

RENDERED: February 18, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2002-CA-001132-MR

JOHN C. BROOKS

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JR., JUDGE  
ACTION NO. 00-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: KNOPF, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: John C. Brooks appeals his convictions of first-degree sexual abuse<sup>1</sup> and second-degree sexual abuse.<sup>2</sup>

Because the trial court erred in admitting prior uncharged sexual acts, we reverse the judgment and remand for a new trial.

Brooks, age 57, lived with his sister, Donna Gamble, and her family, which included three foster type children and a mentally challenged adult female, whom Donna had raised and

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<sup>1</sup> KRS 510.110.

<sup>2</sup> KRS 510.120.

cared for. It was alleged that on February 15, 2000, Brooks entered the bedroom shared by the mentally challenged adult, C.B., who was in her thirties, and one of the children, an eleven-year old girl, R.B. Brooks allegedly put his hand down C.B.'s pants and fondled her. Next, he allegedly put his hand down R.B.'s underpants and fondled her and penetrated her vagina with his finger.

Brooks was indicted May 8, 2000. A competency hearing regarding C.B. and R.B. was held on February 22, 2002, and both were found competent to testify. A jury trial was held on February 27, 2002, wherein Brooks was convicted of first-degree sexual abuse of R.B., a class D felony, and second-degree sexual abuse of C.B., a class A misdemeanor. Brooks was sentenced to five years for the felony, and twelve months on the misdemeanor. This appeal followed.

On appeal, Brooks first argues that the trial court erred in finding C.B. competent to testify, on grounds that it was not demonstrated that she understood the obligation of a witness to tell the truth.<sup>3</sup> KRE 601(b)(4) disqualifies a witness to testify if he or she lacks the capacity to understand the obligation of a witness to tell the truth.

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<sup>3</sup> Brooks does not challenge the competency of R.B. on appeal.

C.B., who is mentally challenged, was 39 years old at the time of the February 22, 2002, competency hearing.<sup>4</sup> When asked about her age, she said "I'll be thirty-eight." She knew her address, and knew the names of some of the people she lived with. She had difficulty understanding many of the questions asked of her, was easily confused, and frequently gave answers which did not pertain to the questions. However, when given simple examples, she was able to demonstrate that she did understand the difference between the truth and a lie. For example, she knew her name was not "Monica" (although she had a friend with that name), and knew that it would not be true if someone said she lived in Kalamazoo, because she lived in Irvine. After the Commonwealth had demonstrated, in this way, that C.B. knew the difference in truth and lie, defense counsel took the interview to the next step and asked C.B. if it was good or bad when you tell a lie. C.B. knew that it was "bad" to tell a lie, although she could not give any consequences of telling a lie. At the conclusion of the hearing, defense counsel expressed concern that the last prong of the competency test, that a witness understand the obligation to tell the truth (KRE 601(b)(4)), was not satisfied. The court disagreed and found C.B. competent.

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<sup>4</sup> Per the trial testimony of Donna Gamble, who gave C.B.'s date of birth as March 14, 1962.

KRE 601 creates a presumption of competency, subject to exceptions. The presumption extends to mentally handicapped persons. See Robert G. Lawson, The Kentucky Evidence Law Handbook, §3.05[3] (4<sup>th</sup> ed. 2003). The presumption of competency is overcome per KRE 601(b)(4), if the person lacks the capacity to understand the obligation of a witness to tell the truth. We agree with the appellant that merely knowing the difference between the truth and a lie is not sufficient to satisfy KRE 601(b)(4), which requires that a witness understand the obligation to tell the truth.

A trial court's determination of competency will not be disturbed absent an abuse of discretion. Pendleton v. Commonwealth, 83 S.W.3d 522, 525 (Ky. 2002). An appellate court may consider a trial court's competency determination from a review of the entire record. Kentucky v. Stincer, 482 U.S. 730, 743, 107 S. Ct. 2658, 2666, 96 L. Ed. 2d 631 (1987); Payne v. Commonwealth, 623 S.W.2d 867, 878 (Ky. 1981); Hendricks v. Commonwealth, 550 S.W.2d 551, 554 (Ky. 1977).

Because of C.B.'s mental handicap, neither the trial court nor counsel had an easy task in this case. However, the examination of C.B. at the competency hearing demonstrated that she knew the difference between the truth and a lie, which is the first step in showing an obligation to speak the truth. Secondly, C.B. also appeared to understand the concept of good

and bad, and knew that it was "bad" to tell a lie. Further, the record, including C.B.'s trial testimony, does not reveal any facts which prove that C.B. did not understand the obligation of a witness to tell the truth. We are unable to say the trial court's finding was an abuse of discretion. However, in light of the fact that this case is being remanded, we recognize that on retrial the defense will have another opportunity to explore the issue in depth.

Brooks also contends that the trial court erred in allowing evidence of prior bad acts. On May 25, 2001, the Commonwealth filed a Notice of Intent to Use KRE 404(b) Evidence, wherein the Commonwealth indicated it planned to offer evidence of prior uncharged sexual acts committed by Brooks upon Donna Gamble, another sister, P.S., and his daughter, J.E. The trial court denied Brooks's motion to exclude this evidence.<sup>5</sup>

Brooks's sister, P.S., was 46 years old at the time of trial. She testified that Brooks, her older brother, began abusing her when she was three or four years old. She testified that he would fondle her and that there was "sexual penetration", including penetration with his fingers, and that he stopped when she was 14 because she had started menstruating. P.S. provided no other details regarding the alleged incidents.

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<sup>5</sup> Although the Commonwealth had given notice that it would call Donna Gamble to testify as to abuse by Brooks, she was not asked about this at trial.

Brooks's daughter, J.E., age 37 at the time of trial, testified that when she was nine or ten, Brooks went into the bathroom when she was taking a bath and showed her how to use a douche. Later, he would have her sit on his lap while he had an erection until it subsided. When she was about twelve years old, he started touching and licking her vagina. As she got older, he would make her pull her pants down so he could "look". J.E. testified that it was not until she was 16 years old that she realized this was not right.

KRE 404(b) provides:

Other crimes, wrongs, or acts. 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;

"[E]vidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). "Trial courts must apply [KRE 404(b)] 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." Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994).

The degree of similarity between the charged and the uncharged acts is a critical factor in establishing a direct relationship independent of character. Billings, 843 S.W. at 892. It is not sufficient that the charged and uncharged acts are both of a sexual nature. Lear v. Commonwealth, 884 S.W.2d 657 (1994). Two acts involving sexual crimes are not necessarily "similar". Billings 843 S.W.2d at 893. With regard to the degree of similarity required, our Supreme Court has explained:

[C]ollateral bad acts evidence offered to prove corpus delicti should satisfy the same criteria as such evidence offered to indicate modus operandi. That is, evidence of other acts of sexual deviance offered to prove the existence of a common scheme or plan must be so similar to the crime on trial as to constitute a so-called signature crime.

Rearick v. Commonwealth, 858 S.W.2d 185, 187 (Ky. 1993), citing Billings 843 S.W.2d at 893. See also, Gray v. Commonwealth, 843 S.W.2d 895 (Ky. 1992).

We agree with Brooks that the trial court erred in admitting the testimony of prior bad acts through P.S. and J.E. The uncharged acts do not show a "striking similarity" indicative of a modus operandi relevant to the charged acts. Gray, 843 S.W.2d at 897; Billings, 843 S.W.2d at 893-894. While

the testimony of P.S. alleged generally similar acts, there was shown no similarity in details (P.S. gave none concerning location, time, and method) as required to demonstrate modus operandi. See Billings, 843 S.W.2d at 893. Further, as in Gray, "any probative worth which that [general] resemblance might endue is diminished by the significant temporal remoteness of those events." Gray, 843 S.W.2d at 895. The evidence of prior bad acts merely showed Brooks's character and predisposition to commit a crime, and was, therefore, inadmissible. Billings, 843 S.W.2d 890. Because the error was prejudicial, it is necessary to remand for a new trial.

The remaining allegations of error are either not likely to occur upon retrial or have become moot.

For the foregoing reasons, the judgment of the Estill Circuit Court is reversed and the matter is remanded for a new trial.

ALL CONCUR.

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