

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001599-MR

NATHAN HERBERT HILL

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 04-CR-00263

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

DIXON, JUDGE: Nathan Herbert Hill was convicted of one count of second-degree sodomy and two counts of third-degree rape following a jury trial. The Kenton Circuit Court sentenced him to sixteen years' imprisonment. We affirm Hill's conviction.

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

The victim in this case was Hill's former stepdaughter, C.H., who testified that she and Hill began an intimate relationship when she was thirteen years old. According to C.H., their relationship began during the summer of 1998, when she accompanied Hill on overnight trips for his job as a truck driver. In the fall of 1998, Hill and C.H.'s mother divorced, and Hill moved to a motel in Kenton County. C.H. continued to spend each weekend with Hill, and they began a sexual relationship.

The jury heard testimony from several other witnesses in addition to C.H. Hill presented exculpatory evidence relating to a sexually transmitted disease contracted by C.H. Hill also testified on his own behalf and denied C.H.'s allegations.

At the conclusion of the trial, the jury convicted Hill of one count of second-degree sodomy and two counts of third-degree rape. The jury recommended an aggregate sentence of sixteen years' imprisonment. The trial court sentenced Hill accordingly, and this appeal followed. Hill alleges four errors relating to 1) the grand jury process, 2) the admissibility of character evidence, 3) the admissibility of hearsay testimony, and 4) mitigation evidence.

I. Grand Jury Indictment

Prior to trial, Hill moved the trial court to dismiss indictment number 04-CR-00263, due to procedural irregularities which allegedly tainted the grand jury proceedings. The trial court denied Hill's motion without an evidentiary hearing.² On appeal, Hill contends the trial court's ruling was erroneous, and he alternatively requests remand for an evidentiary hearing.

² In March 2005, Hill filed an original action with this Court seeking a writ of prohibition following the trial court's denial of his motion to dismiss the indictment. *Hill v. Summe*, 2005-CA-000528-OA (Oct. 14, 2005). This Court denied Hill's petition.

Before the indictment was issued in this case, Hill had been indicted in April 2003, on similar charges against C.H. The first indictment, 03-CR-00155, was withdrawn by the Commonwealth in October 2003. Thereafter, the Commonwealth presented Hill's case to a second grand jury, and indictment number 04-CR-00263 was handed down in May 2004.

According to Hill, the Commonwealth orchestrated the dismissal of the first indictment as a “practice trial.” Hill further speculates that the Commonwealth intended to dismiss the first indictment in order to gather additional evidence to use against him. Hill also points out that the Commonwealth benefited from the dismissal of the first indictment because the prosecutor avoided unfavorable evidentiary rulings and also received additional damaging testimony from the victim to present to the second grand jury.

To warrant the dismissal of an indictment, “a defendant must demonstrate a flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment.” *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky.App. 2000) citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 257-60, 108 S. Ct. 2369, 2374-76, 101 L. Ed. 2d 228 (1988).

Based upon our review of the record, we find that Hill's speculative allegations do not rise to the level contemplated in *Baker, supra*. Likewise, it appears that the trial court thoroughly and meticulously considered Hill's numerous pre-trial motions and memoranda pertaining to his perceived abuse of the grand jury process. We conclude, as did the trial court, that Hill's allegations are without merit. Accordingly, the court properly denied Hill's motion without an evidentiary hearing.

II. Kentucky Rules of Evidence (KRE) 404(b) Testimony

KRE 404(b) states: “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.” Hill contends the trial court improperly allowed C.H. to testify regarding uncharged acts of sexual misconduct which prejudiced his defense and deprived him of a fair trial. Specifically, C.H. testified that she and Hill began touching one another sexually and performing oral sex during the summer of 1998. C.H. also stated that Hill purchased alcohol for her when she spent weekends with him. She also testified that Hill gave her cigarettes, and on one occasion, he bought her a marijuana cigarette.

Our standard for reviewing a trial court's evidentiary ruling is abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005). Consequently, we only disturb the court's decision if it “was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

After a careful review of the record, we conclude the trial court did not abuse its discretion by admitting the KRE 404(b) evidence at issue. Hill opines that the evidence of uncharged sexual misconduct served only to assault his character before the jury. We disagree, as “[e]vidence of similar acts against the same victim is admissible under KRE 404(b)(1) as proof of 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” *Pendleton v. Commonwealth*, 83 S.W.3d 522, 528 (Ky. 2002); *See also Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002). Accordingly, the testimony was properly admitted.

Hill also argues that C.H.'s testimony regarding the alcohol, tobacco, and marijuana cigarette was prejudicial to him because it reflected his bad character for providing such substances to a minor. Again, we disagree. After reviewing the testimony, we conclude that the statements were properly admitted to show Hill's modus operandi prior to his sexual encounters with C.H. *Richardson v. Commonwealth*, 161 S.W.3d 327, 331 (Ky. 2005).

III. Hearsay Testimony

Hill next contends the trial court erroneously limited the testimony of Dr. Robert Flick, C.H.'s treating OB/GYN. Outside the presence of the jury, Dr. Flick testified regarding C.H.'s medical records. Specifically, a note dated October 16, 1998, showed C.H. had an appointment with Dr. Lisa Genari, a former associate in Dr. Flick's practice. Dr. Flick testified that Dr. Genari's note stated, "no signs of sexual abuse." Dr. Flick admitted he had no personal knowledge of the events surrounding Dr. Genari's conclusion; he also stated the medical record did not reveal any other statements by Dr. Genari regarding whether there was a physical examination of C.H. Over Hill's objection, the trial court excluded Dr. Genari's conclusory statement.

Hill argues the trial court erroneously excluded the statement and contends it was admissible under the business record exception to the hearsay rule. "Under KRE 803(6), records of a regularly conducted activity are not excluded by the hearsay rule 'unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'" *Welsh v. Galen of Virginia, Inc.*, 128 S.W.3d 41, 50-51 (Ky.App. 2001).

After reviewing the testimony of Dr. Flick, we find the trial court did not err by excluding Dr. Genari's statement. The statement stood alone in the medical record with no corroboration or explanation. Dr. Flick readily admitted he had no knowledge of the circumstances surrounding the statement.

Records of a regularly conducted business activity are not automatically admissible under the hearsay exceptions of KRE 803 merely because they are records of a regularly conducted business activity. As the language of KRE 803(6) provides: 'the element of "trustworthiness" . . . must be present in order for documents, records or reports to qualify for admission into evidence under the exception created for business records.' [Citations omitted.] It is this element 'which the law considers a substitute for the oath of the declarant, observation of his demeanor by the jury, and his cross-examination by the party against whom the hearsay is offered.'

Id. at 51, quoting *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713, 715 (Ky.App. 1985).

Despite Hill's assertion that Dr. Flick gave a proper evidentiary foundation for Dr. Genari's statement, we agree with the trial court's conclusion that the statement was unreliable. The court did not abuse its discretion by excluding the statement.

IV. Mitigation Evidence

Hill's final assignment of error relates to evidence presented in mitigation of punishment at the penalty phase of his trial. Kentucky Revised Statutes 532.055(2)(b) allows "[t]he defendant [to] introduce evidence in mitigation or in support of leniency[.]" During cross-examination of the Commonwealth's witness, a probation and parole officer, Hill attempted to ask questions regarding sex offender registration, completing a sex

offender treatment program, and the type of healthcare available to prison inmates. We have reviewed the penalty phase of Hill's trial, and we conclude his claims are without merit. The trial court properly limited Hill's inquiries as speculative and irrelevant. There was no error, and Hill is not entitled to a new sentencing trial.

For the reasons stated herein, the judgment of the Kenton Circuit Court is affirmed.

LAMBERT, JUDGE, AND ROSENBLUM, SENIOR JUDGE, CONCUR AND FILE SEPARATE OPINIONS.

LAMBERT, JUDGE, CONCURRING: Upon careful review, I concur in the result in Judge Dixon's opinion; additionally, I adopt the reasoning in Senior Judge Rosenblum's concurring opinion.

ROSENBLUM, SENIOR JUDGE, CONCURRING: I agree with the result as stated in the lead opinion, but write separately to state my views upon the issues relating to the trial court's admission of KRE 404(b) evidence and its exclusion of evidence sought to be introduced by Hill in the penalty phase of the trial.

Hill contends that the trial court erred by permitting the Commonwealth to introduce evidence of uncharged prior bad acts evidence in violation of KRE 404(b). More specifically, Hill argues that the trial court erroneously permitted C.H to testify (1) that in the summer of 1998, while she was on a long-haul truck trip with him, the truck broke down in Wisconsin and they had to get a hotel room, at which time Hill attempted to have intercourse with her but could not because of impotence; (2) that on other occasions that summer Hill began to touch her breasts and vagina; and (3) that on other occasions that summer they had oral sex and sexual intercourse.

Hill further alleges that the trial court erred by permitting C.H. to testify to the following bad acts: (1) that she and Hill watched pornography together; (2) that Hill bought beer and wine coolers for her to drink prior to sex acts; (3) that Hill routinely bought her cigarettes; and (4) that Hill bought her marijuana on one occasion.

KRE 404(b) states:

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 . . .

This list is illustrative rather than exhaustive. *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998). Trial courts undergo a three-part analysis to determine whether evidence of prior bad acts should be admitted pursuant to KRE 404(b). *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky.1994). First, the court inquires whether the proposed evidence is relevant for some other purpose than to prove the defendant's criminal predisposition. *Id.* Second, the court inquires whether the evidence of the prior act is sufficiently probative of its commission. *Id.* Third, the court must balance the probative value of the evidence against the potential for undue prejudice. *Id.*

Our standard for reviewing a trial court's evidentiary ruling is abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005). Consequently, we only disturb the court's decision if it “was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

I believe the evidence of the prior sexual abuse of C.H. by Hill was admissible under the “common scheme or plan” exception as stated in *Commonwealth v. English*, 993 S.W.2d at 943 (citing *Raymond v. Commonwealth*, 123 Ky. 368, 96 S.W. 515 (1906) (Hobson, C.J., dissenting)). “The rule is that where several felonies are connected together as part of one common scheme and all tend to a common end, they may be given in evidence.” *Id.*, (citing *Raymond*, 96 S.W. at 518 (citing *People v. Stout*, 4 Parker, Cr.R. 71 (N .Y.), 1 Wigmore on Evidence § 304, and 1 Jones on Evidence § 144)). In *Douglas v. Commonwealth*, 307 Ky. 391, 211 S.W.2d 156 (1948), the former Court of Appeals, quoting from 20 Am.Jur. Evidence § 310, referred to a common scheme or plan as one “embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.” *Id.*, 211 S.W.2d at 157. Thus, “common scheme or plan” was intended to refer to the fact that the charged offense was but one of two or more related criminal acts. *English* at 943.

In the present case the prior uncharged bad acts of sexual abuse perpetrated by Hill against C.H. falls within the scope of the common scheme or plan exception because the common scheme or plan of the present crimes and the prior uncharged acts both involve the common scheme or plan to sexually abuse C.H. In summary, the whole trial was about the relationship between Hill and the victim. The proffered evidence sought to flesh out this relationship and was admissible.

Moreover, application of the three-part *Bell* analysis establishes the evidence's admissibility. (1) the evidence was presented for some other purpose than to prove the defendant's criminal predisposition, that is, to demonstrate a common scheme or plan to sexually abuse C.H.; (2) the prior abuse is probative of the commission of the

present abuse; and (3) the probative value of the evidence outweighs the corresponding prejudice to Hill. As such I agree with the lead opinion that the trial court did not abuse its discretion in admitting the evidence relating to Hill's prior sexual abuse of C.H.

For similar reasons, I also believe the trial court properly admitted the prior bad acts relating to C.H. and Hill watching pornography together and Hill's purchasing cigarettes, alcohol, and marijuana for her. Those acts, in large part, occurred in conjunction with, and thus were intertwined with, the sexual abuse. Thus the acts were admissible. KRS 404(b)(2) (Evidence of prior bad acts admissible if so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party).

In the sentencing phase of the trial Hill sought to introduce evidence (by way of cross-examining the probation and parole witness) concerning (1) the availability of treatment in prison for his severe diabetes problem; (2) sex offender registration requirements; and (3) the effect his continuing denial of the present crimes would have upon his ability to complete the sexual offender treatment program and the corresponding impact on his eligibility for parole. The trial court excluded this cross-examination as irrelevant.

KRS 532.055(2)(b) specifically provides that during the sentencing phase of a trial, “[t]he defendant may introduce evidence in mitigation or in support of leniency.” I believe that Hill should have been able to pursue the issue of whether adequate medical care for his diabetes would be available in prison because the unavailability of same may have weighed in favor of leniency. Similarly, Hill should have been able to pursue information relating to sex offender registration because information that the public

would be on notice of Hill's sexual offenses, and thus able to guard children against contact with the appellant, may have weighed in favor of leniency.³

Notwithstanding the foregoing, however, Hill failed to properly preserve this argument by failing to place the probation and parole officer's testimony upon these issues in the record by avowal. “[A]n alleged error in the trial court's exclusion of evidence is not preserved for appellate review unless the words of the witness are available to the reviewing court,” by way of an avowal. *Commonwealth v. Ferrell*, 17 S.W.3d 520, 524 (Ky.2000), citing *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky.1996). The purpose of an avowal is to make the substance of the offered evidence known to the trial court and also to allow a reviewing court to determine whether the exclusion was erroneous and whether it affected a substantial right. Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 1.10(3) at 31 (4th Ed.2003). Because this issue is not properly preserved, I agree with the result reached in the lead opinion.

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³ I see no leniency value relating to Hill's point concerning his continuing denial of his present crimes and the potential impact of the ongoing denial upon his parole eligibility. The showing of such a lack of remorse and contrition may have caused the jury to be *less* lenient.