

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001595-MR

THOMAS EDDIE FUSTON

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES BOWLING, JR., JUDGE
ACTION NO. 05-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

GUIDUGLI, JUDGE: Thomas E. Fuston has appealed from the judgment and sentence of the Bell County Circuit Court entered on July 7, 2005, following his conviction for Burglary in the Third Degree.² Having concluded that the trial court did not abuse its discretion in refusing to exclude evidence of an outstanding warrant for the Appellant's arrest, we affirm.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² KRS 511.040.

On October 7, 2004, Appellant's girlfriend, Jennifer Smith, was an employee at Lee's B.P. Gas Station in Middlesboro, Kentucky. Ms. Smith had keys to the building and inner office and she also had a security code to disable the store's alarm system. Although Smith does not remember being officially fired or being told to return her keys, the store manager testified that she had fired Smith and requested that Smith return her keys. It is undisputed, however, that the store manager called the security provider and told it to disable Smith's security code.

Later that evening, Smith and Appellant went to the B.P. Gas Station and went inside using Smith's keys. Smith testified that she wanted to retrieve her purse, which she testified she had left in the office earlier that day. Smith tried to turn off the alarm system, but because her code was deactivated, it would not shut off. When police arrived on the scene, they saw Smith and the Appellant walking down the street away from the scene.

At trial, Officer Joshua Burchett testified that he approached and spoke with Smith and Appellant and that he "checked them for warrants." Officer Burchett then testified that he arrested Appellant because he had an outstanding warrant. Defense counsel objected to this testimony claiming it

was unduly prejudicial, incompetent, and inadmissible, but the trial court overruled this objection.

Smith was also taken into custody. Although Smith testified that she did not recall writing any statement at the police station because she had taken 22 or 23 Xanax pills and was extremely intoxicated, the Commonwealth introduced into evidence her statement, which Smith admitted was in her handwriting. According to Smith's statement, Appellant had forced her to unlock the door to the B.P. store. Both Smith and Appellant then entered the store and Appellant tried to push all the buttons on the alarm to get it to go off.

Appellant was convicted of Burglary in the Third Degree and was sentenced to five years imprisonment. The Appellant has appealed arguing that it was reversible error for the trial court to admit evidence regarding the outstanding warrant for his arrest. We hold that the trial court did not abuse its discretion in this case and therefore affirm.

A trial court has wide discretion regarding evidentiary matters. It is well-settled that the evidentiary decisions of the trial court will not be disturbed absent an abuse of discretion.³ Additionally, a trial court's decision whether to strike all or part of a witness's testimony is also

³ *Partin v. Commonwealth*, 918 S.W.2d. 219 (Ky. 1996).

reviewed under the abuse of discretion standard.⁴ An abuse of discretion only occurs when the trial court's decision to allow, or exclude, evidence is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.⁵

The Appellant argues that it was error for the trial court to allow "inadmissible" and "incompetent" evidence into the case regarding the outstanding warrant for his arrest. The Appellant relies on KRE 404 (b), which provides, "[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, this rule is not applicable in this case. One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case.⁶ Officer Burchett's testimony regarding the outstanding warrant for the Appellant's arrest was used to establish the reason for his arrest and was necessary for a "full presentation" of the case, and as such should not be excluded under Rule 404 (b). Although, there is a general prohibition against the use of evidence of other crimes, wrongs,

⁴ *Moody v. Commonwealth*, 170 S.W.3d. 393 (Ky. 2005).

⁵ *Woodward v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004).

⁶ *Norton v. Commonwealth*, 890 S.W.2d 632, 637 (Ky.App. 1998).

or acts to prove "a disposition to commit particular acts,"⁷ Officer Burchett's testimony was not being used to establish that the Appellant had a "disposition" to commit burglary, and as such, this testimony is outside the scope of Rule 404 (b).

The Appellant cites to several cases, including *Turpin v. Commonwealth*,⁸ for the proposition that "it is reversible error to call to the attention of a jury information that tends to show another crime has been committed, which is independent of, and unconnected with the one for which the accused is on trial."⁹ This case must be distinguished from the ruling in *Turpin* because the prejudicial testimony related directly to the crime committed.

In *Turpin*, the defendant was convicted of the offense of maliciously shooting at and wounding another with the intent to kill and sentenced to five years imprisonment. At trial, the trial judge, while the jury which had been empanelled was seated in the courtroom, proceeded to call the docket set for that day, which included two other indictments returned against the same defendant. One of the indictments was for carrying a concealed deadly weapon, and in connection with this charge the

⁷ *Id.*

⁸ *Turpin v. Commonwealth*, 352 S.W.2d. 66 (Ky. 1961)

⁹ *Turpin*, 352 S.W.2d at 67; See also *Payne v. Commonwealth*, 509 S.W.2d 264 (Ky. 1974); and *Scamahorne v. Commonwealth*, 357 S.W.2d 30 (Ky. 1962).

Commonwealth Attorney made a motion for a peace bond because certain persons interested in that particular indictment were "afraid of the defendant" because he always kept a pistol on or about him. The defendant then moved to discharge the jury and to continue the case, but this motion was denied. The defendant appealed, arguing that because he was being tried for a crime which involved an act of violence and the use of a firearm, to announce an indictment that charged the carrying of a concealed deadly weapon, was highly prejudicial to his case.

The former court of appeals reversed the defendant's conviction stating "this court has frequently held it is reversible error to call to the attention of the jury information that tends to show another crime has been committed which is independent of, and unconnected with, the one for which the accused is on trial."¹⁰ It further stated "in the interest of justice we conclude appellant should be given a new trial free from damaging statements as to the commission of other offenses of which he may be accused."¹¹

The Appellant's case is clearly distinguishable from *Turpin*. In *Turpin* the defendant was on trial for a charge involving a gun. Therefore, any evidence of another type of

¹⁰ *Turpin*, 352 S.W.2d at 67; citing *Acres v. Commonwealth*, 259 S.W.2d 38 (Ky.App. 1953); *Swanger v. Commonwealth*, 255 S.W.3d 38 (Ky.App. 1953).

¹¹ *Id.*

gun-related charge would be prejudicial because it shows a "disposition to commit" the offense charged.¹²

On the other hand, the testimony admitted in the instant case does not have the same affect. Officer Burchett's testimony was not offered to prove a disposition to commit a particular act; it was simply offered to explain the basis for Appellant's arrest and to allow for a "full presentation" of the case. Officer Burchett did not testify as to the basis of the outstanding warrant, he did not testify as to the facts surrounding the warrant, and he did not testify that the warrant was related to a burglary. Nothing in Officer Burchett's testimony established Appellant was likely to commit burglary because he had an outstanding warrant. Had Officer Burchett testified that there was a warrant for Appellant's arrest for an alleged burglary charge, this would have been the type of evidence that *Turpin* would exclude. Officer Burchett was simply painting a full picture of the circumstances surrounding the Appellant's arrest without going into any specifics regarding the warrant. He was simply offering a "full presentation" of the case, which is an acceptable basis for admitting testimony under *Norton v. Commonwealth*.¹³

¹² KRE 404 (b).

¹³ 890 S.W.2d at 638.

The trial court did not abuse its discretion by allowing this testimony into the case because its decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.¹⁴ The trial court based its decision on a sound interpretation of KRE 404 (b), and this ruling must be upheld.

For the foregoing reasons, the final judgment and sentence of the Bell Circuit Court is affirmed.

JOHNSON, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING IN RESULT:

Regardless of whether or not the trial court erred, I conclude that any error in this regard was harmless.

BRIEF FOR APPELLANT:

Astrida L. Lemkins
Frankfort, Kentucky

BRIEF FOR APPELLEE:

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David W. Barr
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¹⁴ *Woodward*, 147 S.W.2d at 63.