

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-000512-MR

MICHAEL HOLT

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 03-CR-003069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TACKETT AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

TAYLOR, JUDGE: Michael Holt brings this appeal from a January 31, 2005, judgment upon a jury verdict convicting appellant of first-degree rape, first-degree sodomy, and impersonating a police officer. We affirm.

In the early morning hours of December 11, 2002, the victim was released from the Jefferson County Jail for an

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

unrelated matter. Upon leaving the jail, she walked to a nearby White Castle to use a pay phone to obtain a ride to her boyfriend's apartment. At this point, the facts are disputed.

The victim testified that appellant was at the counter of the restaurant and asked her if she needed a ride. The victim further testified that appellant stated that he was a police officer and then displayed a badge. She decided to accept a ride from appellant. After getting into the vehicle, appellant threatened the victim. According to the victim, appellant stated he would take her to jail for prostitution if she did not follow his instructions. Appellant showed the victim a gun that had been concealed and threatened to use it if she did not do as he said. The victim alleged that appellant coerced her into engaging in sodomy and eventually raped her. Thereafter, appellant took the victim to her boyfriend's apartment. The victim then walked to Winn Dixie to call her father. She told her father that she had been raped by an undercover police officer. She was then transported to University of Louisville Hospital where the police were called. After meeting with a Jefferson County Police Detective, the victim identified appellant out of a photo pack provided by the detective.

Conversely, appellant testified the victim propositioned him. He said the victim promised to engage in

sexual intercourse in exchange for transportation to her boyfriend's apartment. He agreed, and the two engaged in consensual sexual intercourse.

The Jefferson County Grand Jury indicted appellant upon first-degree rape, first-degree sodomy, sexual abuse, and impersonating a police officer. A jury trial ensued, and appellant was found guilty of first-degree rape, first-degree sodomy, and impersonating a police officer. Appellant was sentenced to a total of eighteen years' imprisonment, thus precipitating this appeal.

Appellant contends the trial court committed reversible error by limiting the cross-examination of the victim. Specifically, appellant sought to introduce the victim's guilty plea to complicity to trafficking in marijuana and her placement into a diversion program. Appellant believed this evidence showed potential bias and motive to lie on the part of the victim. Specifically, appellant argues:

B [the victim] testified that she was charged with trafficking in marijuana in July, 2003. (Tape 2, 12/17/04, 10:38:40). She was placed on felony diversion for this charge after entering a plea of guilty in May, 2004. Under the terms of the agreement, the case would be dismissed if she obeyed all the rules set out for her. (Tape 2, 12/17/04, 10:39:51). B [the victim] acknowledged that she was still on diversion at the time of the trial, (Tape 2, 12/17/04, 10:40:07), and acknowledged that

she could be removed from the program upon motion of the Commonwealth's Attorney.

. . . .

Only two people knew what happened in Michael Holt's Jeep Cherokee in the early morning of December 11, 2003. The government was permitted to introduce evidence corroborating B's [the victim's] version, but the jury was certainly not compelled to accept it. And the jury may well have refused to accept it had they known her obvious motive to placate the Commonwealth, which had allowed her to walk away from a felony charge of trafficking in marijuana and which held power over her until the period of supervision ended.

Appellant's Brief at 8-10.

Appellant is essentially arguing that the victim had a motive to lie or a bias because she was placed in a diversion program after entering a guilty plea to trafficking in marijuana. Even if the evidence could be considered relevant, we conclude it was inadmissible under Ky. R. Evid. (KRE) 403.

KRE 403 states as follows:

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.

The alleged rape took place on December 11, 2002. On that date, appellant told her father she was raped, told the police she was raped, and identified appellant as the

perpetrator from a photo pack. The victim's allegation of rape against appellant was made well before appellant was even charged with trafficking in marijuana, which occurred in July 2003. Thus, appellant's assertion of bias or motive to lie is tenuous at best. Consequently, we believe the prejudicial effect of such evidence clearly outweighed any slight probative value it may have had. As such, we are of the opinion the trial court did not err by excluding from evidence appellant's guilty plea to trafficking in marijuana and her entry into a diversion program.

Appellant also contends the trial court committed reversible error by allowing the Commonwealth to impeach appellant by introduction of two prior felony convictions (theft and receipt of stolen property) that were over twenty-years old. In support thereof, appellant cites to KRE 609(b):

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.

The task of balancing the probative value of the evidence against the danger of undue prejudice to appellant is properly reserved for the sound discretion of the trial judge. See Rake v. Commonwealth, 450 S.W.2d 527 (Ky. 1970). The

decision of the trial court on this issue will not be overturned on appeal absent an abuse of discretion. Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996).

The trial court concluded that the prior felony convictions should be admitted as each looked to the veracity of the witness. Appellant argues that the trial court failed to engage in the "balancing test" required under KRE 609(b). We disagree.

The focus of KRE 609(b) clearly looks to the credibility of a witness where convictions over ten years of age are admitted into evidence. Accordingly, there must be some intended correlation between the aged conviction and the credibility of the witness. In this case, it is clear from the record that the trial court took both the impact of the witness testimony as well as the nature of the prior conviction as probative in its balancing analysis under KRE 609(b). A prior conviction for theft is a crime of dishonesty that is probative of untruthfulness and looks to the veracity of the defendant as a witness. See Miller ex rel. Monticello Banking Company v. Merrymount Medical Center, 125 S.W.3d 274 (Ky. 2004)(holding that conviction for burglary is a crime of dishonesty that is probative of untruthfulness and thus the trial court properly admitted evidence of plaintiff's ten-plus year old burglary conviction).

The Kentucky Supreme Court analyzed the issue regarding aged convictions in McGinnis v. Commonwealth, 875 S.W.2d 518, 528 (Ky. 1994) *overruled on other grounds* in Elliott v. Commonwealth, 976 S.W.2d 416 (Ky. 1998), and made the following observation:

KRE 609 does not, by its terms, divest the trial court of a limited discretion to admit a conviction more than ten years old. It is precatory, rather than mandatory, and leaves room for a trial judge to rule such evidence admissible in circumstances where fairness so demands.

In this case, we believe the trial court engaged in a sufficient balancing test regarding the probative value of the prior convictions and did not abuse its discretion in admitting the prior convictions into evidence.

Even if the trial court erred by admitting these felony convictions, we are of the opinion that any error was harmless. Ky. R. Crim. P. 9.24. Simply stated, we cannot say that absent the admission of these two prior felony convictions the jury verdict would have been different. See Crane v. Commonwealth, 726 S.W.2d 302 (Ky. 1987). Accordingly, we are of the opinion the trial court did not commit reversible error by allowing the introduction of appellant's two prior felony convictions.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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