

RENDERED: JULY 27, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001962-MR

DAVID REYNOLDS

APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 09-CR-00060

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, KELLER, AND STUMBO, JUDGES.

KELLER, JUDGE: David Reynolds (Reynolds) appeals from his conviction of first-degree criminal abuse. On appeal, Reynolds argues that the trial court: improperly admitted evidence; permitted a juror to overhear bench conferences during a portion of the trial; and improperly denied his motion for a directed verdict. Reynolds also argues that the prosecution wrongfully withheld a forensic

interview. The Commonwealth argues to the contrary. Having reviewed the record and the arguments of the parties, we reverse and remand.

FACTS

The undisputed facts are as follows. Reynolds and Wendy McFarland (McFarland) had an on-again, off-again relationship for approximately 6 years. Two children were born as a result of the relationship, Alex (born in 2004) and Abby (born in 2005).

In the winter of 2008, Reynolds began dating Amber Roberts (Amber). Two to three months after they began dating, Amber "got pregnant." Two to three months thereafter, Reynolds and Amber separated, and they did not get together again until after the child, Caleb, was born in January 2009. Once Reynolds and Amber got back together, the couple and Caleb lived successively for short periods of time with Reynolds's cousin, with a friend of Amber's, and in a motel (the Cruise Inn Motel). Thereafter, in mid-April 2009, they rented and lived in a trailer.

On April 28, 2009, Caleb went to spend the night with his maternal great grandmother, Joyce Roberts (Joyce). Joyce testified that Caleb was generally good but that he had a cold, so she asked her daughter/Amber's mother, Cindy Salee (Cindy), to make an appointment for Caleb with the pediatrician. On April 29, Cindy went to Joyce's residence to drive Joyce and Caleb to the pediatrician's. While Joyce was getting ready to go, Caleb had a seizure. Joyce called 911, and, after emergency personnel arrived, Caleb had another seizure. Caleb was

transported by ambulance to Hardin Memorial Hospital (Hardin Memorial) where physicians determined that he had possibly been the victim of abuse. Therefore, Hardin Memorial personnel contacted the Kentucky State Police (KSP) and the Child Safety Branch of the Cabinet for Health and Family Services (the Cabinet). Because Hardin Memorial did not have the appropriate facilities to treat Caleb, he was transported by air care to Kosair Children's Hospital (Kosair) in Louisville. At Kosair, physicians confirmed that Caleb had thirteen fractured ribs, a fractured tibia, a fractured bone in his foot, a fractured bone in his forearm, and evidence of bilateral brain injury.

Armed with this information, detectives from the KSP and a social worker from the Cabinet conducted a child abuse investigation. Based on their investigation, a Larue County Grand Jury indicted Reynolds on one count of criminal abuse in the first degree on June 20, 2009. Following a three-day trial in late August 2010, a jury found Reynolds guilty of first-degree criminal abuse and sentenced him to ten years' imprisonment. We set forth additional facts as necessary below.

STANDARD OF REVIEW

The standard of review on evidentiary issues is abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair,

or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

ANALYSIS

Reynolds argues that the trial court improperly admitted evidence of prior bad acts. He also argues that he was unduly prejudiced because the Commonwealth's witnesses testified at trial regarding evidence that the court had previously ruled was inadmissible hearsay. We first address the hearsay evidence.

On April 23, 2010, the Commonwealth timely filed a notice of its intent to introduce Kentucky Rule of Evidence (KRE) 404(b) evidence of Reynolds's prior acts of violence and angry outbursts involving Amber, her daughter Brooklyn; Alex, McFarland's and Reynolds's son; and McFarland, Alex's former girlfriend. Following a hearing on May 5, 2010, the court determined that the evidence of prior bad acts was admissible, citing *Dant v. Commonwealth*, 258 S.W.3d 12 (Ky. 2008). However, the court noted that, during the hearing, the witnesses had made several statements based on hearsay and made several irrelevant statements regarding Reynolds's character. The court cautioned the Commonwealth that witnesses would not be permitted to give hearsay testimony at trial; that witnesses should refrain from making extraneous comments about Reynolds's character; and that they should limit their testimony to the specific incidents of violence in question.

Under Kentucky Rule of Evidence (KRE) 802, hearsay is not admissible unless it falls within one of a number of exceptions. At trial, Amber

testified that, while the family was staying with her friend Stacy, Reynolds was preparing to give Caleb a bath. Despite the court's admonition to the Commonwealth to advise witnesses to refrain from giving hearsay testimony, Amber testified that her daughter asked why Reynolds was shaking the baby. Reynolds immediately objected, arguing that this testimony was hearsay. The court properly sustained the objection; however, Reynolds did not ask the court to admonish the jury or to take any other action.

Amber also testified that, when she and Reynolds were living at the Cruise Inn Motel, Reynolds called McFarland on the phone. According to Amber, Reynolds became upset because McFarland told him that she did not love him, did not want to speak with him again, and would not re-kindle their relationship. When asked how she knew the contents of the phone call, Amber said that McFarland told her about the conversation. Reynolds objected and the court sustained that objection. Again, Reynolds did not ask the court to admonish the jury or to take any other action.

Once the court sustains an objection, the objecting party must request an admonition in order to preserve any error for our review. *See Allen v. Commonwealth*, 286 S.W.3d 221, 225 (Ky. 2009). Because Reynolds did not request any action by the court once his objections were sustained, there is no reviewable error. Furthermore, any error in the admission of evidence regarding the contents of the telephone conversation was harmless.

We next address the KRE 404(b) evidence. KRE 404(b) provides, in pertinent part, that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

At trial, the Commonwealth offered testimony from McFarland about five incidents that occurred when she and Reynolds lived together: (1) Reynolds broke out the windows, headlights, and taillights of a pick-up truck when he became frustrated because he could not repair it; (2) Reynolds threw a birthday cake and grabbed McFarland when he became angry because his mother told McFarland about a motor vehicle accident in which he was involved; (3) Reynolds grabbed McFarland and pushed her up against a refrigerator during an argument; (4) Reynolds, who was holding a shotgun, threatened to kill himself and, when McFarland tried to intervene, he threatened to kill her; and (5) Reynolds had a shotgun on another occasion, although the specifics of this incident are not clear. McFarland also testified that, after she and Reynolds had separated, Reynolds got angry when he saw McFarland with her fiancé sitting in a car with Abby and Alex. According to McFarland, Reynolds yelled at her, cursed, and stormed off when she told him that her fiancé was spending the night with her.

The Commonwealth also offered testimony from Amber that she confronted Reynolds about how he handled Caleb on two separate occasions. After each confrontation, Reynolds became angry and choked Amber. During one of the choking incidents, Reynolds also put a knife to Amber's wrist and told her to "shut [her] mouth or he would slit [her] wrist." As noted above, Amber testified that Reynolds became angry after his telephone call to McFarland, and he told Amber to take "her piece of shit kid" and leave. Finally, Amber testified that, during the incident with McFarland and her fiancé, Reynolds drove his car as if he was going to hit Amber's car, but did not do so.

On appeal, Reynolds argues that the preceding evidence does not fit within KRE 404(b)(1), and that he was significantly prejudiced by its admission. The Commonwealth argues that the evidence was admissible to show a pattern of conduct and that Caleb was not injured accidentally or by mistake. We disagree with the Commonwealth that the evidence was admissible to show a pattern of conduct or absence of mistake or accident. However, as set forth below, some of the evidence may be admissible for other reasons.

Although evidence of other crimes, wrongs, or acts is not admissible to prove a person's bad character and that he acted in conformity therewith, such evidence may be admissible if offered for some other reason. KRE 404(b)(1). Because such evidence has a significant prejudicial potential, the exceptions allowing it must be strictly construed. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). In order to determine if evidence of prior bad acts is admissible

the trial court must determine if: (1) it is relevant; (2) it has probative value; and (3) its probative value substantially outweighs its prejudicial effect. *Id.* at 889-91.

The Commonwealth admits that the evidence was offered to prove a pattern of conduct - when Reynolds is frustrated, he responds with anger and violence.

When evidence of prior bad acts is offered to prove a pattern of conduct,

the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*. If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

We have reviewed numerous cases involving the admissibility of KRE 404(b) evidence. The key factors relied on by the Court in determining whether such evidence is admissible include the similarity of the victims, the similarity of the acts, and the location(s) where the acts took place. We summarize those cases below.

In *Bell*, a man was charged with the sodomy of his live-in girlfriend's minor son, A.C. During the trial, A.C.'s brother, T.C., testified that Bell had also sodomized him. Bell had not been charged with any crimes related to T.C. The Supreme Court of Kentucky ruled that T.C.'s testimony should not have been admitted because it did not fall within any of the KRE 404(b)(1) exceptions. In doing so, the Court held that

When “pattern of conduct” is the purpose for which evidence is sought to be introduced, “the real question is whether the method of the commission of the other crime or crimes is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person.” *Adcock v. Commonwealth, Ky.*, 702 S.W.2d 440, 443 (1986).

Bell, 875 S.W.2d at 889.

The Court then examined the similarities and dissimilarities in the brothers' testimony.

They each claim that appellant committed acts of oral sodomy against them. T.C. testified that on the one occasion involving him, appellant said, “I will *play* with you.” A.C. testified that on one occasion appellant asked him “to *play* a game.” On this similarity, however, the strength of what might be argued is a unique use of language by appellant (i.e., “play”), is diminished by A.C.'s testimony that no sexual activity took place that day, and that he just “figured [appellant] was trying it again.” A.C. also stated that appellant had never used the terminology “play”, before or since that time.

What are the dissimilarities? The uncharged conduct alleged by T.C. involves a single occasion on which two acts of oral sodomy took place. This occurred on a camping trip in Lincoln County. A.C. testified to repeated episodes of oral and anal sodomy, all of which occurred inside appellant's home. It was T.C.'s testimony that appellant used alcohol to “make him dizzy” before approaching him. A.C. testified that appellant never gave alcohol to him. The sodomy alleged by T.C. occurred in October 1991, two years after A.C. alleged abuse. A.C. testified that he was scared of appellant, because appellant told him “don't tell nobody.” According to T.C., appellant did not admonish him not to tell anyone; but rather, told T.C. if he ever wanted to do it again, to let him know.

Id. at 889-90 (emphasis in original).

The Court then concluded that

the trial record with regard to these separate occurrences demonstrates dissimilarity with respect to the acts, the number of acts, the time, the approach, and the place. These differences convince us that evidence of appellant's alleged crime against T.C., when compared with evidence of appellant's conduct against A.C., fail to establish the *striking* similarity that "in itself would identify appellant as the perpetrator of the acts in question."

Id. at 890 (emphasis in original).

In *Lear v. Commonwealth*, 884 S.W.2d 657 (Ky. 1994), Lear was convicted of rape and sodomy involving his pre-teenage step-granddaughter and step-niece. The Court held that testimony regarding Lear's abuse of other girls was admissible because: all the victims were young females; all were step-relatives of Lear's; all were living in or visiting his home; and all were under his independent family control when the abuse took place.

In *Commonwealth v. Maddox*, 955 S.W.2d 718 (Ky. 1997), Maddox was convicted of beating his girlfriend's two-year-old son to death. During trial, Maddox sought to cast blame on his girlfriend and her cousin. The trial court refused to permit Maddox's cross-examination of the girlfriend regarding an uncharged allegation that she had struck a relative's child with a shoe so hard that it left a mark. In doing so, the court noted that striking the relative's child with a shoe was "a far cry from the blunt trauma which killed" her child.

As to the cousin, he had been previously accused of oral sodomy with a sleeping child. When the child awoke, the cousin stopped what he was doing and

left the room. Maddox attempted to introduce this evidence to show that the cousin might be responsible for the deceased child's anal bruising. The court found that the evidence regarding the cousin's prior bad acts was not admissible because there was no evidence the deceased child had been sexually abused, and the cousin's abuse involved oral, not anal sodomy.

In *English*, 993 S.W.2d 941, English was convicted of sexually abusing his wife's four and six-year-old grandnieces. In addition to the two minors, the trial court permitted two adult nieces to testify about English's abuse when they were six and nine years old. The Court determined that the testimony of the adult nieces was admissible because: all victims were pre-pubescent female relatives of English's wife; each incident occurred in English's house on either a couch or chair; each occurred while English's wife was in the house; and each involved the same behavior by English.

In *Holloman v. Commonwealth*, 37 S.W.3d 764 (Ky. 2001), Holloman was convicted of rape, sodomy, and sexual abuse. At trial, the prosecuting victim and another girl testified about Holloman's abuse. The Court determined that the evidence from the other girl was admissible because: the abuse occurred while Holloman was babysitting both girls; the girls were under twelve-years of age; the offenses took place on the living room floor or in Holloman's bedroom; and the specific acts were similar.

In *Martin v. Commonwealth*, 170 S.W.3d 374 (Ky. 2005), Martin was convicted of sexual abuse and sodomy involving his five-year-old step-

granddaughter. During trial, the prosecuting victim and two other girls testified about Martin's abuse. The Court noted that: all of the victims were Martin's or his wife's family members; all the victims were female between the ages of five and eleven; all were under Martin's care at the time of the abuse; all were alone with him with no other adults present; Martin bribed all of them with something important (ice cream, money, shopping, etc.); all abuse activity was the same; and all were threatened that they would get in trouble if they told. The Court noted the following dissimilarities: two of the victims were sometimes present together when the abuse occurred, but the third was always alone; only one of the victims alleged sodomy; and one victim was bribed with ice cream rather than shopping. The Court recognized the dissimilarities but, because prior bad acts do not have to be identical to be admissible, the Court found no error.

In *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky. 2006), Buford, who was a youth minister, was convicted of sexually abusing two minor girls in his youth group during group functions. At trial, both complaining witnesses testified about Buford's abuse. Buford's niece also testified that Buford had abused her; however, that alleged abuse occurred during a camping trip, not at a youth-group function. The Commonwealth argued that the niece's testimony was admissible because: the girls were all underage; the abuse took place at night when no one else could see; and Buford had been entrusted with the care of each girl. The Court disagreed, noting that: the prosecuting victims were considerably older than the niece; the

niece was a family member while the prosecuting victims were not; and the incidents occurred in very different settings.

In *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010) reh'g denied (May 20, 2010), as corrected (Apr. 9, 2010), Colvard was convicted of rape, sodomy, burglary, and of being a persistent felony offender. The sodomy and rape involved the six and seven-year-old granddaughters of Colvard's former fiancé. At trial, the Commonwealth introduced evidence that Colvard had been convicted of raping a ten-year-old girl twelve years earlier. The Court determined that the incidents were sufficiently similar to be admissible because: both involved prepubescent girls; Colvard knew both victims and gained access to their homes through a romantic relationship with an adult female in the household; both victims had second-floor bedrooms; Colvard assaulted both while others were in the home; and Colvard's actions were the same.

In *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010), Montgomery was convicted of sexually abusing his thirteen-to-fourteen year-old stepdaughter. At trial, the stepdaughter and several of her friends testified about Montgomery's abuse. The Court held that the testimony of the friends was admissible because: the girls were of the same age; Montgomery touched each girl the same way; each incident occurred in Montgomery's home while the girl was asleep and another girl slept nearby; and in each case, Montgomery stopped and left the room when each girl awoke.

Finally, in *Dant v. Commonwealth*, 258 S.W.3d 12 (Ky. 2008), Dant was convicted of wanton murder in the death of his girlfriend's seven-month-old daughter, Addryana. The medical evidence indicated that Addryana died as a result of head trauma from being shaken with great force. During trial, the Commonwealth introduced evidence that Dant: had put Addryana in a corner and smacked her on the head when she cried; had pushed his own six-month-old daughter's face into a corner, shaken her, smacked her, and wrapped her in a blanket to make her stop crying; and had physically abused the sixteen-month-old son of a former girlfriend by striking the child in the face. As in this case, the Commonwealth argued that the preceding was admissible to prove a pattern of conduct. The Court, after setting forth the appropriate standards, noted that the inquiry into the question of admissibility was difficult because

the specific facts surrounding the abuse that caused Addryana's death are relatively unclear. No specific facts were alleged regarding when or exactly how Addryana was abused on the night of her death. It is certain, however, that Addryana died from head trauma. Her autopsy revealed that this head trauma resulted from being struck in the head and from having her head violently shaken back and forth. Although there is no evidence that Dant put Addryana in a corner for not minding him on the night of her death, the evidence of Dant previously smacking the infant on the head could constitute a pattern of conduct since her death was partly caused by being struck on the head. Similarly, the prior act of abuse and what the Commonwealth alleged occurred at the time of Addryana's death were similar enough to show also that Dant had the same mental state during both acts of abuse: on both occasions, Dant used violence in response to the infant Addryana's behavior. Therefore, because the evidence of Dant previously

smacking Addryana on the head when she did not mind him could support a “reasonable probability” that Dant also struck Addryana on the head and/or used violence to stop her from crying on the night of her death, we find that the trial court did not abuse its discretion when it determined that this evidence was relevant under KRE 404(b).

Id. at 19.

Furthermore, the Court held that testimony regarding Dant's actions toward his own daughter and his former girlfriend's son, although not identical to his treatment of Addryana, were admissible. The Court held that such evidence met the strikingly similar requirement "because the same circumstances - a baby crying - and a similar reaction - violent physical conduct - were common elements present each time Dant abused" the children. *Id.* at 21. The Court concluded that

the evidence strongly reveals a common element that precedes each act of physical abuse - a crying baby. Despite the fact that each physical act was not identical, because each action was prompted by a crying child, Hall's testimony regarding Dant's prior abuse of Katilyn and Isaac fits within the pattern of conduct exception and was properly admitted at trial.

Id.

Based on the preceding, we must conclude that the testimony by Amber and McFarland about Reynolds's prior bad acts, with two exceptions, should not have been admitted. We discuss the exceptions first.

As previously noted, Amber testified that, when she confronted Reynolds about how he handled Caleb, he became angry and choked her. Furthermore, when she discussed Reynolds's phone call from McFarland with him, Reynolds

referred to Caleb as "her piece of shit kid." We do not believe this testimony is admissible to show a pattern of conduct, because Reynolds's conduct, if any, was directed toward Amber, not toward Caleb or any other child. However, because they involved or concerned Reynolds and his reactions to/feelings toward Caleb, testimony about these incidents may be admissible for some other purpose. In the event this matter is re-tried, the trial court may undertake an admissibility analysis under some other theory. However, the court cannot find evidence of those two incidents admissible for the purpose of establishing a pattern of conduct, absence of mistake or accident.

Having determined that evidence of two of the incidents of prior bad acts testified to by Amber may be admissible, we must conclude that the testimony from McFarland and Amber about prior bad acts directed toward McFarland should not have been admitted. The only possible similarity between those incidents and the abuse of Caleb is that Reynolds reacted violently when upset. However, the dissimilarities abound. Caleb was a three-month-old male and McFarland was an adult female. Reynolds is Caleb's father, but he is not related to McFarland. The abuse of Caleb for which Reynolds was prosecuted occurred at the Cruise Inn Motel. The other incidents occurred at a variety of locations. Furthermore, the other incidents involving McFarland followed arguments Reynolds had with McFarland and/or others and generally took place when others were or could have been present. There was no testimony that anyone saw Reynolds inflict the severe injuries from which Caleb suffered or that Reynolds

abused Caleb following an argument. Thus, there is little, if any, commonality between Reynolds's actions toward McFarland during the other incidents of prior bad acts and the abuse suffered by Caleb. Lacking that commonality, the testimony of McFarland and Amber regarding those other incidents should have been excluded.

Having determined the court's admission of evidence regarding prior bad acts directed toward McFarland was erroneous, we must determine if that error was harmless. We conclude that it was not.

RCr 9.24 requires us to disregard an error if it is harmless. A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The inquiry is not simply “whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.” *Id.* at 765, 66 S.Ct. 1239; *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky.2009).

Colvard, 309 S.W.3d at 249.

In light of the facts that: no one actually saw Reynolds inflict the injuries on Caleb; the Commonwealth's expert could not specify exactly when or how Caleb was injured; there was no evidence that Reynolds had abused or even struck either of his other children; and others were alone with Caleb when the abuse could have occurred, we cannot say that the testimony of McFarland regarding the other

incidents of abuse was harmless. Therefore, we must remand this matter for a new trial.

Because we are remanding this matter for a new trial, the remaining issues are moot, and we do not address them.

CONCLUSION

The trial court erroneously permitted McFarland to testify regarding prior bad acts and that error was not harmless. Therefore, we reverse and remand for a new trial with instructions for the trial court to exclude that evidence. As noted above, the court may find the testimony from Amber regarding prior bad acts directed toward her to be admissible; however, it cannot do so for proof of pattern of conduct or to show absence of mistake or accident.

ALL CONCUR.

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