

RENDERED: JANUARY 5, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF DECEMBER 22, 2017 WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000100-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 14-CR-00015

BRETT A. SMITH

APPELLEE

AND

NO. 2016-CA-000101-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 14-CR-00017

LAURA SUSANNE PIKE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CLAYTON AND J. LAMBERT, JUDGES.

ACREE, JUDGE: The Commonwealth of Kentucky brings these appeals, which have been designated to be heard together, from orders of the Henry Circuit Court denying its motions to introduce evidence of prior bad acts against the appellees Brett Smith and Laura Pike. At issue is whether the trial court correctly ruled that certain evidence was inadmissible because it did not meet the *modus operandi* exception to Kentucky Rules of Evidence (KRE) 404(b).

On February 28, 2014, the Henry County Grand Jury indicted Brett Smith on one count of sodomy in the first degree and three counts of sexual abuse in the first degree. His girlfriend, Laura Pike, was indicted on the same day on two counts of incest, two counts of sodomy in the first degree, and one count of sexual abuse in the first degree. The charges stemmed from substantially the same course of conduct toward the victim, M.F., who is the biological daughter of Pike.

The evidence relating to M.F. consisted of her forensic interview in which she related that Smith orally sodomized her and forced her to orally sodomize him. The sexual contact occurred in the home shared by Smith, Pike, and M.F. Smith and Pike usually participated in the abuse of M.F. simultaneously.

M.F. revealed that the abuse began when she was nine years of age and continued until she was eleven, when she was removed from the home.

M.F.'s older sister, D.F., who is also the biological daughter of Pike, disclosed that she was forced to have sex with Smith and that her mother was present and involved. She stated that she was forced to orally sodomize both Pike and Smith, and that Pike and Smith would orally sodomize her and have sexual contact with her. D.F. also stated that Smith raped her on at least one occasion, although the Commonwealth does not intend to elicit testimony regarding the rape at the trial. These events occurred in the home of Smith and Pike where D.F. lived with her mother. The alleged abuse committed against D.F. occurred in Jefferson County.

The Commonwealth sought to admit D.F.'s testimony under the "*modus operandi*" exception to the strictures against the admission of evidence of prior bad acts found in KRE 404(b). The trial court denied the motion and this appeal by the Commonwealth followed.

The Commonwealth is proceeding pursuant to Kentucky Revised Statutes (KRS) 22A.020(4) which permits an interlocutory appeal to be taken "by the state in criminal cases from an adverse decision or ruling of the Circuit Court," under certain conditions. The rationale underlying the statutory provision is that the Commonwealth is precluded from filing an appeal if a defendant is acquitted. "It is, indeed, only fair to the public, and proper for its protection, because otherwise the guilty might escape by an acquittal resulting from legal errors[.]"

Ballard v. Commonwealth, 320 S.W.3d 69, 72 (Ky. 2010) (internal citation omitted).

The trial court is the gatekeeper of evidence. *Leatherman v. Commonwealth*, 357 S.W.3d 518, 529 (Ky. App. 2011) (citation omitted). In this role, the trial court possesses substantial discretion. *See Washington v. Goodman*, 830 S.W.2d 398, 400 (Ky. App. 1992). Our standard when reviewing a question of admissibility of evidence is whether the trial court abused that discretion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 438 (Ky. 2003). “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).

KRE 404(b) provides 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 evidence may, however, be admissible “[i]f 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 Kentucky Supreme Court has recognized other non-enumerated exceptions to KRE 404(b)’s general prohibition against the introduction of prior bad acts evidence; one of these exceptions is if the evidence is probative of *modus operandi*. *Newcomb v. Commonwealth*, 410 S.W.3d 63, 73 (Ky. 2013). “The *modus operandi* exception requires the facts surrounding the prior misconduct [to] 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.*

The trial court ruled that the evidence relating to the elder child, D.F., was not sufficiently strikingly similar to that of M.F. to be admissible under KRE 404(b). The trial court acknowledged that both victims have the same relationship to Laura Pike, that of mother and daughter, but pointed out that the victims were not the same age when the abuse occurred (M.F. was nine years of age when the abuse began; D.F. was fourteen). The trial court described M.F. as “very unaware” of what was happening to her, and reluctant to participate. M.F. stated that she declined Smith’s and Pike’s advances and asked her mother to stop. The trial court noted that D.F. was asked by Smith and Pike to participate and declined many times, but eventually complied in order to protect her younger siblings and her mother. The trial court also found that D.F.’s allegations of frequency and the type of abuse (full sexual intercourse) were not similar enough to M.F.’s allegations.

We cannot say this decision constitutes an abuse of discretion.

“[W]hether prior sexual misconduct by a defendant is admissible [is] a difficult, fact-specific inquiry[.]” *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007).

There are certainly similarities here between the acts of sexual abuse that occurred between the defendants and the two victims. However, “conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the *modus operandi* exception.” *Clark v. Commonwealth*, 223 S.W.3d 90, 98 (Ky. 2007).

The Commonwealth argues that the fact that the defendants acted with concerted effort to abuse the victims is a sure sign of peculiarity and probative of *modus operandi* of the perpetrators. However, as the trial court noted in its order, M.F. alleged that it was only her mother that first subjected her to abuse in the shower when she was just nine years old. And despite similarities in the allegations by M.F. and D.F. that Smith and Pike acted together, no distinct pattern of abuse materializes from the victim's accounts indicative of a so-called "signature crime." *Id.* Further, "it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a *modus operandi*." *Dickerson v. Commonwealth*, 174 S.W.3d 451, 469 (Ky. 2005).

There are sufficient differences in this case between the accounts provided by M.F. and D.F. of their encounters with the defendants supporting the trial court's exclusion of the evidence under KRE 404(b). The victims were of different ages when the abuse began, only M.F. described an incident solely involving her mother, and her encounters with the defendants did not involve full intercourse. Only D.F. alleged Smith would abuse her mother if she did not participate, she described regular encounters of full intercourse with the defendants as well as drug use by the defendants. Although it is not required that the facts be identical in all respects, "evidence of other acts of sexual deviance . . . must be so similar to the crime on trial as to constitute a so-called signature crime." *Id.* (quoting *Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993)). Provided the lack of remarkable commonality in the defendants' conduct toward the victims

outside the acts constituting the offenses, we agree with the trial court that evidence of prior acts with D.H. and the defendants are inadmissible under the *modus operandi* exception to KRE 404(b). Accordingly, we are not persuaded the trial court erred.

Smith and Pike assert in their response to the Commonwealth's interlocutory appeal that such action has deprived them of their right to a speedy trial. They rely on *Commonwealth v. Blincoe*, 33 S.W.3d 533 (Ky. App. 2000). In *Blincoe*, the Commonwealth filed an interlocutory appeal after a key witness invoked his Fifth Amendment rights. While that appeal was pending, the trial court entered an order stating that the case would be dismissed in sixty days if the Commonwealth did not proceed to trial. The Commonwealth refused to proceed to trial until the interlocutory appeal was decided, and the trial court accordingly dismissed the case without prejudice after sixty days had elapsed. The appeal that is the subject of *Blincoe* was taken by the Commonwealth from the final order of the circuit court dismissing the indictment against Blincoe. A panel of this Court held that the trial court did not err in dismissing the indictment because the Commonwealth would be able to obtain a new indictment if it prevailed in its interlocutory appeal.

In this case, Smith and Pike responded to the Commonwealth's notice to continue the trial pending the resolution of this appeal by opposing the continuance and demanding the right to a speedy trial. The record before us does not indicate whether the trial court ruled on these matters, and in any event, Smith

and Pike are not appealing or cross-appealing from any adverse final action of the trial court. Their arguments regarding the potential violation of their right to a speedy trial is an issue which may be addressed on direct appeal after the entry of final judgments in their cases.

We note also the Kentucky Supreme Court's holding in a case in which the appellant argued that an interlocutory appeal had violated his right to a speedy trial which is also applicable to these cases. The Court said "[a]ny delay attributable to time consumed by the interlocutory appeal does not count toward Appellant's speedy trial claim. The appeal was neither tangential nor frivolous." *Tamme v. Commonwealth*, 973 S.W.2d 13, 23 (Ky. 1998), *as modified on denial of reh'g* (Sept. 3, 1998) (citing *United States v. Loud Hawk*, 474 U.S. 302, 315–16, 106 S.Ct. 648, 656, 88 L.Ed.2d 640 (1986)).

Smith and Pike also contend that D.F.'s evidence does not meet the requirements for an interlocutory appeal under KRS 22A.040 as elucidated in *Eaton v. Commonwealth*, 562 S.W.2d 637, 639 (Ky. 1978): "Unless the constitutional right to a speedy trial were unduly threatened, we see no reason why an interlocutory 'ruling' entered prior to trial, if it decides a matter vital to the Commonwealth's case, could not be reviewed by appeal." *Id.* They contend that D.F.'s evidence is not vital to the Commonwealth's case. We disagree. The evidence at issue is highly relevant, especially in light of the fact that the prosecution's witness is a child who was nine years of age at the time the alleged crimes were committed. Notwithstanding the fact that the evidence cannot, by

rule, be admitted, it is unquestionably capable of persuading a jury in the direction of a conviction.

In conclusion, the circuit court's orders denying the Commonwealth's motions in both cases to introduce evidence of prior bad acts of defendants involving D.F. are affirmed.

ALL CONCUR.

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