

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000485-MR

MICHAEL EDWARD MOORE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 05-CR-01373

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2006-CA-000784-MR

MICHAEL EDWARD MOORE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CR-01159

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

DIXON, JUDGE: In this consolidated action, Michael Moore appeals his convictions pursuant to two guilty pleas from Fayette Circuit Court. Moore entered two conditional

guilty pleas pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Moore reserved the right to appeal the trial court's adverse ruling on his pretrial motion *in limine* to exclude evidence under Kentucky Rules of Evidence (KRE) 404(b). After reviewing the record on appeal, we affirm.

Moore was indicted by a Fayette County Grand Jury on September 12, 2005, and charged with failure to comply with sex offender registration (KRS 17.510) and being a persistent felony offender (PFO) first degree (KRS 532.081).¹ Moore was subsequently indicted on October 25, 2005, and charged with first-degree sexual abuse (KRS 510.110) and being a PFO first degree.²

A trial date was set for February 9, 2006, in the sexual abuse case. The Commonwealth gave notice pursuant to KRE 404(c) that it intended to introduce “prior bad acts” evidence at trial. In 1993, Moore had been convicted of sexual assault and sexual abuse in Cook County, Illinois. The Commonwealth sought to introduce testimony of the victim in that case, who was Moore's step-daughter at the time. In that case, the victim came forward at age seventeen and alleged the sexual abuse had been ongoing for ten years. Moore moved to exclude the evidence, and the court held a hearing on Moore's motion *in limine* on February 2, 2006.

After hearing the arguments of both parties, the court found that the evidence was admissible, as long as the earlier victim was going to testify at trial. The

¹ Indictment number 05-CR-01159.

² Indictment number 05-CR-01373.

court emphasized that there could be no testimony implying Moore was a convicted sex offender. The court also agreed to continue the trial date as a result of its ruling.

On February 12, 2006, Moore accepted a “package deal” plea agreement offered by the Commonwealth resolving both pending indictments. In 05-CR-01373, Moore entered a conditional *Alford* plea to an amended charge of sexual abuse second degree, and he was sentenced to eight months in jail. In 05-CR-01159, Moore entered an *Alford* plea to failure to comply with sex offender registration and an amended charge of being a PFO second degree. He was sentenced to six years' imprisonment.

The only issue presently before us relates to whether the trial court abused its discretion by finding the KRE 404(b) evidence admissible. Moore opines he would have been unfairly prejudiced at trial by the testimony and therefore pleaded guilty instead. As such, he asks this Court to find the KRE 404(b) evidence inadmissible and vacate his guilty pleas.

Moore argues the evidence of his prior sexual misconduct unfairly implies his bad character as a “child molester.” While the Commonwealth argues the evidence was properly held admissible to prove *modus operandi*, Moore contends the details of his past sexual crimes were not “strikingly similar” to the current charge.

The evidentiary issues in this case were recently summarized by our Supreme Court in *Martin v. Commonwealth*, 170 S.W.3d 374 (Ky. 2005):

KRE 404(b) provides that evidence of other crimes, wrongs, or acts are not admissible to prove character. However, an exception to this rule is that evidence of other crimes, wrongs or acts may be admitted to show 'motive, identity, absence of mistake or accident, intent, or knowledge, or common scheme

or plan.' [KRE 404(b)(1); *Pendleton v. Commonwealth*, 685 S.W.2d 549, 552 (Ky. 1985).] If evidence is offered to show *modus operandi*, the facts surrounding the prior bad acts must be so strikingly similar to the charged offense as to show '(1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same mens rea.' [*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing *Billings v. Commonwealth*, 843 S.W.2d 890, 891 (Ky. 1992); *Adcock v. Commonwealth*, 702 S.W.2d 440 (Ky. 1986)).] Whether there exist common facts between the acts is the relevant examination, not whether there was common criminality. [*Lear v. Commonwealth*, 884 S.W.2d 657, 659 (Ky. 1994); *Billings*, 843 S.W.2d at 892.]

Id. at 380.

At the evidentiary hearing, the Commonwealth argued there were substantial similarities between the two crimes. Both victims were female, and both were between seven and ten years old when the abuse began. The prior victim was Moore's stepdaughter, while the present victim was the daughter of Moore's live-in girlfriend. Moore held a position of authority in the family household, and in both cases the abuse consisted of genital fondling in bed while the victim was home alone with Moore. Finally, Moore made both victims afraid to tell anyone about the abuse. These similarities mirror those considered by the Supreme Court in both *Martin* and *English*. See *Martin*, 170 S.W.3d at 380;³ *English*, 993 S.W.2d at 945.

³ In *Martin*, the Court found the following factors "strikingly similar:" "The prior wrongs and the current charged offenses all involved victims that were: (1) family of the Appellant or his wife at the time of the occurrence; (2) female; (3) between the ages of five to eleven years old at the time of the abuse; (4) under the care of the Appellant when the abuse occurred; (5) alone with the Appellant when no other adults were present or if present, were asleep in a separate room; (6) bribed with something of importance to a child (money, ice cream, shopping, etc.); (7) abused by similar touching of the vaginal area, always without penetration; and (8) threatened that if they told they would get into trouble." *Id.*

Although Moore opines any similarities between the two cases are just as similar to innumerable other sexual abuse cases, we find the similarities sufficient to show a *modus operandi*. Once sufficient proof of *modus operandi* is adduced, the relevancy of the evidence is also established. *English*, 993 S.W.2d at 945. However, exclusion of the evidence may still be warranted “if its probative value is substantially outweighed by the danger of undue prejudice” KRE 403; *Robey v. Commonwealth*, 943 S.W.2d 616, 618 (Ky. 1997).

“The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge.” *English*, 993 S.W.2d at 945 citing *Rake v. Commonwealth*, 450 S.W.2d 527, 528 (Ky. 1970). Accordingly, we review the trial court's decision for an abuse of that discretion. *Id.* citing *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996).

Moore argues the evidence of prior sexual misconduct would have undoubtedly prejudiced him at trial. He also contends the 1993 conviction was too remote in time to be of probative value in the present case. We note, though, that temporal remoteness is only one factor for the court to consider when balancing the evidence. *Id.* Furthermore, there is no bright line rule as to when evidence of past crimes is too remote in time to be admissible. *Robey*, 943 S.W.2d at 618. In this case, there was a ten-year lapse in time between Moore's 1993 conviction and when the abuse of the present victim began in 2003. “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”

English, 993 S.W.2d at 945. Pursuant to this standard, we find that the trial court did not abuse its discretion in finding the evidence more probative than prejudicial.

For the reasons stated herein, the convictions of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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