

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002450-MR

JEFFREY LANE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 04-CR-00297

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, Jeffrey Lane (Lane), appeals his conviction for burglary in the second degree and sexual abuse in the third degree. We affirm.

Lane was charged with entering a residence in the apartment complex where he was a maintenance man and fondling one of the residents while she slept. Lane admitted that he took four pills of Klonopin for anxiety, three more than the prescribed dosage, and drank multiple beers the evening of the incident. He claims that the combination of drugs and alcohol

left him in an alcoholic haze. The victim testified that she awoke late that night to someone touching her private parts. She saw Lane in the apartment. He left while she was calling for help. Lane was not found that weekend, but returned to work on Monday, at which time he was fired. Lane testified that he got lost; that he was looking for a place to sleep; that he heard a girl scream, and that he left the area. He stated that he woke up the next morning in the electric room in the north building. He also claimed that the mixture of alcohol and Klonopin made it impossible for him to remember much about the evening.

Lane was arrested and charged with burglary in the second degree and sexual abuse in the third degree. He was convicted and sentenced to serve seven years.

Lane contends that prior bad acts were admitted without proper notice to the defense. The Commonwealth presented evidence at trial that Lane had a pornographic magazine and that he had done "odd jobs" for various residents of the apartment complex in violation of his employer's rules. Lane argues that admission of this evidence, without prior warning of its submission to the defense, violated KRE 404(b) and RCr 9.22. Lane asserts that this evidence was improperly introduced to show his bad character and served to bias the jury.

The apartment building owner testified at trial that while looking for Lane she noticed a pornographic magazine on his desk. The Commonwealth argues that this was the sole mention of pornography, and that no undue emphasis was placed upon the witness' statement at trial. The same witness also testified that Lane did do at least one side job for a resident, despite being advised to refrain from doing such jobs. No defense objection was raised to either statement by the witness. Defense counsel asserts that to have made an objection would have drawn the jurors' attention to the statements. The Commonwealth argues that the failure to object makes review impossible.

KRE 404(c) does require prior notice of introduction of evidence concerning prior bad acts of a criminal defendant. Reasonable notice of such evidence must be given to the defense. Daniel v. Commonwealth, 905 S.W.2d 76, 77 (Ky. 1995). Lane argues that the failure to provide him notice of the expected testimony of the witness constitutes reversible error. Gray v. Commonwealth, 843 S.W.2d 895, 897 (Ky. 1992). The Commonwealth argues that the witness' testimony was unexpected, and that it did not constitute reversible error because the activities testified about were not similar offenses or criminal acts.

The record shows that Lane was charged with offenses separate and distinct from reading an allegedly pornographic

magazine or taking odd jobs on the side. Neither of the two actions referred to by defense counsel as prior bad acts are criminal behavior. No defense objection was made to the statements. To prove reversible error the defendant must show that there is a substantial possibility that the result at trial would have been different absent admission of such evidence. Abernathy v. Commonwealth, 439 S.W.2d 949 (Ky. 1969). Evidence other than that objected to supported the conviction. There was evidence that Lane was in the apartment complex and that the victim recognized him. The testimony regarding the pornographic magazine and the appellant's alleged side jobs were not necessary to his conviction. Therefore, no reversible error occurred.

Lane argues that the Commonwealth improperly asserted that his statement that he was prescribed Klonopin was false. Lane contends that the Commonwealth insinuated that he does not have such a prescription, and that his assertion that he took Klonopin for anxiety was false. At trial the Commonwealth questioned Lane as to whether he ever informed the police that he was on medication the evening of the incident. Lane replied that he had not done so. Lane also admitted that he had not told the police that he was intoxicated when the offense occurred. The Commonwealth then asked Lane whether he had his prescription information with him. Lane replied that the

information was at the jail. The Commonwealth asserts that the questions were merely attempts to point out to the jury that Lane had given several different versions of the events, and that the questions should not be considered reversible error. Lane complains that these comments were an insinuation that he was lying about having such a prescription.

Lane testified that he did have a prescription for his medication. He also testified that he took greatly in excess of the recommended dosage, and consumed alcoholic beverages at the same time. The court gave the jury an instruction on the possible mitigating effects of voluntary intoxication on an offense requiring intent. The jury was aware of substances which may have affected Lane on the night in question. Questioning regarding the existence of a prescription for the medication was not so improper as to constitute reversible error.

A statement must be more than a mere aside to be found an insinuation requiring reversal of a conviction. Tamme v. Commonwealth, 973 S.W.2d 13, 29 (Ky. 1998). Where the prosecutor focuses on the subject of the insinuation, or makes repeated insinuations in an attempt to lead the jury to a conviction, that may constitute reversible error. Black v. Commonwealth, 42 S.W.2d 883, 884 (Ky. 1931). This Court must review the overall fairness of the entire trial in determining

whether to reverse. Dean v. Commonwealth, 844 S.W.2d 417 (Ky. 1992). In the present case, the prosecutor's questions regarding the location or validity of Lane's prescription do not rise to the level required of reversible error. For this reason, we affirm the conviction.

ALL CONCUR.

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