 2010) (emphasis in original)). Certainly, this Court is free to choose to follow Alaskan law; however, Mr. Cavanaugh urges this Court to adopt a commonsense approach that prevents a witness from changing their testimony to conform with others. As this Court has stated, "the purpose of [the separation of witnesses] rule is to ensure the integrity of the trial by denying the witness an opportunity to alter testimony in the light of that presented by other witnesses." *Epperson v. Commonwealth*, 197 S.W.3d 46, 58 (Ky. 2006). Missy was the next to last witness for the Commonwealth and she was given free rein to come and go from the courtroom. Alaskan law might permit this; but Kentucky law can and should be better. Having her testify first would not deny her right to be present and preserve a defendant's right to a separation of witnesses.

Similarly, by referring to Missy as the 'victim,' the trial court failed to vigorously protect the defendant's right to have the presumption of innocence.

If this Court believes this argument is unpreserved, Mr. Cavanaugh asks for palpable error review under RCr. 10.26. Nonetheless, Marsy's Law states, "Nothing in this section shall afford the victim party status, or be construed as altering the presumption of innocence in the criminal justice system." Ky. Const. § 26A. By calling her a victim before the jury, the trial court altered that presumption of innocence. This Court has stated that besides the prosecutor, "No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial," *Niemeyer v. Commonwealth*, 533 S.W.2d 218, 222 (Ky. 1976). In this case, both the Commonwealth and the trial court failed to ensure Mr. Cavanaugh received a fair trial. Indeed, the Commonwealth, in opining in its Counterstatement of the Case¹ that this was a "brutal crime," "[t]he facts of this crime are horrific" and Missy's "testimony was haunting" (all without timestamps) continues to actively ignore its strict obligation to pursue the ends of justice. (Appellee's Brief at 1-2).

The Commonwealth's publicly stated goal is, in part, "to protect the Commonwealth from unnecessary government intrusion and to defend the rights of Kentuckians." Kentucky Attorney General Daniel Cameron, "Checking Government Overreach," <https://ag.ky.gov/Priorities/Checking-Government-Overreach/Pages/default.aspx>, last viewed July 25, 2022. Mr. Cavanaugh is a Kentuckian and had his right of presumption of innocence

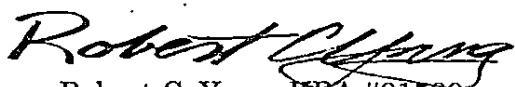
¹ Kentucky Rules of Civil Procedure 76.12(4)(c)(iv) and (4)(d)(iii) requires timestamps "supporting each of the statements narrated in the summary[]" and of the "facts...essential to a fair and adequate statement of the case."

and to a fair trial denied by the trial court's actions. Mr. Cavanaugh asks for the same rights afforded Missy the Commonwealth so vigorously defends.

Conclusion

Based on the above arguments, as well as those arguments contained in Appellant's opening brief, Appellant respectfully requests that this Court reverse the trial court below, remand this case, and provide for all other relief to which he is entitled.

Respectfully submitted,



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