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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000674-MR

KEVIN FOX — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN D. SEAY, JUDGE
ACTION NO. 12-CR-00176

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER
AFFIRMING
AND DENYING
MOTION TO TAKE JUDICIAL NOTICE

** ** ** ** **

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Kevin Fox appeals from an April 4, 2014 Judgment of Conviction and Sentence following his conviction in Nelson Circuit Court for one count of Sexual Abuse in the First Degree. Specifically, he contends that the trial court erred in admitting the testimony of two women who alleged that Fox had abused them when they were teenagers. The Commonwealth presented this

testimony under KRE[1] 404(b) as evidence of Fox's *modus operandi* in the present case. Fox also challenges testimony given during the penalty phase of his trial concerning his parole eligibility.

We agree with the trial court that the prior assaults of which Fox is accused are similar to the assault in this case, and we conclude that the alleged conduct in all three assaults was sufficiently peculiar or distinct to admit the prior acts as evidence. Additionally, we agree with the Commonwealth that no palpable error resulted from testimony concerning Fox's parole eligibility. Therefore, after careful consideration of the issues Fox raises on appeal, we affirm.

Background

In May 2012, Fox's fourteen-year-old step-daughter, S.W., disclosed to a friend that Fox had fondled her breasts and pubic area during an incident that occurred at their home the prior October. These accusations eventually made it to authorities, and a grand jury indicted Fox on June 6, 2012, on a single charge of first-degree sexual abuse.

Prior to trial, the Commonwealth filed notice of its intent to introduce evidence of Fox's alleged prior sexual abuse of his niece, Gretchen, and another woman named Jennifer. With this evidence, the Commonwealth sought to establish Fox's pattern of behavior, or *modus operandi*, in each of the three assaults. The trial court conducted a hearing on the motion in March 2013.

[1] Kentucky Rules of Evidence.

At the hearing, Fox's niece, Gretchen, testified that in 1987 or 1988, when she was around ten or eleven years old, Fox reached inside her shirt and fondled her breasts as she lay on a couch in a home she and her family then shared with Fox. Gretchen did not seek criminal charges against Fox, nor did she tell anyone of Fox's actions until she was an adult.

Jennifer testified that she was a friend of another of Fox's nieces, Tori. In 1991, when Jennifer was twelve years old, Tori's family moved from Cincinnati to Louisville. Jennifer spent the night before the move at Tori's house, and Fox was there. According to Jennifer, Fox arranged for her to meet him in the basement of the home after everyone was asleep. There, he kissed and fondled Jennifer, and rubbed his clothed genitals against her. Jennifer visited Tori and her family often after they moved, which permitted Jennifer and Fox to carry on a two-year relationship during which they engaged in sexual intercourse on at least three occasions. Jennifer did not report these events to anyone until she was seventeen years old, and Fox never faced criminal charges as a result.

Finally, S.W. testified regarding Fox's assault on her. She stated that Fox entered her bedroom and offered to pop her back, a task he performed frequently due to S.W.'s chronic, sports-related back pain. After Fox popped S.W.'s back, he turned her over and began rubbing the inside of her legs. S.W. told Fox to stop, and he did, momentarily. Fox then reached inside S.W.'s shirt and fondled her breasts, later placing his hand inside her shorts and underwear. The incident ceased, and Fox left the room.

Following the hearing on the Commonwealth's KRE 404(b) motion, the trial court concluded that "there are sufficient similarities for the [prior] incidents to be introduced as evidence." Among these were: Fox's relation or near-relation to all three victims; the victims' ages and that all three had recently developed breasts; that the victims were in a residence and in a room alone; and the time of night when all three victims were dressed for bed.

A jury trial took place over three days in October 2013 during which the Commonwealth introduced the testimony of Jennifer and S.W., but not Gretchen. At the conclusion of the proof phase, the jury rendered a verdict of guilty.

During the penalty phase, the Commonwealth called Bridgette Kelley, a Department of Probation and Parole representative. Kelley testified concerning the penalty range for first-degree sexual assault and that Fox would be parole eligible after serving twenty percent of his sentence. Accordingly, Kelley went on to explain that a sentence of one year in prison would make Fox parole eligible after four months, and a two-year sentence would make him eligible after five months. Following this testimony, the jury recommended a sentence of two-years' imprisonment. The trial court imposed the recommended sentence and entered its Judgment of Conviction and Sentence from which Fox now appeals.

During the pendency of this case on appeal, the Commonwealth moved that we take judicial notice of a two-page Department of Corrections document which reflected that Fox would be parole eligible after serving five

months of his two-year prison term. A Motion Panel of this Court passed the Commonwealth's motion to this panel, and we consider the motion along with the substantive arguments raised on appeal.

Standard of Review

On appeal, Fox contends that the trial court's decision to admit evidence of prior sexual assaults allegedly perpetrated by him contradicted fundamental principles of fairness and law. In considering Fox's argument on this point, we are reminded that "the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence[.]" *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). For this reason, trial courts retain considerable discretion over evidentiary rulings, *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); and we will only reverse the trial court's ruling on the Commonwealth's KRE 404(b) motion if we conclude that it was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id*. at 581, *citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Analysis

As we have stated, Fox appeals on two bases: That testimony concerning the prior alleged assaults was inadmissible, and that Kelley's testimony concerning his parole eligibility was erroneous, misleading, and prejudicial. We address both issues in-turn.

I. Admission of Evidence of Fox's Alleged Prior Assaults

KRE 404(b) is an exclusionary rule. It 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." Such a rule is founded upon the premise that a defendant should "be tried for the particular crime for which he is charged." *Clark*, 223 S.W.3d at 96, *citing O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982). However, there are exceptions to this rule. Such evidence may be admissible if offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b). As the Commonwealth points out on appeal, this list in "illustrative, not exhaustive." *Clark* at 96. Furthermore, these exceptions remain subject to KRE 403.[2]

Among the recognized but "non-enumerated" exceptions to KRE 404(b)'s exclusionary rule is evidence of a common *modus operandi*. *Clark* at 96, *citing English*, 993 S.W.2d at 945. To demonstrate such a commonality, "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*." *Id*. at 945. If the prior acts do not demonstrate such a probability "then the evidence of prior misconduct proves only a criminal disposition and is inadmissible." *Id*.

In *Clark v. Commonwealth*, *supra*, Kentucky's Supreme Court clarified its requirement of a "striking" similarity among crimes. The Court

[2] "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."

pointed out that it is not the "commonality of crimes" that is crucial, but "the commonality of facts constituting the crimes[.]" 223 S.W.3d at 97, *quoting Dickerson v. Commonwealth*, 174 S.W.3d 451, 469 (Ky. 2005). Thus, the Court added to the Commonwealth's burden upon presenting *modus operandi* evidence:

> [A]s a prerequisite to admissibility of prior bad acts evidence, we now require the proponent of the evidence to 'demonstrate that there is 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.'

Id., *quoting Commonwealth v. Buford*, 197 S.W.3d 66, 71 (Ky. 2006). "Although it is not required that the facts be identical in all respects, evidence of other facts of sexual deviance … must be so similar to the crime on trial as to constitute a so-called signature crime." *Id*., *quoting Dickerson*, 174 S.W.3d at 469 (internal quotation marks omitted). As the Court went on to observe, this places a heavy burden upon the Commonwealth. *Id.*

We begin, as the Court in *Clark* did, by stating that the mere fact that there was sexual contact between Fox and all three witnesses "is, in and of itself, not a distinct pattern sufficient to satisfy the *modus operandi* exception." 223 S.W.3d at 98. There must be other facts which are both similar and so peculiar or distinctive as to implicate Fox or to demonstrate a common *mens rea*. This means we must engage in "a searching analysis of the similarities and dissimilarities between" Fox's alleged assaults of Jennifer and Gretchen and the assault for which he was convicted in this case. *Id*.

As the trial court pointed out, there were many facts common to all three assaults and which were more than the inevitable product of the nature or requisite elements of the crime in question. However, *Clark* requires that the other alleged assaults also be of a character "so peculiar or distinct" as to create a "reasonable probability" that the same person committed the crime presented at trial. *Clark*, 223 S.W.3d at 97. This is a more exacting question.

Fox's principal argument on appeal is that the three crimes were insufficiently similar under the standard in *Clark* to permit evidence of those assaults to reach the jury. Fox points out that the duration, frequency, and nature of the contact differed among the respective assaults. He states that the testimony of the three women is similar only in that they "describe conduct which may theoretically fit within the statute, but which do not constitute a signature crime." We disagree.

Jennifer, Gretchen, and S.W. were of very similar ages at the time Fox assaulted them; they were all pubescent and had recently developed breasts at the time Fox assaulted them; and they were all related to and living with Fox, or close to someone who was. Among those facts to which Fox now points and which the trial court listed as common to all three assaults, these facts stand out.

That the three victims were so similarly aged, physically developed, and, for lack of a better term, "convenient" to Fox is ultimately persuasive to this Court. These are characteristics which go beyond mere coincidence or happenstance even given the elements of the crime in question. Vitally, they

demonstrate not only a similarity or commonality of fact, but a distinct pattern among victims sufficient to raise the reasonable probability that the same person, Fox, perpetrated all three assaults. This meets the rigorous requirements of *Clark*; therefore, we conclude there was sufficient peculiarity and distinctiveness among the facts common to all three assaults to admit testimony regarding the prior two.

Fox also argues that, even assuming sufficient similarity between the three assaults, the prior assaults were too remote in time from the charge in this case to be of sufficient probative value. However, Fox is correct when he states that such a fact properly goes to the weight of the evidence and not its admissibility. *See English*, 993 S.W.2d at 944. Accordingly, we reserve such considerations to the rightful province of the finder of fact – in this case, the jury.

II. Testimony Concerning Fox's Parole Eligibility

Finally, Fox asks us to review the testimony of Bridgette Kelley, who stated at the sentencing phase of the trial that a one-year sentence would make Fox parole eligible after four months and a two-year sentence would do so after five months. Fox argues that Kelley provided "patently false and misleading" testimony because state law requires that, as a "violent offender," he serve eighty-five percent of his sentence before he is parole eligible. However, Fox's trial counsel did not object to Kelley's testimony; therefore, this issue is unpreserved on appeal and subject only to review for palpable error by this Court. RCr[3] 10.26.

[3] Kentucky Rules of Criminal Procedure.

A palpable error is one that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered or remedied. *Id*. Even where the Commonwealth acts in good faith, incorrect information regarding parole eligibility during the sentencing phase of a trial is palpable error. *See Robinson v. Commonwealth*, 181 S.W.3d 30, 37-38 (Ky. 2005), *citing Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Therefore, we proceed to the merits of Fox's argument concerning his parole eligibility.

The version of KRS[4] 439.3401 in effect at the time Fox committed the offense in this case includes among its definition of a "violent offender" persons convicted of felony sexual abuse. KRS 439.3401(1)(d). The Commonwealth does not contest this. The conflict on this issue arises from another paragraph of the same statute which states that "[a] violent offender shall not be awarded any credit on his sentence authorized under KRS 197.045(1)(b)(1). In no event shall a violent offender be given credit on his sentence if the credit reduces the term of imprisonment to less than eighty-five percent (85%) of the sentence." KRS 439.3401(4). Fox contends that this limits his parole eligibility, and that Kelley's statement to the contrary resulted in the jury recommending a harsher sentence than it otherwise would have. The Commonwealth disagrees, stating that KRS 439.3401(4) and KRS 197.045 concern a prisoner's good-time and meritorious credit only and that individuals like Fox who have been convicted of a Class D felony sex crime are not subject to an eighty-five percent minimum sentence.

[4] Kentucky Revised Statutes.

The law required Fox required to serve a minimum of twenty percent of his sentence. While he fits the statutory definition of a "violent offender," this does not guarantee a minimum sentence of eighty-five percent. KRS 439.3401 merely limits the impact good-time credit and other credits can have on his sentence. Parole is not "credit" on a prisoner's sentence, and we see no support, in KRS 439.3401 or elsewhere, for such a minimum. Hence, KRS 439.3401(4), while confusing as to its scope, is irrelevant to Fox's parole eligibility.

This result is bolstered by regulations concerning the determination of parole eligibility which state those convicted of Class A and Class B felony sex offenses shall be subject to the eighty-five percent minimum sentence. *See* 501 KAR[5] 1:030 § 3(1)(e)(4)(e). Fox's charge of sexual assault in the first degree in this case was classified as a Class D felony. *See* KRS 510.110. Therefore, the charge for which Fox was convicted is not included among the offenses subject to the eighty-five percent minimum, and Kelley's testimony was correct.

There was no error during the sentencing phase of Fox's trial. Furthermore, having made our decision concerning parole eligibility based strictly upon the relevant case law, statutes, and regulations, we need not resort to the document of which the Commonwealth asks us to take judicial notice.

Conclusion

Questions concerning the admissibility of character evidence and a defendant's prior bad acts seldom prove easy to answer. This case is no exception.

[5] Kentucky Administrative Regulations.

However, the testimony that the Commonwealth sought to admit was ultimately the trial court's to allow or exclude based upon a finding of whether that testimony created a reasonable probability that Fox committed all three assaults. Given this, and notwithstanding Fox's counsel's well-pled brief, we conclude that the trial court did not err in admitting the testimony concerning Fox's alleged prior conduct. Additionally, we find no palpable error in the testimony during the sentencing phase of Fox's trial.

The Judgment of Conviction and Sentence of the Nelson Circuit Court is affirmed; and IT IS FURTHER ORDERED that the Commonwealth's August 25, 2015 Motion to Take Judicial Notice is DENIED.

ALL CONCUR.

ENTERED: March 4, 2016

/s/ Irv Maze
JUDGE, COURT OF APPEALS

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