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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001477-MR

QUENTIN JACOB WHITE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CR-00421

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: Quentin Jacob White appeals from a final judgment and sentence of the Fayette Circuit Court arising from a conditional plea of guilty to one count of sodomy in the second-degree. White maintains that the circuit court

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

erred in allowing the introduction of prior bad acts. He also argues that the court erred in failing to render findings of fact and conclusions of law, and improperly admitted into evidence a statement made after he requested an attorney. For the reasons stated below, we affirm the judgment on appeal.

On February 6, 2006, Detective Albert Johnson of the Lexington Police Department investigated an allegation of sodomy involving a minor child referred to in the record as "J.T." As part of the investigation, Detective Johnson spoke on the phone with White, who agreed to come to the police station to be interviewed.

White arrived at the police station and was apprised of his right not to answer questions and to have an attorney present. White was interviewed by Detective Johnson for about 90 minutes. Detective Johnson would state that the interview was conducted in a calm and quiet manner, and that he sought to develop a rapport with White. According to Detective Johnson, White initially denied the victim's allegation that the victim awoke to find White underneath a blanket performing a sex act on him. During the course of the interview, White changed his story and admitted the allegation.

White would later allege that shortly after the interview began, he requested that he be allowed to get an attorney and to come back later. According to White, Detective Johnson's response was "you don't want to talk to me?" after which the interview continued. In contrast, Detective Johnson later stated that

though White did mention an attorney, he did not request one and expressly stated that he wished to continue voluntarily.

After interviewing White, Detective Johnson interviewed J.T.'s older brother, "D.M." D.M. told Detective Johnson that White had engaged in the same sex act with him as he had with J.T., and had done so on at least 20 occasions. D.M. stated that these acts occurred when D.M. was in middle school, and that they ended when White was about 17 or 18 years old. Furthermore, similar to J.T.'s allegation, D.M. stated that the first time the act occurred, he awoke to find White performing the sex act on him.

The matter resulted in the Fayette County grand jury returning an indictment on one count of first-degree sodomy on March 28, 2006. As the matter proceeded in Fayette Circuit Court, the Commonwealth gave notice that it sought to introduce evidence of prior bad acts pursuant to KRS 404(b), to wit, evidence that White committed acts of sexual contact and sodomy against D.M. when D.M. was a minor and in a manner similar to that alleged by J.T.

On May 2, 2007, a suppression hearing was conducted to adjudicate White's claim that the alleged confession during the interview conducted by Detective Johnson should be suppressed due to coercion and violation of KRS 422.110 (the "anti-sweating" statute).[2] At the same time, White sought to suppress

[2] KRS 422.110 provides that, "No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so."

the introduction of the alleged prior bad acts involving D.M., arguing that they were too remote in time and were more prejudicial than probative.

After considering the proof, the court concluded that the confession did not violate the "anti-sweating" provisions of KRS 422.110. Accordingly, it denied White's motion to suppress the confession at trial. As to the evidence of prior bad acts, the court initially expressed concern that the jury might improperly rely on D.M.'s testimony to conclude that J.T.'s allegation was true. After considering the matter further, however, it allowed for the introduction of the evidence at trial noting that "I think under the law it comes in."

After the motions to suppress were denied, White entered a plea of guilty to the amended charge of second-degree sodomy. The plea was conditioned on the reservation of White's right to appeal the denial of his motion to suppress. This appeal followed.

White first argues that the circuit court erred in denying his motion to suppress the introduction of the alleged prior bad acts involving D.M. Citing KRE 404(b) and *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992), he contends that the evidence should have been held inadmissible because its prejudicial effect outweighed its probative value. According to White, the alleged prior bad acts were remote in time, unlike the act allegedly involving J.T., and were not relevant to the instant proceeding. He also notes that the acts involving D.M. occurred some time between seven to twelve years before White's arrest in the instant matter, at which time White would have been somewhere between thirteen and

eighteen years old. Based on White's apparent age at the time of the alleged prior bad acts, i.e., that he was a juvenile, he argues that the acts should be held inadmissible.

We find no error on this issue. KRE 404(b)[3] states 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; or
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

As the Commonwealth properly notes, this list is not exhaustive. For example, prior bad acts are also admissible to prove *modus operandi*. *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky. 2006).

> In order to prove the elements of a subsequent offense by evidence of modus operandi, 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.

Id.

The dispositive question is whether the circuit court properly concluded that evidence of the prior bad acts was offered for some purpose set out

[3] KRE 404 was amended by Order 2007-02 of the Kentucky Supreme Court effective May 1, 2007. The amendment only affected the admissibility of evidence of the accused's character as set out in section (a), and has no bearing on the applicability of section (b) to the matter at bar.

in KRE 404(b) or otherwise recognized in the case law. This question must be answered in the affirmative. The nature of the alleged prior bad acts bears a reasonable relationship to that of the act allegedly committed against J.T., and as such, is properly admissible to show *modus operandi*. Both instances allegedly involved the same sexual act committed against male victims of similar age who were sleeping. Furthermore, the alleged victims were brothers, and each was a cousin of White. We agree with the Commonwealth that these facts are relevant to evidence a similar *modus operandi*. While KRE 404(b) is exclusionary in nature, *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994), and may not be used merely to prove a criminal disposition, *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999), we find no error in the circuit court's implicit conclusion that the Commonwealth met its burden of proving the admissibility of the prior bad acts.

White goes on to argue that the evidence of prior bad acts should also be excluded because he may have been a juvenile when the acts allegedly were committed. We are not persuaded by this argument. KRE 404(b) provides no prohibition against the admission into evidence of prior bad acts committed before the actor reached the age of majority. Furthermore, the notion of juvenile confidentiality is a legislative creation which does not implicate any constitutional right. *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002). The question whether to suppress evidence prior to trial rests with the discretion of the trial court. *Freeman v. Commonwealth*, 425 S.W.2d 575 (Ky. 1967). The Fayette Circuit Court did not abuse its discretion on this issue, and we find no error.

White next argues that the circuit court improperly failed to enter in the record the findings of fact and conclusions of law it relied upon in determining that White's confession was not coerced in violation of the "anti-sweating statute." White contends that the circuit court "failed to provide a proper written statement," that the court failed to comply with RCr 9.78 and that its denial of White's motion to suppress the confession was merely conclusory. White also notes that RCr 8.22 requires that a "verbatim record shall be made . . . including findings of fact and conclusions of law . . . ."

RCr 9.78 states that,

> If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive. (Emphasis added).

We find no error on this issue. RCr 9.78 requires only those findings "resolving essential issues of material fact" to be memorialized in the order. In determining that KRS 422.110 did not operate as a bar to the introduction of the contested evidence, the court adjudicated the motion as a question of law. It stated that, "I think that based on the law as I understand it, it is not a violation of the sweating statutes." That is to say, the parties were fully apprised of the facts which

were essentially uncontested, and the matter was resolved by application of the law to those facts. Furthermore, the sole case relied upon by White in support of his claim of error was an unpublished opinion which may not be cited or relied upon for precedential value. CR 76.28(4).[4] And finally, even if error exists in the court's alleged failure to comply with RCr 9.78, any such error is harmless. Accordingly, we find no basis for reversing on this issue.

White's final argument is that he was denied due process of law when his statement given at the police station was ruled admissible. He claims that the statement was made after he sought - and was denied - the presence of counsel. He contends that he stated to Detective Johnson during the interview that he "can try to get a lawyer and come back." This statement, he claims, evidenced his desire to have counsel present during questioning, and Detective Johnson's failure to allow White to obtain counsel should serve to bar the admission of any statements made after the denial. Conversely, the Commonwealth notes that Detective Johnson stated at the suppression hearing that White never requested an attorney.

White's claim of error on this issue centers on his assertion that he was denied counsel during custodial interrogation. There are sufficient facts in the record, however, to support the circuit court's implicit conclusion that White was not in custody when he made the statement at issue. It is uncontroverted that he voluntarily came to the police station with his girlfriend and spoke to Detective

[4] CR 76.28(4)(c) states that, "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state . . . ."

Johnson, who would later state that White was not in custody and did not request an attorney.

White relies on *West v. Commonwealth*, 887 S.W.2d 338 (Ky. 1994), in support of his claim of error. In *West*, the defendant was arrested and taken into custody prior to having a request for counsel made on his behalf by a family member. The Kentucky Supreme Court determined that a third party's request for counsel had the same effect as a defendant's request for counsel. In the matter at bar, White was not under arrest when he claims to have requested counsel, and facts exist in the record upon which the court could have reasonably relied in concluding that he was not in custody. Detective Johnson stated at the suppression hearing that White came to the police station voluntarily; that he was apprised of his rights and was not under arrest; and, that he did not request an attorney and never stated that he wished to stop speaking with the detective. Since "the Fifth Amendment rights protected by *Miranda* attach only after a defendant is taken into custody," *Wilson v. Commonwealth*, 199 S.W.3d 175 (Ky. 2006), and because testimony exists in the record upon which one may reasonably conclude that White was not in custody when his statement was made, we find no error in the circuit court's denial of his motion to suppress.

For the foregoing reasons, we affirm the order and judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Alyette Durham, II
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky