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TO BE PUBLISHED

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

NO. 2004-CA-002108-MR

JOHN FIELDS

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
INDICTMENT NO. 03-CR-00339

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.<sup>1</sup>

PAISLEY, SENIOR JUDGE: John Daniel Fields appeals from a judgment entered by the Daviess Circuit Court in which he was found guilty of rape in the first degree, assault in the fourth degree and unlawful imprisonment in the second degree. The trial court sentenced Fields to a total of ten years in prison. Finding no error, we affirm Fields's judgment of conviction.

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

John Daniel Fields and Marilyn Ann Keller met in July 2001 and, after a brief courtship, married in August of that year. According to Marilyn, Fields began to physically and emotionally abuse her in early 2002. On May 11, 2003, Marilyn finally left Fields and moved out of the marital home. One month later, Fields told Marilyn that he would be attending a conference in Missouri and would not return until June 15, 2003. Fields urged Marilyn to visit their home while he was away so she could retrieve her belongings.

After receiving numerous phone calls from Fields which Marilyn's caller identification showed were made from Missouri, Marilyn thought that Fields was out of town and that it was safe for her to go to the home. So, on the evening of June 14, 2003, Marilyn went to the home at approximately 10:00 p.m. While there, Marilyn saw a light moving outside. When she went to investigate, she found the front door unlocked. At that time, Fields barged into the home, physically assaulted Marilyn and began to yell at and berate her. Fields continued to verbally abuse Marilyn during the entire incident. Fields forcibly took Marilyn's car keys away from her and physically held her in the home against her will. When Marilyn attempted to grab a phone, Fields physically assaulted her again, and, dragging her from room to room, he gathered all the phones in the home so she could not use them. Eventually, Fields dragged Marilyn upstairs

and forced her to undress while yelling at her for wearing "ungodly" clothes.

Fields then pulled Marilyn into their bedroom and attempted to perform oral sex on her. He then forced Marilyn into the bathroom and forced her to take a shower with him. Then he took Marilyn back into the bedroom and proceeded to have sexual intercourse with her. During intercourse, Fields used coarse and crude language to describe himself, used crude and demeaning language to describe the act, and forced Marilyn to use crude language to beg him for sex. She later testified at trial that she neither struggled with Fields nor told him "no" because she knew what he was capable of doing. She further testified that she was terrified the entire time and that she feared for her life.

Afterwards, Fields decided that he wanted to go to Marilyn's apartment to look for evidence that she had been seeing other men. Fields forced Marilyn into the passenger seat of her own car and then drove towards her apartment. While driving, he attempted to look at Marilyn's cell phone. This caused Fields to drive erratically which attracted the attention of a police officer who stopped the vehicle.

After Marilyn had jumped from the car and told the officer about being physically assaulted, the officer arrested Fields. However, it was not until the next day that Marilyn

reported the rape to the police. At trial, she testified that she had delayed because she had felt ashamed and humiliated for letting her guard down.

On August 5, 2003, a Daviess County Grand Jury indicted Fields for rape in the first degree, unlawful imprisonment in the first degree, assault in the fourth degree and violation of a domestic violence order. Prior to trial, the Commonwealth filed three notices pursuant to Kentucky Rules of Evidence (KRE) 404(c) seeking to introduce evidence of prior instances of domestic violence between Fields and Marilyn. Fields objected arguing that the evidence was not relevant and that the Commonwealth's sole reason for introducing such evidence was to denigrate his character. On June 23, 2004, the trial court held a hearing to determine if the prior acts were admissible. At the hearing, Marilyn testified regarding ten separate acts of prior domestic violence where Fields had either physically or emotionally abused her. Fields argued that Marilyn did not testify to any prior sexual assaults; thus, he concluded the prior bad acts failed to show a plan or scheme that was relevant to the charge of rape.

The trial court found that Marilyn's testimony established a pattern of domestic violence which showed a common scheme or plan on Fields's part to force Marilyn to be submissive to him and which showed Marilyn's lack of consent.

In addition, the trial court found that the evidence showed motive, opportunity, intent and absence of mistake or accident. The trial court also found that the evidence's probative value outweighed any prejudicial effect it might have. Thus, the trial court concluded that Marilyn's testimony regarding the prior acts of domestic violence was admissible at trial.

Fields proceeded to trial and was convicted of rape in the first degree, unlawful imprisonment in the second degree and assault in the fourth degree. On September 10, 2004, the trial court sentenced Fields to a total of ten years in prison. Now, Fields seeks relief from his conviction.

#### **PRIOR BAD ACTS**

On appeal, Fields argues that the trial court erred in its evaluation of the prior bad acts; thus, it erred in concluding they were admissible. Citing Commonwealth v. English, 993 S.W.2d 941 (Ky. 1999), Fields argues on appeal that prior bad acts of a criminal defendant must be so similar to the charged act that it is reasonably probable that the prior acts and the charged act were committed by the same person and/or the prior acts and the charged act were accompanied by the same mental state. According to Fields, the prior acts of domestic violence to which Marilyn testified were not similar enough to the charge of rape in the first degree to be admissible against him since Marilyn did not testify to any prior acts of sexual

abuse. Furthermore, if the prior acts were similar enough to show that they and the charged act were committed by the same person, then such evidence would still be irrelevant and inadmissible since Fields's identity was not at issue. As Fields points out, he never denied having sex with Marilyn; he simply claimed that it was consensual.

In addition, Fields points out that the Commonwealth argued at trial that it needed evidence of the prior bad acts in order to show why Marilyn did not resist having sex with Fields. But, Fields argues that the Commonwealth was not required to prove that Marilyn resisted. In fact, Fields argues that the Commonwealth solicited testimony from Marilyn that she in fact tried to resist, thereby, undermining the very reason why the Commonwealth needed the evidence in the first place.

Furthermore, Fields points out that the only evidence adduced at trial regarding the prior acts of domestic violence was Marilyn's testimony. Relying on Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994), Fields insists that Marilyn's testimony was not enough evidence for the jury to reasonably conclude that the prior acts had actually occurred. Thus, he insists that the prior acts were not sufficiently probative to have been admitted at trial.

Also, citing Old Chief v. U.S., 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), Fields argues that the trial

court did not exercise its discretion when it determined that the evidence's probative value outweighed its prejudicial effect. According to Fields, in order to exercise its discretion, the court was required to consider whether less prejudicial evidence was available to the Commonwealth. According to Fields, less prejudicial evidence was available, although he fails to disclose what this evidence was, and he insists that the trial court never considered it. Thus, the trial court failed to exercise its discretion which is, in and of itself, an abuse of discretion.

KRE 404(b) reads in pertinent part:

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; or
- (2) If 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.

Marilyn testified to ten prior acts of domestic violence that included both physical and emotional abuse. There was clearly sufficient evidence of the prior acts to allow the evidence to be introduced. This evidence was relevant to show Marilyn's state of mind during the assault and rape and helped to explain why she was so afraid of Fields. Thus, the evidence

was relevant to show Marilyn's lack of consent. In other words, the evidence of prior domestic violence was relevant to show forcible compulsion, one of the elements of rape in the first degree. Thus, the trial court did not err in admitting Marilyn's testimony regarding the prior acts of domestic violence.

#### **TRANSCRIPT**

At trial, the Commonwealth introduced an audio tape recording of an interview Fields gave to the police after he had been arrested. Prior to trial, the Commonwealth had prepared a transcript of the interview, and, at trial, proposed to provide copies of the transcript to the jury so the jurors could read it while listening to the tape. Fields objected to the transcript arguing that the Commonwealth had placed the word, "inaudible" in various place in the transcript to hide the fact that, during the interview, Fields had repeatedly requested the interview to end. The Commonwealth assured Fields that it had no intentions of introducing the transcript into evidence. Upon receiving this assurance, Fields withdrew his objection.

Citing U.S. v. Robinson, 707 F.2d 872 (6<sup>th</sup> Cir. 1983), Fields argues that the transcript of the interview should not have been used at trial unless both he and the Commonwealth stipulated to the accuracy of the transcript. And, he argues that the trial court should have instructed the jury that



neither he nor the Commonwealth had stipulated to the accuracy of the transcript.

While Fields initially objected, he withdrew the objection; thus, he did not properly preserve this issue for appellate review. Since allowing the jury to read the transcript did not affect the substantial rights of Fields or result in manifest injustice, we find no palpable error under RCr 10.26.

**CONCLUSION**

Finding no error, the judgment of conviction entered by the Daviess Circuit Court is affirmed.

ALL CONCUR.

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