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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001627-MR

SETH SMITH — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 06-CR-00622

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Seth Smith (hereinafter Appellant) appeals from a conviction for first-degree assault and a sentence of thirteen years, following the entry of a conditional guilty plea. Appellant reserved for appeal three issues: that the court erred in admitting evidence of a prior conviction of assault, that the court erred in excluding certain testimony from Smith's expert witness, and that the court erred in excluding evidence of the victim's criminal history. We find that Appellant's

first argument has merit and reverse the trial court's decision regarding that claim, but we affirm the trial court's decision concerning Appellant's remaining two claims.

On October 22, 2006, Appellant assaulted Kevin Smith (no relation) at Cline's on the River in Campbell County. After a night of drinking, the two began arguing in Kevin Smith's vehicle. During the argument, Appellant stabbed Kevin Smith twice, once in the torso and once in the right leg. It is unclear where the knife came from, but Appellant claims he took it away from Kevin Smith. Appellant does not deny stabbing Kevin Smith; however he does argue that it was done in self-defense.

During the discovery phase of the case, a number of motions were filed. Appellant sought to exclude a prior conviction for assault wherein he stabbed his mother. He also moved to be permitted to present evidence that his psychologist, Dr. Edward Connor, was of the opinion that Appellant "acted in a manner which he felt was necessary to defend himself."[1] The Commonwealth moved to exclude the victim's criminal history, specifically a conviction for disorderly conduct. The trial court ordered that Appellant's prior assault conviction could be introduced into evidence, that the victim's criminal history could not be introduced, and that Dr. Connor could not testify that Appellant "acted in a manner which he felt was necessary to defend himself."

[1] This is a quote from Dr. Connor's psychiatric report and was the only part to which the Commonwealth objected.

Following these rulings, the Commonwealth and Appellant entered into the agreement previously described. This appeal followed.

Appellant first argues that his prior conviction for assault should not have been admitted into evidence. Generally, evidence of prior crimes is not admissible. Kentucky Rule of Evidence (KRE) 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." There are exceptions to this rule. Prior bad acts may be entered into evidence if "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" or "[i]f 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." KRE 404(b)(1)-(2). "But that list of exceptions is illustrative, not exhaustive. Among the non-enumerated exceptions we have recognized to KRE 404(b)'s general prohibition on the introduction of prior bad acts evidence is . . . modus operandi." *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007).

The trial court permitted introduction of evidence of Appellant's prior assault conviction under the theories of intent and modus operandi, both exceptions to the general prohibition of prior bad acts evidence. Because this is an evidentiary issue, the proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "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).

First, we find that the prior conviction does not meet the standard for modus operandi.

> The modus operandi exception requires "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." (Citations omitted).

Clark, 223 S.W.3d at 96. The Kentucky Supreme Court has held

> that "it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi." So, as a prerequisite to the admissibility of prior bad acts evidence, we now require the proponent of the evidence to "demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual." (Citations omitted).

Id. at 97.

Evidence of prior bad acts is highly prejudicial against a defendant. *Commonwealth v. Buford*, 197 S.W.3d 66, 70 (Ky. 2006).

> KRE 404(b) has always been interpreted as *exclusionary* in nature. "It is a well-known fundamental rule that evidence that a defendant on trial had committed other offenses is never admissible unless it comes within certain exceptions, which are well-defined in the rule itself." For this reason, trial courts must apply the rule cautiously, with an eye towards eliminating evidence

> which is relevant only as proof of an accused's propensity to commit a certain type of crime. (Citations omitted).

Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994).

> [C]lever attorneys on each side can invariably muster long lists of facts and inferences supporting both similarities and differences between the prior bad acts and the present allegations. It is inevitable, particularly when the prior act amounts to an earlier violation of the charged offense, that there will be some basic similarities between the prior bad act and the new criminal conduct . . . Ultimately, the Commonwealth must demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual.

Buford, 197 S.W.3d at 71.

Here, we find that the two assaults were not so similar as to meet the modus operandi exception. One victim was his mother, the other a male friend. Each was stabbed in different locations on their bodies with different knives. Also, each stabbing took place in different geographic locations. Further, Appellant was allegedly drunk during the most recent stabbing. Finally, Appellant's mother was not as severely injured as Kevin Smith. Although the record is almost devoid of information regarding the severity of Appellant's mother's injury, Appellant states that she did not even require stitches, while Kevin Smith was critically injured.

If we were to imagine that the identity of the perpetrator of both assaults was unknown and compared the two crimes, we could not find that the two

crimes were committed by the same person. The modus operandi exception does not apply to this evidence.

As stated previously, the trial court also found the intent exception applied. We disagree. The trial court stated that

> the Commonwealth has the right and the obligation to prove each and every element of the offense charged. In this instant matter, Defendant's prior conviction was for assault first degree wherein he knifed an individual in the back. This evidence is admissible to prove the Defendant's intent in wielding a knife in this case, that is, to inflict serious physical injury.

Here, intent was not at issue. Appellant admitted to stabbing Kevin Smith. He intended to cause him physical injury. It appears as though this evidence was being introduced to show Appellant's general violent behavior. In essence, because Appellant stabbed his mother, without an allegation of self-defense, he must have also stabbed Kevin Smith for no reason. Had both assaults been against the same person, then the introduction of the first assault could be relevant to show intent and rebut the self-defense claim, thereby being admissible under KRE 404(b), but that is not the case here.

Appellant cites us to some cases that he argues support his theory the prior conviction should not have been admitted. Although not from this jurisdiction, we find one worthy of mention. In *United States v. Sanders*, 964 F.2d 295 (4th Cir. 1992), Sanders was being prosecuted for assault. A prior conviction for assault was introduced into evidence for the purpose of showing intent.[2] As in

[2] Federal Rule of Evidence 404(b) is almost identical to our KRE 404(b).

the case *sub judice*, Sanders admitted to the assault, but claimed it was committed in self-defense. The Fourth Circuit Court of Appeals held the evidence should not have been admitted because Sanders admitted the assault. The Court found the prior assault had no bearing on the intent in the current assault and that it was only showing Sanders' "propensity to commit assaults . . . or his general propensity to commit violent crimes." *Id*. at 299.

Because this type of evidence is highly prejudicial, we find the admission of the prior conviction was an abuse of discretion. It did not show intent, and it did not rise to the level of modus operandi. We therefore reverse this order of the trial court.

Appellant next argues that the trial court erred in excluding certain proposed testimony from Dr. Connor. Appellant states that Dr. Connor would have testified that Appellant "acted in a manner which he felt was necessary to defend himself." The trial court stated that Dr. Connor could not testify to such because "he would be testifying as to what was actually in the Defendant's mind at the time he committed the offense." We agree with the trial court.

"Expert testimony will . . . be precluded if [it] would usurp the jury's role as the final arbiter of the facts, such as testimony on witness credibility and state of mind." *See United States v. Libby*, 461 F.Supp.2d 3, 7 (D.D.C. 2006). In the present case, Dr. Connor's report of his findings after treating Appellant for more than two years and participating in over forty therapy sessions with Appellant, stated:

> I can only state that in my clinical opinion although Mr. Smith had made significant improvement in psychotherapy, at that moment, he felt frightened that he would be assaulted and acted in a manner which he felt was necessary to defend himself. One can certainly question his judgment at that moment in time and can also consider in hindsight that there would have been a better way to protect himself, such as leaving the car.

This opinion concerning the Appellant's state of mind is inadmissible because it would usurp the jury's role as the finder of fact. Therefore, the trial court properly excluded this evidence.

Appellant's final claim of error was that the trial court should not have excluded evidence of the victim's prior criminal history. Appellant wanted to introduce Kevin Smith's criminal record to show why Appellant was afraid and acted in self-defense. Kevin Smith allegedly had an extensive criminal history,[3] all of it misdemeanor convictions. The one misdemeanor Appellant specifically wanted to introduce was a conviction for disorderly conduct. We find that the trial court correctly held the victim's criminal record inadmissible.

In *Saylor v. Commonwealth*, 144 S.W.3d 812, 815-816 (Ky. 2004), the Kentucky Supreme Court stated:

> Generally, a . . . defendant may introduce evidence of the victim's character for violence in support of a claim that he acted in self-defense or that the victim was the initial aggressor. KRE 404(a)(2); *Johnson v. Commonwealth,* Ky., 477 S.W.2d 159, 161 (1972); Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.15[4][b], at 104 (4th ed. LexisNexis 2003). However, such evidence

[3] Kevin Smith's criminal history is not contained in the two volumes of record associated with this case. Any evidence of his criminal history discussed is what was acquired from watching video of pretrial hearings.

> may only be in the form of reputation or opinion, not specific acts of misconduct. KRE 405(a); Lawson, *supra,* § 2.20 [4], at 116 ("By providing only for the use of reputation or opinion evidence in this situation, the rule plainly implies a prohibition on evidence of particular acts of conduct."). Specifically, in *Johnson,* our predecessor court held that a homicide defendant could not introduce the victim's police record for the purpose of showing his propensity for violence. *Johnson,* 477 S.W.2d at 161.
>
> An exception exists, however, when evidence of the victim's prior acts of violence, threats, and even hearsay evidence of such acts and threats, is offered to prove that the defendant so feared the victim that he believed it was necessary to use physical force (or deadly physical force) in self-protection, "provided that the defendant knew of such acts, threats, or statements at the time of the encounter." Lawson, *supra,* § 2.15[4][d], at 105-06. *See also Commonwealth v. Higgs,* Ky., 59 S.W.3d 886, 892 (2001); *Commonwealth v. Davis,* Ky., 14 S.W.3d 9, 14 (2000); *Wilson v. Commonwealth,* Ky. App., 880 S.W.2d 877, 878 (1994). In that scenario, the evidence is not offered to prove the victim's character to show action in conformity therewith but to prove the defendant's state of mind (fear of the victim) at the time he acted in self-defense. "Obviously, such evidence could not be used to prove fear by the accused without accompanying proof that the defendant knew of such matters at the time of the alleged homicide or assault." Lawson, *supra,* § 2.15[4][d], at 106 (citing *Baze v. Commonwealth,* Ky., 965 S.W.2d 817, 824-25 (1997)).

Here, Appellant could introduce general reputational or opinion evidence of Kevin Smith's violent character. Appellant, however, wanted to introduce specific acts in the form of Kevin Smith's criminal history. In order to use the specific acts to show why Appellant was afraid of Kevin Smith, the specific acts would need to be violent acts. Kevin Smith's criminal history was devoid of

violent acts. The disorderly conduct conviction Appellant specifically mentioned was for "yelling in public," which is not a violent crime. The trial court properly declined to admit this evidence.

For the above reasons we reverse the trial court's order pertaining to the admissibility of Appellant's prior conviction for assault. We affirm the trial court's orders limiting Dr. Connor's testimony and denying admissibility of the victim's criminal history. Accordingly, we reverse the Judgment reflecting Smith's conditional guilty plea and remand the matter for further proceedings consistent with this Opinion.

DIXON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN PART; DISSENTS IN PART AND FILES SEPARATE OPINION.

STUMBO, JUDGE: Respectfully, I must dissent from the majority opinion in regard to the second issue, whether the trial court erred in excluding testimony of Appellant's treating physician.

During the discovery phase of the proceedings, Appellant moved to be permitted to present evidence that his psychologist, Dr. Edward Connor, was of the opinion that Appellant "acted in a manner which he felt was necessary to defend himself." The trial court held that Dr. Connor could not testify to such because "he would be testifying as to what was actually in the Defendant's mind at the time he committed the offense." I disagree with this decision of the trial court and would hold that it was an abuse of discretion not to allow the testimony.

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

Stringer v. Commonwealth, 956 S.W.2d 883, 891 (Ky. 1997). None of the four above guidelines were referenced by either the trial court or the prosecution. Further, Dr. Connor's expertise was never questioned; therefore, no *Daubert* hearing was held.

In fact, it appears to me that Dr. Connor was more than qualified to give his opinion of Appellant's state of mind at the time of the assault. Dr. Connor had been treating Appellant for more than two years, had participated in over forty therapy sessions with Appellant, made a report of his findings, and diagnosed Appellant with multiple mental disorders. The part of Dr. Connor's report that contains the anticipated testimony objected to by the Commonwealth states:

> I can only state that in my clinical opinion although Mr. Smith had made significant improvement in psychotherapy, at that moment, he felt frightened that he would be assaulted and acted in a manner which he felt was necessary to defend himself. One can certainly question his judgment at that moment in time and can also consider in hindsight that there would have been a better way to protect himself, such as leaving the car.

(R. 70). Superficially, this opinion would appear to invade the province of the jury which in this case would need to determine what the defendant's state of mind was

at the time of the stabbing. However, the testimony, when placed in proper context is clearly specialized knowledge that would assist the trier of fact to understand the evidence or to determine a fact in issue. *Stringer, supra*. In *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002), our Supreme Court applied this analysis to the admission of expert testimony sought to be introduced in regard to the role of mental retardation and its connection to the phenomenon of false confessions. Therein the Court said that testimony specifically stating that testimony which "would have assisted the trier of fact by providing an explanation for Appellant's confession that would rebut the common assumption that people do not ordinarily make untruthful inculpatory statements" was not inadmissible because it may have addressed the ultimate issue in the case. *Id*. at 42. Here the expert testimony would have assisted the trier of fact by providing information on the effect of the Appellant's various mental problems on his actions on the day of the assault. I would reverse and remand for a new trial.

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