

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-000722-MR

BILLY RAY WHITE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 04-CR-001391

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: Billy Ray White was indicted on felony charges of rape in the first degree, intimidating a participant in the legal process, two counts of tampering with a witness, tampering with public records, tampering with physical evidence and a misdemeanor charge of official misconduct in the first

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

degree. A Jefferson Circuit Court jury found him guilty of all charges and he was sentenced to serve twelve years. He brings three issues to our attention on appeal. After a thorough review of the record, we find there was error requiring a new trial.

At the times relevant to this case White was a married Jefferson County police officer. Although he was charged with forcibly raping one woman, the trial became a parade of witnesses disclosing unprofessional conduct and numerous extra-marital sexual relationships. For example, one witness at the trial was a young woman White met when responding to a domestic violence call. She testified he was nice to her and told her his wife was dead. They began a sexual relationship. There were no charges related to this witness.

Another young woman testified that when White arrested her on a bench warrant after she was stopped for speeding, he offered to help her find a job. He told this woman he was divorced and tried several times to meet her. She eventually told him to not contact her again and he complied. Again, no charges resulted from anything related to this witness.

White arrested a third young female witness who was detained at a local store for suspected shoplifting. White issued a citation requiring her to be in court on July 14, 2003. When White discovered she was unemployed, he offered to help her find a job and took her telephone number. He met with her several days later and he arrived in uniform with several job applications. She testified he

also stated he would “help her out” regarding the shoplifting charge. They met again while he was in uniform and after discussing the job applications and the impending court date, he asked her to sit in his lap. They began kissing and ended up engaging in sexual activities. These rendezvous continued over the course of time. On another occasion she met White, again wearing his uniform, and they went to a home that White said he shared with another police officer. There they had consensual sex. White told the woman he would take the judge to lunch and that would take care of the pending court date for her shoplifting charge. He told this woman he was a widower. He also told her that if he could not take care of the situation by talking to the judge, he would simply not appear at the hearing and the charges would be dismissed or at worst, she would be sentenced to pay a small fine. He told her to not worry about even going to court.

The shoplifting charge in fact never appeared on the court’s docket because White never entered it into the court’s data system. Although the accompanying police report had been reviewed by White’s supervising sergeant, the citation had no such indication. Based on this incident, White was charged with tampering with a witness, tampering with public records and official misconduct.

White met another woman when she stopped him and asked for directions to a job interview. White discussed her need for a job and they

exchanged telephone numbers. After talking on the telephone several times, the two began a consensual sexual relationship that lasted from June of 2003 until September of 2003. They broke up for about a month but again started seeing each other in October 2003. This went on until White was arrested in January 2004. In January 2004, White appeared at the woman's home on at least two occasions very late in the evening after his shift ended. He was in uniform and stayed until the next morning. No charges were filed as a result of White's relationship with this witness.

In September 2003, White also began a sexual relationship with a female police officer. He told her he had filed for a legal separation from his wife. This relationship also ended in January 2004 when White was arrested. No charges were filed regarding his behavior as it related to the fellow officer.

In December 2003, White and another officer responded to a domestic trouble call. A woman had called 911 to report she had obtained a Domestic Violence Order against her estranged husband but that he was sitting in his car across the street from her home. She was afraid to go outside but needed to meet the school bus in order to escort her four-year-old child home. White arrived and stayed with the woman until the child came home. While they waited, they talked about her need to find a job to support herself and her two small children. White

told her his wife had died and he had two sons. He also offered to help her find work and she gave him her telephone number.

He called the woman several days later and told her he had found her a job at a local pizza parlor. He said he knew the manager and assured her she would be hired. He also suggested he could find her jobs at other local businesses. On January 1, 2004, he stopped by her home in his squad car and dropped off an application from the pizza parlor. He called the next day to ask if she had completed the application. She did return the application that afternoon and was told by the manager she would receive a call in a few days regarding when she could start working. She spoke with White later that day and he told her she was attractive. She tried to lightheartedly dismiss these advances but he got angry, told her “he had done a lot for her,” and hung up. He called her again the next evening and told her he had some papers for her to see. She testified that he did not seem angry, so she gave him permission to stop at her home. When he arrived, he told her he wanted to talk inside. As they entered the apartment, he slammed the door behind them. White then pointed his gun at her and told her to be quiet. He threw her against a hall closet door and then threw her to the floor. She testified that White pulled down her pajama pants and underwear, then raped her. Afterward he told her that if she told anyone, he would kill her. He told her he had used a

condom so there would be no physical evidence and further said that even if she did report it, no one would believe her.

She did not call 911 or report the incident to the police. She did place two telephone calls to the father of her four-year-old child that evening. He advised her to go to the hospital but, fearing they would report the incident, she refused. She also talked to her mother that evening but did not tell her what had happened. She left her apartment and went to stay with her mother for a few days. Telephone records revealed she also called a Lowe's store approximately twelve hours after the time she testified the rape occurred, to discuss a malfunctioning washer the store had delivered earlier.

About a week later, she told her estranged husband she had been raped at gunpoint by a police officer. She asked him not to report the incident to the police. He waited almost another week but then reported the incident. Shortly thereafter, police officers came to her home to interview her. She was reluctant to discuss the matter but they returned the following day and she provided the details. On January 19, 2004 police officers came to her apartment and conducted a controlled telephone call to White. While the officers monitored the call, she told White she had discovered she was HIV positive. White denied having any sexual contact with her. She then gave a recorded statement to the police on January 28, 2004. White was then charged with rape in the first degree, tampering with a

witness and intimidating a participant in a legal process stemming from the allegations brought by this witness.

After the controlled telephone call, White was interviewed by police officers. Unknown to White, they had been monitoring him since the victim's estranged husband had reported the rape. It was clear from his answers based on what they knew from monitoring his activities that he was not being completely honest. He continually however, denied any sexual contact with the rape victim.

A former police officer who had been provided immunity from prosecution for his truthful testimony had given White a computer printout of charges pending against the rape victim on January 20, 2004. When he learned of White's arrest, he accessed the computer system and obtained the name of the complaining witness. He then ran a search for records related to her and discovered she had an outstanding arrest warrant. He obscured his identifiers on the printout, made a copy and gave both copies to White. Police searched White's home but White hid the papers in his pants and the police did not find the copies. White was charged with tampering with physical evidence for that act.

White's first allegation of error is that the trial court should have granted his motion to sever the offenses and try them separately. The trial court denied the motion, finding "there is a common scheme or plan as to both offenses charged in the indictment as well as uncharged criminal acts." In connection with

the forcible rape, White was charged with rape in the first degree, tampering with a witness and intimidating a participant in a legal process. In addition White was charged with tampering with a witness, tampering with public records and official misconduct regarding the situation of the woman and the shoplifting charge. He was also charged with tampering with physical evidence when he hid the printout that disclosed the identity of the former officer who secured that printout for him.

Multiple offenses may be charged in the same indictment “if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.” Kentucky Rules of Criminal Procedure (RCr) 6.18. White sought to sever the charges related to the woman charged with shoplifting from the allegations connected with the first-degree rape charge.

The trial court found that in the course of his duties, White would come into contact with women, determine if they needed employment and then offer to help them find a job. He would then “use false pretenses to either gain entrance into the females’ homes, or would promise to dispose of their pending charges.” It is clear from the order that the trial court believed there was a common scheme or plan. We give great deference to the determinations of the trial court and will not overturn those decisions absent a “clear abuse of discretion.” *Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993). While minds may



differ on exactly what constitutes a common scheme or plan, we will not substitute our judgment for that of the trial court. White's method of engaging women was consistent as it relates to both the rape victim and the woman charged with shoplifting. We cannot say that finding a common scheme or plan within the facts of those two situations is a clear abuse of discretion.

The trial court shall order separate trials if joinder of offenses or defendants will prejudice a defendant or the Commonwealth. RCr 9.16. "The issue is whether Appellant was unduly prejudiced by the joinder, i.e., whether the prejudice was unnecessary and unreasonable." *Roak v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002). "The primary test for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other." *Id.* Clearly, testimony concerning the rape would be irrelevant to any charges arising from the conduct with the shoplifter. *See* Kentucky Rules of Evidence (KRE) 401. Even though some of White's actions in each incident were similar, they did not rise to the level of being so distinctive as to create a signature crime, thus allowing the admission of the evidence of one situation to be admitted in the trial of the other. *See Clark v. Commonwealth*, 223 S.W.3d 90, 96-100 (Ky. 2007). In fact apart from White's offer to help the women find employment, there are more dissimilarities than similarities between the two situations. White was only alleged to use force and to

become violent and threatening with the rape victim. None of the other witnesses made any such allegations. Because of the rape victim's reluctance to report the crime and the concomitant lack of other evidence, the case turned largely upon her credibility. This heightens our attention upon the prejudicial nature of joinder of offenses in this case. In such cases "[w]here to draw the line depends on the facts of the individual case." *Romans v. Commonwealth*, 547 S.W.2d 128 (Ky. 1977). We acknowledge that such case-by-case judgment calls are difficult and to some degree subjective. But we believe that joinder of the offenses relating to the rape victim and the shoplifter in this case was impermissibly prejudicial, and that permitting joinder was an abuse of discretion. Therefore we must reverse on this ground and remand for a new trial.

White next argues that the introduction of evidence in violation of KRE 404(b) was also error. We agree, and because the issues may well arise during re-trial, we examine them in detail here. "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." KRE 404(b). Such evidence is however admissible if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” KRE 404(b)(1). The Commonwealth asserts the testimony from the witnesses

where White's behavior did not result in criminal charges, was intended to show White's plan and was therefore admissible.

Whether such evidence is properly admitted at trial is controlled by the three part test from the case of *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994). The trial court must first ask whether the evidence is relevant for some purpose other than to prove the criminal disposition of the defendant. *Id* at 889. Identity was not at issue in this case, so the evidence was not admissible for that purpose. *See Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986). Neither was the evidence related to the other women so intertwined with evidence of the crime charged that its introduction was unavoidable. *Funk v. Commonwealth*, 842 S.W.2d 476, 480 (Ky. 1993).

The next question for the trial court is whether the evidence is probative. The Commonwealth asserts the evidence is probative as it relates to the pattern of conduct White exhibited with these women. The evidence certainly proves that White is an adulterous lecher who was constantly on the prowl to use his uniform in furtherance of his lust and that he was an embarrassment and a disgrace to his family and to the many fine officers who protect and serve the people of Jefferson County. It is not nearly as clear that it is probative of a propensity by White to commit rape at gunpoint, or even to tamper with evidence. But we agree that the evidence does have some probative value.

Finally, the trial court must determine whether the probative value of the offered evidence outweighs its prejudicial effect. *Id.* The evidence must be excluded if the probative value is substantially outweighed by unfair prejudicial risk. *Old Chief v. United States*, 519 U.S. 172, 183, 117 S.Ct. 644, 651, 136 L.Ed.2d 574 (1997). Here, the trial court even warned the prosecution this conviction might not survive our review but allowed the evidence “with great reluctance.” Here again, while such judgment calls perhaps seem clearer with the benefit of hindsight, our review of the record leads us to the conclusion that the questioned evidence was overly prejudicial and exceeded its probative value. Upon retrial such “other acts” evidence should not be admitted as part of the Commonwealth’s case in chief.

White’s final issue is that the trial court improperly limited testimony from the accuser regarding her tumultuous relationship with her husband. White’s theory was this would tend to show she was not telling the truth about the rape. The trial court prohibited the testimony as being a collateral issue. We agree. Impeachment on collateral issues is generally improper. *See Metcalf v. Commonwealth*, 158 S.W.3d 740, 744-45 (Ky. 2005); *Purcell v. Commonwealth*, 149 S.W.3d 382, 397-398 (Ky. 2004); *Neal v. Commonwealth*, 95 S.W.3d 843, 849 (Ky. 2003); *Slaven v. Commonwealth*, 962 S.W.2d 845, 858 (Ky. 1997). The trial court’s decision was supported by sound legal principles and was neither arbitrary,

unreasonable nor unfair. *See English v. Commonwealth*, 993 S.W.2d 941, 945 (Ky. 1999). There was no abuse of discretion as to this issue.

Our review of the record discloses one last incident which must be addressed. One witness testified that White discussed his desire to have someone watch him while he engaged in sexual relations. The Commonwealth did not directly elicit this testimony. We attribute this to an over-zealous witness and not any wrongdoing by the prosecution or the trial court. Care should however be taken at any retrial to ensure that witnesses are properly cautioned against such irrelevant and prejudicial interjections.

For the reasons stated, we reverse the judgment and conviction of the Jefferson Circuit Court and remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

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