

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

NO. 2015-CA-000702-MR

SAMMY LEE BOGGS

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE THOMAS L. JENSEN, JUDGE  
ACTION NO. 14-CR-00208

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \*

BEFORE: JOHNSON, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: Sammy Lee Boggs (“Boggs”), was found guilty of Rape, First Degree,<sup>1</sup> following a jury trial in Laurel Circuit Court. Boggs’s sole argument on appeal is that the trial court erroneously refused to allow him to introduce the victim’s certified medical records or any testimony related thereto. The medical

---

<sup>1</sup> Kentucky Revised Statutes (“KRS”) 510.040.

records contained the results of three blood alcohol level tests administered to the victim when she sought treatment at the hospital following the alleged rape. Boggs claimed this evidence was relevant because it showed an alcohol level that was totally incompatible with the amount of alcohol the victim claimed to have consumed in the period leading up to the alleged rape and her admission to the hospital. The trial court overruled Boggs's motion to allow introduction of this evidence. It reasoned that the laboratory test results were not admissible because Boggs was unable to produce the emergency room technician(s) who drew the victim's blood for testing. After reviewing the record in conjunction with the applicable legal authorities, we VACATE the judgment of the Laurel Circuit Court and REMAND this matter for further proceedings.

## **I. BACKGROUND**

On May 26, 2013, the alleged victim, M.A., reported that Boggs had sexually assaulted her. Following a police investigation, Boggs was arrested. The Laurel County Grand Jury returned an indictment charging Boggs with Rape, First Degree. A jury trial was held on February 10, 2015. Boggs did not testify at the trial or present any witnesses on his behalf. The relevant evidence presented by the Commonwealth at trial is summarized below.

M.A. testified that she was acquainted with John Osborne because she had done some cleaning for him in the past. On the evening of May 25, 2013,

M.A. went to Osborne's trailer in Laurel County, Kentucky. M.A. was not romantically involved with Osborne, but she had stayed the night at his trailer before and planned to do so that evening. M.A. testified that she arrived at Osborne's trailer early in the evening while it was still daylight. However, she did not deny that she told the investigating officer on July 10, 2013, that she arrived at Osborne's trailer closer to ten in the evening. M.A. admitted that she smoked marijuana at her home prior to going to Osborne's trailer, but denied that she consumed any alcohol beforehand.

When M.A. arrived at Osborne's trailer, Boggs was already present. M.A. stated that she had met Boggs previously, but they were not friends. M.A. testified to drinking a beer and then beginning to drink a second beer retrieved for her by Boggs. Before finishing the second beer, M.A. testified that she began to feel extremely tired and sleepy. She asked Osborne if she could go lay down in his room. He told her that was fine. M.A. took her overnight bag to Osborne's room, shut the door behind her, and laid down on the bed on top of the covers. M.A. testified that Boggs and Osborne stayed behind in the living room to talk and watch television.

M.A. testified that she awoke in the middle of the night, but was unable to open her eyes or move her body. She alleged that it was at this moment that she realized someone was having sex with her. She explained that she could

tell someone was lifting her legs up and could feel that person in her vagina. M.A. stated she did not know who was having sex with her because she could not open her eyes. She next remembers waking up when it became daylight outside. M.A. testified that she was wearing her t-shirt and bra, but someone had removed her pajama bottoms and panties. M.A. saw Boggs, without his shirt, next to her on the bed. She asked Boggs why he had “done this to her,” but he did not respond. She then left the room. At her request, Osborne gave her a ride back to her trailer.

Upon arriving home, M.A. encountered her daughter and relayed the events of the previous night. M.A.’s daughter told her not to take a shower and then called 911. An ambulance transported M.A. to St. Joseph’s Hospital where a “rape kit” analysis was performed. Semen was found and subsequent DNA analysis matched this DNA to Boggs’s DNA profile with the chance of the DNA found in and on M.A. belonging to another individual being one in 150 quadrillion.

Boggs did not testify at trial, but a police detective testified that she interviewed Boggs on July 15, 2013, at the London Police Department. The statement was recorded. This recording was played for the jury. During the interview, Boggs admitted that he was at Osborne’s trailer one night in May 2013. He told the investigator that he believed there was “a colored woman” at Osborne’s trailer that night.<sup>2</sup> Boggs said that he went to bed that night and that when he did

---

<sup>2</sup> M.A. is African American.

so no one else was in the bed. He then told the investigator that he was beaten by two individuals the next day because of the accusations M.A. made against him, and that he did not want to talk about the incident any further. Boggs refused to identify the individuals who beat him up. At that point, Boggs requested to terminate the interview.

Relevant to this appeal, the trial court would not permit Boggs to present evidence during his defense regarding the results of blood alcohol level tests administered by the hospital as part of its treatment of M.A. Boggs asserted that the results of these tests were entirely inconsistent with M.A.'s testimony that she had only consumed a little more than one beer prior to the alleged rape. The Commonwealth acknowledged that this evidence was relevant as it tended to discredit M.A.'s version of the events. Even though the Commonwealth acknowledged that the results of the blood tests were contained in M.A.'s certified medical records, which the trial court had previously ordered the hospital to provide to the Commonwealth, it argued that unless Boggs could produce the individual(s) who drew the blood samples and the laboratory technician who tested them, the evidence could not be admitted. The trial court ultimately determined that no evidence regarding the blood tests could be introduced by Boggs without such testimony. At this point, Boggs's counsel indicated that he was going to try and subpoena the necessary hospital personnel prior to the end of trial.

Ultimately, Boggs was able to procure two different hospital employees: Gale Boggs, the Director of Laboratory Services at St. Joseph's Hospital (hereinafter referred to as "Director Gale"), and Steve Gooden, the laboratory technician who performed the first blood test. The trial court allowed Boggs to present the testimony of these witnesses by avowal.

Director Gale testified that she had been the Director of Laboratory Services at St. Joseph Hospital for the past eighteen years. Boggs's counsel showed Director Gale a copy of M.A.'s medical records. Director Gale confirmed that the records were M.A.'s hospital records from May 26, 2013, and specifically that the records contained laboratory reports for the blood samples taken from M.A. as part of her treatment at the hospital that day.

Director Gale then explained the standard procedure for obtaining laboratory results. She indicated that the process begins when a physician orders a test. In M.A.'s case, a blood test was ordered by the emergency room department ("E.R."). In response to the request, a technician collects the sample. The sample is packaged in a biohazard bag and sent up to the laboratory through a pneumatic tube system. Once the specimen is received by the laboratory, it is sent to a workstation for processing. A trained laboratory technician then performs the ordered test on the specimen. Once the test is complete, the laboratory technician verifies the result, prepares the report, and sends the report to the requesting

physician or department. The following day, either Director Gale, her subordinate, or the weekend supervisor performs a retrospective verification for accuracy and completeness.

Director Gale reviewed the laboratory reports generated for M.A. on May 26, 2013. She testified that the first test was performed when M.A. presented to the E.R. as part of a larger blood test panel. This is standard protocol. The laboratory report indicated that the sample was drawn by "D.D.". Director Gale testified that Deb Daniels is the E.R. technician with those initials who drew the blood. The results from this first test showed that M.A. had a blood alcohol level of 264 mg/dl (.264 g/dl). A second test was ordered from the E.R. department at 16:55 (4:00 p.m.); it was collected at 17:50 (5:50 p.m.); received in the laboratory at 17:52 (5:52 p.m.); and verified (meaning the test result was completed and reviewed) at 18:12 (6:12 p.m.) The identity of the technician who drew this second blood sample from M.A. was not listed for this test. The results of this test showed that M.A. had a blood alcohol level of 186 mg/dl (.168 g/dl). A final test was ordered at 20:49 (7:49 p.m.); it was collected by D.D. at 20:50 (7:50 p.m.); received in laboratory at 20:53 (7:53); and verified at 21:19 (8:19 p.m.). The test result for alcohol for this final sample was 114 mg/dl (.114g/dl).

Steve Gooden testified next. Gooden is a technologist in the laboratory and is the head of laboratory's chemistry department. Gooden testified

that he was the laboratory technician who retrieved M.A.'s blood sample when it arrived in the laboratory. He explained the process used to test M.A.'s blood sample and identified the type of machine used to test the sample, a Cobas 6000 Analyzer by Roche Diagnostics. This type of machine tests blood serum levels. Gooden confirmed that the results for the first test showed that M.A. had an alcohol level of 264 mg/dl (.264 g/dl). Gooden did not recall any problems or irregularities in testing M.A.'s sample. He testified that had he noticed any problems with the test, he would have noted it on the report. The report contains no such notation.

Following the avowal testimony of Director Gale and Gooden, Boggs renewed his motion to allow the jury to hear evidence about M.A.'s blood alcohol levels as tested and reported by the hospital on May 26, 2013. Relying primarily on *Rabovsky v. Commonwealth*, 973 S.W.2d 6 (Ky. 1998), the Commonwealth objected because Boggs failed to produce the individual(s) who obtained the blood samples from M.A. The trial court overruled Boggs's motion. Specifically, the trial court determined that without the testimony of the technician(s) who drew M.A.'s blood for testing in the E.R., the tests results could not be admitted.

This appeal followed.

## **II. STANDARD OF REVIEW**



Our standard when reviewing a question of admissibility of evidence is whether the trial court abused its discretion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 438 (Ky. 2003). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). “[P]reserved evidentiary and other non-constitutional errors will be deemed harmless [error] ... if we can say with fair assurance that the judgment was not substantially swayed by the error.” *Ordway v. Commonwealth*, 391 S.W.3d 762, 774 (Ky. 2013).

### **III. ANALYSIS**

Kentucky Rule of Evidence (“KRE”) 901(a) states that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” “[T]he more fungible the evidence, the more significant its condition, or the higher its susceptibility to change, the more elaborate the foundation must be.” *Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004). Thus, “while the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody, chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis to show that the

sample tested in the laboratory was the same sample drawn from the victim.”

*Mollette v. Kentucky Personnel Bd.*, 997 S.W.2d 492, 495 (Ky. App. 1999)

(internal citations omitted).

In this case, Boggs was ultimately able to procure testimony from Director Gale about hospital protocol and procedures for collecting and testing blood samples, and relative to the first blood sample, the testimony from Gooden about how he tested the sample. The Commonwealth asserted that this testimony was not sufficient. It argued that Boggs had to produce “both parts of the chain[,]” *i.e.*, both the person who drew the blood from M.A. and then the person who tested the blood in the laboratory. The Commonwealth argued, and the trial court ultimately agreed, that without the testimony of the person who drew the blood samples from M.A., Boggs could not complete the chain of custody and was unable to introduce the blood test results contained within M.A.’s hospital treatment records.

In *Rabovsky*, 973 S.W.2d at 6, the Kentucky Supreme Court extensively examined how the requirements of KRE 901(a) apply to blood samples. As related to this case, the trial court determined that *Rabovsky*’s chain of custody requirements required exclusion of M.A.’s blood test results because Boggs was unable to secure testimony from the E.R. technician(s) who drew

M.A.'s blood before sending it to the laboratory for testing. Having reviewed *Rabovsky*, we do not agree that it required exclusion of M.A.'s blood test results.

Sue Rabovsky's husband became unresponsive during the morning hours of March 28, 1995. An ambulance transported Mr. Rabovsky to Audubon Hospital in Louisville, Kentucky. After Mr. Rabovsky was admitted to the hospital, the treating neurologist diagnosed the cause of his comatose state and ultimate death as hypoglycemia due to external administration of a massive dose of insulin. A total of six blood samples were collected by the hospital prior to the Mr. Rabovsky's death. However, unlike this case, Mr. Rabovsky's blood samples were not tested at Audubon Hospital where they were collected. Instead of doing its own testing, Audubon Hospital had a contract with National Health Laboratories, Inc. ("N.H.L."), located in Louisville, to perform laboratory tests on blood samples collected from patients at the hospital. Mr. Rabovsky's blood samples were transported from Audubon Hospital to N.H.L. However, for unknown reasons, the blood samples were not tested by N.H.L. in Louisville. Instead, they were sent to N.H.L.'s corporate affiliate, National Reference Laboratory ("N.R.L.") in Nashville, Tennessee. The results were then reported to N.H.L. who in turn reported them to Audubon Hospital. The record did not reveal how N.R.L. reported its test results to N.H.L., but the results were reported to Audubon on N.H.L.'s computer-generated report forms. The results, especially those of the

earlier samples, showed unusually high levels of insulin. Sue Rabovsky was eventually indicted and convicted of murder. The trial court allowed the Commonwealth to introduce Audubon Hospital's medical records, which contained the results of the blood tests. On direct appeal to the Kentucky Supreme Court, Sue argued that admission of the test results was reversible error.

The Supreme Court first determined that the laboratory records were properly authenticated by the testimony of Dr. Ronald Wagner, technical director of Laboratory Corporation of America (formerly N.H.L.). However, the Court held that its inquiry did not end there. Even though the records themselves were authenticated, the Court concluded that authentication alone was not sufficient because of "the total failure of the Commonwealth to establish a chain of custody of the blood samples." *Id.* at 8. The Court explained:

The purpose of requiring proof of the chain of custody of a blood sample is to show that the blood tested in the laboratory was the same blood drawn from the victim. R. Lawson, *The Kentucky Evidence Law Handbook*, § 11.00, p. 592 (3rd ed. Michie 1993). While the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody, *e.g.*, *Beason v. Commonwealth*, Ky., 548 S.W.2d 835 (1977), *Smith v. Commonwealth*, Ky., 366 S.W.2d 902 (1962), a chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis. *Henderson v. Commonwealth*, Ky., 507 S.W.2d 454 (1974); *Calvert v. Commonwealth*, Ky. App., 708 S.W.2d 121, 124 (1986); *Haste v. Kentucky Unemployment Ins. Comm'n*, Ky. App., 673 S.W.2d 740 (1984); Lawson,

supra, § 11.00, p. 593; 32A C.J.S. Evidence § 797 (1996).

Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that “the reasonable probability is that the evidence has not been altered in any material respect.” *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989), *cert. denied*, 491 U.S. 909, 109 S.Ct. 3197, 105 L.Ed.2d 705 (1989). *See also Brown v. Commonwealth*, Ky., 449 S.W.2d 738, 740 (1969). Gaps in the chain normally go to the weight of the evidence rather than to its admissibility. *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988). Here, however, there was no attempt at all to establish the chain of custody of these blood samples, even though the samples apparently were transferred and stored internally within the hospital, then transferred and stored outside the hospital, first at a laboratory in Louisville, then, presumably, at another laboratory in Nashville.

...

Although KRE 803(6), the successor to the common law shopbook exception, is available to admit a report of a blood test result without the necessity of producing the person who prepared the report, the report is inadmissible if it could not have been introduced by the person who prepared it. Here, the persons who prepared these blood test reports could not have testified to their contents absent a preliminary showing sufficient to satisfy the authenticity requirement of KRE 901(a) that the blood which was tested was that of the patient in question. That preliminary showing would have required proof of the chain of custody of the samples tested. The fact that the blood test reports were ultimately placed in the business records of Audubon Hospital does not alter this requirement.

*Id.* at 8-9.

The *Rabovsky* court ultimately held that the trial court erred when it allowed the blood test results into evidence. However, it was clear that this result was required because of the Commonwealth's "total failure" to establish a chain of custody. It was not simply a matter of gaps in the chain; there was no chain. To this end, the Court noted that at trial the Commonwealth had failed to present any evidence to establish "who collected the blood samples, how they were stored, how they were transported to N.H.L., how they were transported (if they were) to N.R.L., or what method was used to test the samples." *Id.* at 7.

The Court, however, did not hold that any specific type of testimony is necessary to establish a sufficient chain of custody. Most importantly, it did not indicate that the eyewitness testimony from the person who drew the blood was an absolute prerequisite for admission. Such a requirement has never been part of our law. In fact, we have long held that the chain of custody can be established through eyewitness testimony, chain of custody forms, or "testimony as to routine practice sufficient to dispel any inference of substitution or change in the contents of the exhibit in question." *Mollette*, 997 S.W.2d at 496. "The fact that some personnel involved in the process cannot recall handling the specific sample at issue is not fatal." *Parrish v. Commonwealth*, 464 S.W.3d 505, 510 (Ky. App. 2015).

Before the trial court, the Commonwealth analogized this case to a DUI prosecution; it argued that in a DUI prosecution, it had to introduce testimony from someone who was present and observed the defendant's blood being drawn before it could introduce the results. The differentiating fact between this case and the DUI cases relied on by the Commonwealth is that M.A.'s blood samples were drawn by hospital personnel for the purpose of providing medical treatment to her. They were not drawn at the request of law enforcement for investigative purposes. As such, the DUI analogy relied on by the Commonwealth is inapposite. *See Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001) ("Appellant was not under arrest when the hospital drew his blood, and his blood was not drawn at the request or under the direction of a peace officer. Thus, the procedures required by 500 KAR 8:030(2) were not applicable."); *see also Little v. Commonwealth*, 422 S.W.3d 238, 247 (Ky. 2013); *Armstrong v. Commonwealth*, 205 S.W.3d 230, 234 (Ky. App. 2006); *Osborne v. Commonwealth*, 867 S.W.2d 484, 492 (Ky. App. 1993).

Even though Boggs may not have not presented evidence to establish a perfect chain of custody, this was certainly not a case where there a "total failure" to show how M.A.'s samples were collected and analyzed. Through the testimony of Director Gale, Boggs introduced evidence regarding the time the samples were ordered, taken, received in laboratory, tested, and reported. Director

Gale also testified that the hospital's records showed that two of the three samples were collected by D.D., whom Director Gale identified as Deb Daniels, an E.R. technician. Director Gale testified that the samples would have been labeled, placed in biohazard packages, and transmitted to laboratory through the hospital's pneumatic tube system. Gooden testified that he received the first sample in the laboratory. He did not note anything unusual about how the sample was packaged or received in the laboratory. The package bore M.A.'s identification information. Gooden explained the process he used to test M.A.'s sample and identified the type of machine used to test the sample, a Cobas 6000 Analyzer by Roche Diagnostics. He explained that he obtained what he believed to be a valid result and then transmitted the report to the E.R. via the hospital's computer system. Importantly, the testimony of Director Gale and Gooden confirmed that none of the samples would have left the hospital and that the samples were requested, taken, tested and reported in a span of just a few hours.

The facts in this case are similar to the facts recounted in an unpublished 2004 opinion authored by Judge (now Chief Justice) Minton, *Story v. Commonwealth*, No. 2003-CA-002112-MR, 2004 WL 2634494 (Ky. App. Nov. 19, 2004), wherein this Court distinguished *Rabovsky*.

Story first argues the hospital toxicology reports should have been suppressed because the chain of custody was not established. Specifically, he argues the Commonwealth failed to provide information concerning



his blood and urine samples, such as who took the samples, when they were taken, how they were stored, and how they were transported. Story claims that without this information, there is no way to authenticate the integrity of the samples.

...

*Rabovsky* involved an appeal from a murder conviction in which a woman was convicted of injecting her husband with a lethal dose of insulin. The victim was taken to the emergency room where blood samples were taken at periodic intervals and tested. The samples were moved from the hospital to a laboratory in Louisville and then transferred to a second testing facility in Nashville, Tennessee. The appellant claimed that because the blood samples were moved three times, a sufficient chain of custody had not been established. The Supreme Court agreed, reversing the trial court's conviction. In Story's case, the blood and urine samples were taken from him while at the hospital following his accident. The samples were taken as part of routine hospital procedure and tested at the hospital shortly after he was admitted. The tests showed that Story's alcohol level was .264, and his urine toxicology was positive for cocaine. Full toxicology results from Story's blood and urine samples were completed on July 14, 2000, at the U.K. Medical Center laboratory. The results corroborated the earlier tests and confirmed the presence of alcohol and cocaine in Story's system.

Story's situation is distinguishable from *Rabovsky*. The blood samples in *Rabovsky* were moved from and stored in three different facilities. There was no documentation whatsoever to establish the chain of custody as the sample moved from the hospital to a lab in Louisville and, later, to a separate lab in Nashville.

...

Here, Story's samples were taken at the hospital upon his arrival. A report was made that same day by his attending physician. Likewise, later blood and urine tests, which bore the same results as the initial tests, were completed at the hospital laboratory. *These samples never left the hospital premises, nor is there any allegation that other patients' samples were tested simultaneously with Story's. In fact, there is no hint of evidence offered by Story to lead this Court to believe Story's blood sample or urine testing was altered in any way or confused with a sample from another patient.*

*Id.* at \*2–3 (emphasis added); *see also Ogle v. Commonwealth*, 2011-CA-000098-MR, 2012 WL 5627566, at \*5 (Ky. App. Nov. 16, 2012) (“[T]he blood sample was labeled with Ogle’s information and was handled in the way blood samples were typically handled as part of hospital procedure. There is no allegation or indication that anyone other than hospital personnel handled the blood or had any reason to tamper with its contents.”).<sup>3</sup>

Just as in *Story*, there is no allegation or suggestion by the Commonwealth that anyone tampered with M.A.’s blood sample, that it was mixed up with another’s patient’s sample, or that either of those scenarios was a realistic possibility. Boggs introduced testimony from Director Gale regarding the laboratory and testing protocols and from Gooden regarding his receipt and testing of the first sample. Boggs presented sufficient foundational evidence regarding the

---

<sup>3</sup> These cases were not designated to be published. Therefore, they do not bind us. We cite to them for illustrative purposes only. *See* Kentucky Rule of Civil Procedure (“CR”) 76.28(4)(c).

blood samples taken from M.A. “While it may not have been perfect, it is not a case where the chain of custody was not established at all.” *Sluss v.*

*Commonwealth*, 450 S.W.3d 279, 290 (Ky. 2014). “Any gaps or problems in the chain of custody, goes to the weight of the evidence rather than its admissibility.”

*Helphenstine v. Commonwealth*, 423 S.W.3d 708, 717 (Ky. 2014).

In sum, we hold that the trial court erred when it determined that Boggs failed to establish a sufficient chain of custody to permit introduction of M.A.’s blood test results. We must therefore determine whether this error requires us to vacate the jury’s guilty verdict.

The Sixth Amendment to the United States Constitution “guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him.” *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (internal quotations omitted). The primary interest secured by the Confrontation Clause is the right to cross-examine a witness. *Id.*

“Generally, a witness may be cross-examined on any facts which tend to show bias, interest, or motive which might affect the witness’ credibility.” *Romero-Perez v. Commonwealth*, 492 S.W.3d 902, 905 (Ky. App. 2016) (citing *Keller v. Commonwealth*, 572 S.W.2d 157, 159 (Ky. 1978)). In order for the jury to properly weigh the testimony of the witness, it is entitled to hear all of the evidence

calculated to influence the witness' testimony. *Id.* Witness credibility is always at issue. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (1997).

Errors that implicate a defendant's Confrontation Clause rights are subject to a harmless-error analysis. *See Star v. Commonwealth*, 313 S.W.3d 30, 38 (Ky. 2010) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986)). "The test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different." *Taylor v. Commonwealth*, 995 S.W.2d 355, 361 (Ky. 1999). Whether the error is harmless beyond a reasonable doubt depends on a number of factors, including: the importance of the witness' testimony in the prosecution's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of cross-examination otherwise permitted; and the overall strength of the prosecution's case. *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438.

Here, we cannot say that exclusion of the blood test results was harmless. While the DNA evidence established that Boggs had sexual intercourse with M.A., that evidence alone would not have established that Boggs raped M.A. To prove rape, the Commonwealth needed the jury to believe M.A.'s testimony regarding the sequence of events. During her testimony, M.A. was emphatic that she only consumed a beer and half on May 25, 2013, and that she did not ingest

any alcohol before she went to the hospital. However, the first blood test performed at the hospital showed she had a blood alcohol level of .264 g/dl, well over the limit at which one is presumed too intoxicated to drive an automobile.<sup>4</sup> The disparity between the blood test calls both M.A.'s testimony as well as her recollection of the events into question. While the jury may have still reached the same verdict, we cannot say with any degree of certainty that the result of this case would have been the same had M.A.'s blood test results been admitted. Accordingly, we must vacate and remand this matter to the trial court for further proceedings.

#### **IV. CONCLUSION**

Based upon the foregoing, the Laurel Circuit Court's judgment and sentence is VACATED and this matter is REMANDED for further proceedings.

THOMPSON, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent with the majority opinion in this case, and therefore, file this dissent.

---

<sup>4</sup> In the event of retrial, it would likely be necessary for Boggs to introduce some testimony to correlate this level with the amount of beer a person of M.A.'s size would have had to have consumed to produce this reading. For the purposes of assessing whether exclusion of the evidence itself was harmless error, however, we can make a common-sense determination that the level of alcohol in M.A.'s blood was totally incompatible with the amount of alcohol she testified to consuming. *See Webb v. Stone*, 445 S.W.2d 842, 845 (Ky. 1969). In fact, the Commonwealth conceded as much during the bench conference before the trial court.

Where I disagree with the majority is their determination that you can begin the chain of custody to prove the Blood Alcohol Content (“BAC”) of M.A.’s blood without establishing how and where the blood came from. Boggs sought to introduce the hospital record to prove the level of intoxication of M.A. the morning after the alleged assault.

Had Boggs merely wanted to introduce the hospital record as a document which speaks for itself, I would have no problem with it being put into evidence. Yet, that is not what Boggs sought. He wanted to prove M.A.’s BAC by introducing the hospital record, without laying a proper foundation which begins the chain of custody. Where I disagree with the majority, and agree with the trial judge, is that the hospital record does not prove the blood alcohol level of M.A. unless Boggs can establish that the blood sample was taken in compliance with the requirements of KRE 901(a).

Kentucky law and the rules of evidence have established what is required to begin a chain of custody where the issue is the BAC of an individual. To introduce such evidence, the law requires that the chain have a definitive beginning. At trial, Boggs indicated to the court that he intended to produce the hospital record under the business records requirements of KRE 902(11), in order to prove the BAC of M.A. The Commonwealth objected, pointing out that Boggs was not introducing the hospital record as just a record but to prove the BAC of

M.A. To prove the BAC of M.A., Boggs would need to lay a proper foundation for the evidence he was attempting to offer.

The Commonwealth also noted that in cases where the BAC of an individual in a DUI case was required, the state is required by statute and regulation to produce the individual who took the sample in order to authenticate that the sample was correctly collected, not put in an incorrect container, was properly identified by the name of the person from whom the sample was taken, the time and date, and the name of the person who collected the sample. The trial court agreed with the Commonwealth that such authentication is required, and therefore, denied Boggs request to put into evidence the hospital record to prove the BAC of M.A.

The trial court correctly decided that there must be a witness who can testify as to the procedures used to collect the sample before such evidence can be introduced. In this case, *sub judice*, the issue is not whether there are gaps in the chain of custody as suggested by the majority, but whether Boggs laid a proper foundation for putting the BAC into evidence, thus beginning a chain of custody.

If we follow the logic of the majority, Boggs has no burden to demonstrate that the blood sample was not contaminated by the use of alcohol in cleaning the skin, or that the blood container did not contain any type of anticoagulant or preservative which might interfere with the intended analytical

method. As the majority points out, the hospital administered M.A.'s blood test as part of its treatment plan for M.A, as part of a larger blood test panel.

In addition, the hospital record would also show that further blood tests were even less reliable since there is no notation as to who the technician was who drew M.A.'s blood. Thus, the requirement of KRE 901(a) would only be appropriate if Boggs sought to enter the hospital record as simply a hospital record. But that is not what Boggs attempted to do. Boggs wanted to authenticate the BAC test results of M.A. without a sufficient showing that the blood tested was that of M.A. As the majority notes, "[T]he more fungible the evidence, the more significant its condition, or the higher its susceptibility to change, the more elaborate the foundation must be." *Thomas v. Commonwealth*, 153 S.W.3d 772, 779 (Ky. 2004).

I believe the majority errs in choosing to jump over the requirements of initiating a chain of custody for BAC in order to introduce it into evidence in a trial. Instead, the majority would replace that standard with one where any questions concerning the legitimacy of the blood sample taken merely go to the weight of the evidence. The majority attempts to explain this by relying on *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998). *Rabovsky* held that, "[t]he purpose of requiring proof of the chain of custody of a blood sample is to show that the blood tested in the laboratory was the same blood drawn from the



victim.” *Id.* at 8. *Rabovsky* also noted that “[t]he persons who prepared the blood test reports could not have testified to their contents absent a preliminary showing sufficient to satisfy the authenticity requirement of KRE 901(a) that the blood which was tested was that of the patient in question.” *Id.* at 9 (emphasis added). KRE 901(a) states, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” While the majority rests its opinion on *Rabovsky*, it is important to note that the Kentucky Supreme Court determined in that case that the blood test results were inadmissible due to the lack of a chain of custody ever being established.

I believe that the trial judge correctly denied Boggs’s motion to use the hospital record as proof of M.A.’s BAC. Boggs had not established a proper foundation for entering that part of the hospital record concerning M.A.’s level of intoxication in order to prove her BAC.

Our Supreme Court has held, where the proper procedures are followed, in the absence of any indication whatsoever of contamination or inaccuracy, there is no reason to reject the evidence. *Matthews v. Commonwealth*, 44 S.W.3d 361, 364 (Ky. 2001). Here, Boggs failed to establish that the proper procedures were followed, leaving his evidence unauthenticated and improper for admission.

Thus, I dissent from the majority opinion.

BRIEF FOR APPELLANT:

Brandon Neil Jewell  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General

M. Brandon Roberts  
Assistant Attorney General  
Frankfort, Kentucky