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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000194-MR

LUTHER WILBERT SEXTON — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 05-CR-00267

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Luther Wilbert Sexton appeals his conviction of tampering with physical evidence and disorderly conduct in the Pulaski Circuit Court. Sexton argues that it was error for the court to allow his prior convictions for sexual

[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 Revised Statutes (KRS) 21.580.

offenses into evidence, and that it was error to deny his motion for a directed verdict. Finding no error, we affirm.

Sexton was convicted of tampering with physical evidence under Kentucky Revised Statutes (KRS) 524.100 and disorderly conduct, second degree, under KRS 525.060, after a jury trial on November 20, 2006. Sexton then stipulated to the offense of persistent felony offender (PFO), first degree, and was sentenced to twelve (12) years imprisonment for the conviction of tampering with physical evidence enhanced by PFO in the first degree.

On July 21, 2005, the Pulaski County Public School Child Care Program took approximately twenty-four (24) children, ages five (5) to twelve (12), to the General Burnside Island State Park swimming pool. While there, the Director of the Program, Brenda McDowell, noticed a man crouched down, not that far from the pool, whom appeared to be videotaping the children on a camcorder. When McDowell and parents at the pool noticed the man, he immediately left in his pickup truck. One of the parents at the pool called the police after noting the make, model, and license plate number of the truck.

Pulaski County Sheriff's Deputy Troy McClin responded and, after acquiring the address through the license plate check, went to Sexton's home. Deputy McClin asked Sexton if he had been at the Burnside pool, which Sexton denied. When Deputy McClin informed Sexton that his truck had been seen at the pool, Sexton recanted his prior denial. Sexton denied videotaping at the pool and then recanted and admitted to videotaping a houseboat. Upon request, Deputy

McClin briefly viewed the alleged recording and found that it contained only television recordings and no footage of either children or a houseboat. Thereafter, Deputy McClin contacted the detective in charge of the investigation. The officers obtained a search warrant for Sexton's home and an arrest warrant for the crime of disorderly conduct for his conduct at the pool. The officers learned that Sexton was on bond for three counts of sexual abuse in Wayne County and had prior sex offender convictions in Florida.

Deputy McClin returned to Sexton's home approximately two (2) hours after the initial encounter, to serve the warrants. The search of the home failed to produce the videotape previously viewed by Deputy McClin. Sexton refused to tell the police where the videotape was located. Based on the Sexton's continuing refusal, Deputy McClin charged Sexton with tampering with physical evidence.

Prior to trial, the Commonwealth submitted notice of their intention to introduce (KRE) 404(B) evidence. In their notice, the Commonwealth referenced that the charge of tampering with physical evidence and stated "[s]pecifically, the Commonwealth intends to show at trial that Defendant videotaped children at Burnside Island Pool. The Commonwealth will show that the Defendant was in the act of committing Voyeurism and/or Video Voyeurism." To show motive, the Commonwealth intended to introduce both evidence that Defendant was a registered sex offender with convictions in other states and that video footage taken by Defendant was used in those proceedings. Further, the Commonwealth

intended to introduce evidence that Defendant was out on bond in Wayne County, Kentucky and that if the videotape had contained images of children then it would have been used against Defendant in a bond revocation proceeding. The Commonwealth asserted that the aforementioned evidence tended to show motive, modus operandi, intent, plan, knowledge, or absence of mistake.

After two hearings on the evidentiary issue, the court entered a written order on November 20, 2006,[2] that evidence of prior crimes, given through the testimony of investigating officers, was admissible. The court stated that the evidence was relevant and the basis for reasonable inferences bearing on motive and absence of mistake, as well as intent for the tampering charge. The court ruled that the balancing test of KRE 403 was met and that proper admonitions to the jury would be given.

Sexton's first claim of error is the court improperly admitted KRE 404(b) evidence and the Commonwealth's theory of voyeurism did not relate to the admitted evidence. We disagree.

In assessing an evidentiary ruling under KRE 404(b), the trial court plays a unique role as the gatekeeper of evidence. As such, we may reverse a trial court's decision to admit evidence only if the decision was an abuse of discretion, i.e., one that was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Brewer v. Commonwealth,* 206 S.W.3d 313, 320 (Ky. 2006),

[2] This was on the Defendant's motion to reconsider the courts prior ruling allowing evidence to be introduced under KRE 404(b).

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999), and *Clark v. Commonwealth,* 223 S.W.3d 90 (Ky. 2007).

In assessing the admissibility of prior crime evidence, KRE 404(b)(1) provides a well-defined exception to the exclusionary nature of the rule as concerns prior crimes. *Commonwealth v. Buford*, 197 S.W.3d 66, 70 (Ky. 2006). KRE 404(b) (1) allows introduction of prior crime evidence if offered for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

We agree with the trial court that the evidence of Sexton's prior crimes, as testified to by the investigating officers, tends to show motive for the tampering charge. Sexton's prior conviction also involved usage of videotape evidence against him.[3] This prior similar experience certainly gave him motive, knowledge, and absence of mistake for tampering with the physical evidence that might be used in the current proceeding. Sexton was well aware that a videotape of children could be used to incriminate him in Wayne County. Sexton's bond conditions from Wayne County[4] provided knowledge and absence of mistake for tampering with physical evidence.

[3] Videotape footage shot by Sexton was used to convict him in Florida. The footage showed minors playing on a beach with Sexton zooming in on their genitals.

[4] Sexton was directed not to break any laws in Kentucky and the trial courts order notes that the August 20, 2004, order of the Wayne Circuit Court forbade Sexton from being around children. The Assistant Commonwealth's Attorney for Wayne County testified that if the videotape of children at the pool filmed by Sexton had been found, it would have been used to revoke Sexton's bond.

If evidence is admissible under KRE 404(b), it may still be excluded under the KRE 403 balancing test. *Bell v. Commonwealth,* 875 S.W.2d 882(Ky. 1994). An appellate court will only reverse the evidentiary ruling if an abuse of discretion has occurred. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998). We agree with the trial court that the probative value of the prior crimes evidence was not substantially outweighed by the danger of undue prejudice, especially given the multiple admonitions to the jury by the trial court. *See* KRE 403 and *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005). Therefore, we do not find that the trial court abused its discretion in admitting the evidence.

Sexton's second claim of error is that the trial court improperly denied his motion for a directed verdict because the Commonwealth failed to prove the elements of tampering and disorderly conduct. Sexton argues that the Commonwealth failed to prove that he possessed evidence associated with a crime that would lead to proceedings against him and, thus, the Commonwealth could not prove that he destroyed, concealed, or removed physical evidence. Sexton argues that he had no way of knowing that an investigation was proceeding against him because Deputy McClin never indicated he would be back after the initial viewing of the videotape. Sexton's argument is not well taken.

To be convicted of tampering with physical evidence, KRS 524.100 states:

> 1) A person is guilty of tampering with physical evidence when, *believing* that an official proceeding is pending or may be instituted, he:

> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he *believes* is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or
> (b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.
> (2) Tampering with physical evidence is a Class D felony.
> (emphasis added).

The Commonwealth did not have to prove that criminal evidence was possessed by Sexton. The Commonwealth only had to prove that Sexton *believed* that the evidence may be used in an official proceeding and that Sexton intended to impair the availability of such evidence. *See Com. v. Nourse,* 177 S.W.3d 691 (Ky.2005) and Leslie W. Abramson Ky. Prac. Substantive Crim. L. § 8:46 (2007-2008). Sufficient evidence was presented at trial for the jury to find that Sexton believed that the videotape constituted evidence that would be used against him in either the Wayne County bond revocation hearing or in a separate proceeding in Pulaski County. Specifically, Sexton stated that he was not at the park, then recanted and stated he was at the park but was not videotaping, they again recanted and stated he was videotaping. Sexton's equivocal statements combined with the officers observations of the video footage, which did not show what Sexton purported to be on the videotape, certainly gave the videotape evidentiary value. The officer could neither confirm nor deny the allegations made against Sexton. This videotape shown to the officer was then either inculpatory or exculpatory. The statute does not speak in terms of only inculpatory evidence; it speaks in terms

of physical evidence in an official proceeding. The statute also prohibits tampering with exculpatory evidence.

Given the facts of the case, Sexton was on notice that the videotape was evidence once he identified it to the officer as the videotape he had used at the park. First, an investigation was initiated by the officer and Sexton was on notice thereof when he presented himself at Sexton's door and viewed the videotape. Sexton complains that he was not told by the officer the investigation was continuing; however, neither was he told the investigation was completed. Second, Sexton was well aware of the evidentiary value of a videotape; such was used to convict him in Florida. Lastly, Sexton offered no excuse for the absence of the videotape when the officers arrived with a search warrant but, instead, flatly refused production of it. The crime of tampering with physical evidence was then complete.

As to Sexton's claim that he was entitled to a directed verdict, the defendant is only entitled to a directed verdict if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) citing to *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky.1983). Further,

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence

> for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. Based on the appellate review standard articulated in *Benham* and the applicable statute,[5] we do not find error in denying the motion for directed verdict. The Commonwealth presented sufficient evidence to survive a directed verdict motion by Sexton.

We hereby affirm the judgment of the Pulaski Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Sam Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

James C. Maxson
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[5] We likewise do not find error in the denial of Sexton's directed verdict motion as to the disorderly conduct charge.