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RENDERED: MARCH 22, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000406-MR

GARRETT CALLAHAN — APPELLANT

V.

ON APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
NO. 08-CR-00083

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

During the early morning hours of May 17, 2008, Meghan Muntz returned from the grocery store to her apartment in Winchester, Kentucky. Appellant, Garret Callahan, lived next door to Muntz and was standing outside with Cory Knox when she arrived. Appellant and Knox had been drinking that night. Appellant offered to carry in her groceries, but Muntz declined the offer and carried the first load inside by herself. When she returned to her car to get another load, Appellant again asked if she needed help and she again refused his offer. However, Appellant grabbed the groceries from Muntz and started towards her front door. Muntz got ahead of him and tried to shut the door, but Appellant knocked her back into the house. Once inside, Appellant proceeded

to rape Muntz. Because of the principal issue raised on this appeal, a detailed and sordid account of the sexual assault is necessary.

Once Appellant had pushed Muntz back into the house, he tried to kiss her several times and bit her lower lip. He also tried to put his hands down her shirt. Eventually, he grabbed her arm and pulled her over to the couch. Then he pulled her by her hair, jerked his pants down, and pushed her head down on his penis. He held onto her hair with one hand and put a condom on with the other. He then pulled her into her bedroom and jerked her clothes off.

At this point, Muntz was lying on her back as Appellant was trying to penetrate her, but he could not maintain an erection. So he used his fingers to insert his penis into her vagina. Muntz was telling him to stop and that he was hurting her. He then flipped her over and pulled her up so that she was on her hands and knees and he was behind her. He penetrated her vagina again. He grabbed and squeezed her breasts as hard as he could, causing severe bruising. He also penetrated her anus and slapped her buttocks very hard, causing severe bruising.

After the sexual assault, Appellant suggested to Muntz that maybe she would feel more comfortable at his house and asked her several times to come over. She eventually said yes and convinced Appellant to leave her home, then locked the door behind him. She tried to call a friend, but he did not answer. When Appellant shortly returned and began banging on her front door, Muntz dialed 911.

Soon after the police arrived at Muntz's apartment, they heard sounds coming from Appellant's residence. When officers went next door, Appellant came to the door with a knife in his hand. After the police told him they needed to ask him some questions, Appellant stabbed himself in the neck several times and then retreated back into his apartment. He eventually returned to the front door, stabbing himself again. Appellant stated to the police that he had already been to jail once for something that he had not done, and that he would rather die than return to jail. Eventually, the police were forced to use Tasers on Appellant before taking him to the hospital for treatment. Felicia Evans, the emergency room technician on duty that morning, testified that, while at the hospital, Appellant said "he had done this once and got away with it and he would get away with it again."

Appellant was indicted by a Clark County Grand Jury on July 5, 2008, and charged with first-degree rape, first-degree unlawful imprisonment, first-degree wanton endangerment, two counts of first-degree sodomy, resisting arrest, and disorderly conduct. The Commonwealth moved to dismiss all counts, except for the rape and sodomy counts. On March 24, 2009, Appellant was convicted in the Clark Circuit Court of first-degree rape and one count of first-degree sodomy. He was sentenced to 15 years in prison on each count. The sentences were ordered to run consecutively, totaling 30 years in prison. He now appeals the judgment and convictions as a matter of right. Ky. Const. § 110(2)(b).

The Appellant raises two issues for appellate review. Because it is dispositive, we address only the first issue presented.

Admissibility of Modus Operandi Evidence of Prior Sexual Assault

At trial, over Appellant's objection, the Commonwealth called Janice Workman to testify about a sexual assault committed against her by Appellant in August of 2007. Appellant had met Workman at a local gas station and had given her his phone number. Two days later, she saw him at the same gas station where he again asked her to call him. This time Workman did call and she, her niece, and Appellant went to see a movie together.

Several days later, Workman agreed to watch a movie at Appellant's house. Appellant told Workman that there would be other friends there as well, but when she arrived, Appellant was alone and he was drinking. Workman's ex-boyfriend called, causing Appellant to become angry and break Workman's cell phone. Workman then walked outside and Appellant apologized, asking her to come back in. Once inside, Appellant began hitting and kicking her. He eventually stopped, but told her that he would not take her home and that she could not leave. He then took Workman upstairs to his bedroom and tried to take her shirt off. He told her that either she could take her clothes off or that he would. Workman undressed and Appellant threw her onto the bed. He was wearing a condom and inserted his penis into her vagina. According to Workman, he could only maintain an erection when he was violent. He grabbed her breasts and squeezed them very hard, causing severe

bruising. He flipped her over on her knees and slapped her on her right buttocks, also causing severe bruising. He then tried to have anal sex, but she kept screaming and saying no. Eventually, Appellant told Workman to put her clothes back on and not to tell anyone what had happened.

After Workman's testimony, the trial court admonished the jury, stating "the testimony you just heard from Ms. Workman is not evidence of the defendant's guilt and is not to be considered by you in any respect whatsoever except as it may tend to show a plan or method of operation on the defendant's part." This evidence was admitted by the trial court over Appellant's objection.

The basis for the trial court allowing the introduction of the prior sexual assault was under the modus operandi exception to KRE 404(b). We review trial court decisions to admit evidence, pursuant to KRE 404(b), under the abuse of discretion standard. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). That is, we determine whether the decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

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." However, such evidence may 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). This list of exceptions is not exhaustive. *Tamme v.*

Commonwealth, 973 S.W.2d 13, 29 (Ky. 1998). In addition to those listed, courts have recognized modus operandi evidence as an exception to KRE 404(b)'s general exclusion of evidence of prior bad acts. *Clark*, 223 S.W.3d at 96.

We set out the modus operandi analysis in *Commonwealth v. Buford*, 197 S.W.3d 66, 70 (Ky. 2006) (internal citations omitted):

> 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.

Stated another way,

> [I]t is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi. 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. at 71.

Applying this rationale to the case before us, it is clear that the evidence of the alleged rape upon Janice Workman does not rise to the level of a "signature crime." First, Appellant had different relationships with Muntz and Workman. Workman and Appellant had met before and had gone to see a movie together. On the day of the alleged rape, Workman had come to Appellant's house to watch another movie with him. Muntz, on the other hand,

had just moved next door to Appellant and had only met him on one prior occasion, when she asked for help moving furniture. Muntz also testified that Appellant forced her to engage in oral sex; whereas Workman did not. Further, the alleged rape of Workman occurred at Appellant's apartment; whereas the rape of Muntz occurred at her apartment.

These differences in Workman's and Muntz's testimonies are analogous to the differences set forth in *Clark v. Commonwealth,* 223 S.W.3d 90 (Ky. 2007). In *Clark*, this Court found that the prior bad act evidence and evidence of the charged offense were not similar enough to constitute signature crimes, noting the following differences: (1) the type of relationship between the defendant and the victims; (2) defendant subjected only some of his victims to oral-genital contact; and (3) the incidents occurred at different locations. *Clark*, 223 S.W.3d at 98-99.

There were also other differences, in addition to those associable to *Clark.* Workman's sexual assault was instigated because of jealousy due to a phone call from an ex-boyfriend, while Muntz's was not. Additionally, a physical assault occurred prior to Workman's rape, but not Muntz's.

After considering these differences, the only remaining common facts include: (1) drinking; (2) protected sex in similar positions; (3) squeezing breasts and slapping buttocks while in those positions; and (4) difficulty maintaining an erection. Although we recognize there are similarities between the two incidents, we cannot find that these facts are adequately similar to

constitute a signature crime.

Even if Workman's testimony had been sufficiently similar, it fails the KRE 403 balancing test. Workman's testimony was more prejudicial than probative because it was not relevant or "probative of an issue independent of character or criminal disposition." *Robey v. Commonwealth*, 943 S.W.2d 616, 617 (Ky. 1997) (citing *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992)). On appeal, the Commonwealth contends that Workman's testimony shows that Appellant knew he was not having consensual sex with Muntz (knowledge and absence of mistake). The Commonwealth also claims that the testimony shows that Appellant planned to have a sexual encounter by forcible compulsion (common scheme, plan, or intent).

However, neither of the purposes offered by the Commonwealth is relevant or probative of an issue that was disputed at trial. The tape of Appellant's interview with Detective Hall, in which he admitted to having sexual intercourse with Muntz, was played for the jury. Accordingly, Appellant's counsel conceded at trial that Appellant had sexual intercourse with Muntz, but argued that she had consented. Thus, Muntz's consent, not Appellant's knowledge, was the principal issue. Appellant's knowledge or mistaken beliefs concerning Muntz's supposed consent were irrelevant.

Further, the evidence of the other crime did not show a plan by Appellant. The common scheme or plan exception

> was intended to refer to the fact that the charged offense was but one of two or more related criminal acts. . . . For example, in a case involving a charge of armed robbery [where] evidence is introduced to show that the getaway car

> had been stolen by the defendant shortly before the robbery[,] it is possible to see the auto theft (the uncharged other crime) and the armed robbery (the charged offense) as part of a common scheme.

English, 993 S.W.2d at 943-44. The prior bad act of the common scheme or plan must be connected in the sequence of events making up the crime. Here, they were nine months apart.

The Commonwealth also argues that Workman's testimony was admitted to explain Appellant's statement to the police "that he had already been to jail once for something that he did not do and would rather die." However, this statement is neither relevant nor admissible and is not open to corroboration by Workman's testimony. Furthermore, the Commonwealth argues that the evidence of the previous rape goes toward explaining Appellant's statement to a nurse at the hospital that "he had done this once and got away with it and would get away with it again." This is simply an incriminating admission and does nothing to move Workman's testimony into one of the exceptions listed in 404(b).

In summary, the testimony of Janice Workman had no purpose other than to show Appellant's character or criminal disposition. "Since there was no proper purpose this evidence could serve, the conclusion that its potential for prejudice substantially outweighed its probative value is inescapable." *Bell v. Commonwealth*, 875 S.W.2d 882, 890-91 (Ky. 1994) (citing *Walker v. Commonwealth*, 476 S.W.2d 630 (Ky. 1972)). We find that the trial court abused its discretion in admitting this highly prejudicial testimony.

Accordingly, we reverse and remand for further proceedings in accordance with this opinion.

All sitting. All concur. Venters, J. also concurs by separate opinion, in which Schroder and Scott, JJ., join.

VENTERS, J., CONCURRING: The majority opinion, with which I fully concur, concludes that the prior bad act alleged here is not similar enough to the crime for which Callahan was being tried to qualify for admission under KRE 404(b). We therefore avoid the need to revisit recent opinions, such as *Montgomery v. Commonwealth*, 320 S.W.3d 28 (Ky. 2010) and *Clark v. Commonwealth*, 223 S.W.3d 90 (Ky. 2007) that have allowed the introduction of prior bad acts, relevant not to prove a specific issue of fact such as the identity or the mental state of the alleged perpetrator, but solely to prove the "corpus delicti" – that is, to show that the alleged crime actually happened. Upon reflection, it seems that in those and other recent cases, we may have allowed the 404(b) exceptions to completely swallow the 404(b) rule. In practice, the only way that prior bad acts "prove the corpus delicti" is drawn from the natural assumption that the crime must have occurred as the victim claims because the defendant has a history of doing that sort of thing. This is simply propensity evidence by another name – exactly what KRE 404 and its common law antecedent have prohibited for generations. We have never offered a sound rationale for what I see as a departure from that venerable principle of law. Moreover, our decisions have not given clear guidance on matters such as the

degree of proof needed to reliably establish the occurrence of the prior bad acts, or how to gauge the degree of similarity between the crimes on trial and the alleged prior acts. We have also neglected serious discussion of the role of the KRE 403 balancing test. I would welcome a re-evaluation of this troublesome area of law when the issue is squarely presented in a subsequent case or upon consideration of the matter as part of this Court's rule-making authority.

Schroder and Scott, JJ., join.

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