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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000050-MR

JOHN ROGER WINES — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 06-CR-00404

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HENRY, SENIOR JUDGE.

WINE, JUDGE: John Roger Wines ("Wines") appeals from the judgment of the McCracken Circuit Court convicting him of first-degree stalking and second-degree persistent felony offender. Wines argues that the trial court committed several errors during trial, including admitting evidence of prior bad acts contrary to the dictates of Kentucky Rule(s) of Evidence ("KRE") 404(b) and admitting evidence of an acquittal charge of second-degree stalking in violation of the

Double Jeopardy Clause of the Fifth Amendment of the United States Constitution ("Double Jeopardy") and Kentucky Revised Statute(s) ("KRS") 505.020(1).

Wines was convicted of first-degree stalking and second-degree persistent felony offender. The jury recommend a five-year sentence for first-degree stalking, enhanced to a ten-year sentence by virtue of being a second-degree persistent felony offender. After careful review of the record and having considered the arguments of counsel, we reverse the trial court and remand this case for re-trial.

Factual and Procedural Background

In March 2006, Crystal Hazen ("Crystal") met Wines at a local bar in Paducah. During their brief dating relationship, Wines and Crystal had a chance meeting with Tammy Anderson ("Tammy"), an ex-girlfriend of Wines'. Wines explained to Crystal that a domestic violence order ("DVO") had been issued against him and that he had a felony conviction due to allegations by previous girlfriends, including Tammy, who had accused him of stalking. Wines revealed this information to Crystal because he believed his federal probation officer might contact Crystal or her university professors to determine why he had been seen on campus.

At trial, Crystal testified that Wines had described to her the allegations Tammy had made against him, which included sexual assaults, following Tammy's children to school, various threats of physical violence, and attempting to record her telephone calls. Crystal further testified that Wines told

her about another girlfriend, Page Cosby ("Page"), whom he claimed was mentally ill and who, he alleged, would injure herself and then call police and blame Wines for her injuries.

In early April 2006, Crystal attempted to end the relationship with Wines. Subsequently, Wines made numerous phone calls to Crystal, appeared unexpectedly in her yard, and drove by her home. Crystal made it clear to Wines that their relationship was over and that his phone calls and drive-by visits were not welcomed. Based on what Wines had told her about his previous relationships, Crystal testified she was concerned about what he might do to her and was terrified by his calls. Crystal was ultimately prescribed an anti-anxiety medication.

On the evening of June 5, 2006, Crystal saw Wines staring through her window. Wines fled when Crystal ran outside, but she flagged down a nearby police cruiser. Crystal sought a warrant against Wines the following day, charging the offense of second-degree stalking.[1] Wines was arrested pursuant to the warrant on June 9, 2006 and was released on a $500.00 cash bond. A non-financial condition of his bond directed that he have no contact with Crystal.

Because Wines had made several, uninvited appearances in her backyard, Crystal attempted to "capture" Wines on film. On June 10, 2006, after several hours of waiting in her garage for Wines to make another appearance, Crystal tired and returned to her house. Realizing she forgot to turn on a floodlight, Crystal went back outside and promptly ran into Wines, whom she

[1] The warrant comprised a time period between April 6 and June 6, 2006.

again chased. Several neighbors witnessed the pursuit. When Crystal called his home, Wines denied he had been near her residence, claiming his car was in the garage and he was in bed. On June 12, 2006, Crystal found a handwritten note from Wines on her car which stated, among other things, "See you tonight. I can't wait."

In July 2006, Wines was indicted and charged with first-degree stalking and second-degree persistent felony offender for the events surrounding June 11 and 12, 2006. On August 31, 2007, Wines was acquitted of the original charge of second-degree stalking (stemming from the warrant taken by Crystal).

Prior to the trial on the felony charges, the Commonwealth filed several notices pursuant KRE 404(c)[2] of its intention to introduce prior allegations of domestic violence and stalking made by other women again Wines.[3] The Commonwealth also filed a motion *in limine* seeking to preclude the introduction of the second-degree stalking acquittal. A hearing on all pretrial motions was held one day before trial. Wines objected to the introduction of the prior bad acts, as

[2] KRE 404(c) states, "Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure."

[3] KRE 404(b) states, "Other crimes, wrongs, or acts. 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; or (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party."

well as any testimony about the facts which gave rise to the second-degree stalking charge. He further objected to any restriction on his ability to advise the jury he had been acquitted on the second-degree stalking charge. The trial court ruled that evidence of prior bad acts, including those comprising the allegations of second-degree stalking, were admissible. The trial court further ruled that the jury could be advised that Wines had been acquitted on that charge.

During the trial, the Commonwealth called Tammy, who dated Wines in 1998 and 1999. Although she became pregnant with Wines' child, Tammy decided to end their relationship. She testified that he called her repeatedly, followed her and a male friend, hid in the back seat of her car, and eavesdropped on her telephone conversations using a portable tape recording device.[4] The stalking and domestic violence allegations were dismissed. Tammy further testified that Wines admitted to her that he had engaged in similar conduct against his ex-wife, Nerissa Wines ("Nerissa") and her new boyfriend.

Although Page refused to testify at trial, asserting a Fifth Amendment privilege, the Commonwealth introduced testimony through third parties that alleged she had been physically abused by Wines. At trial, Paducah police officers testified they made a run to Page's apartment in May 2004. They testified they could hear a female screaming and a male saying, "be quiet." Wines was removed from the apartment. A McCracken County deputy who saw Page at the hospital following this incident testified that her face looked puffy and it appeared as

[4] Ultimately, Wines was convicted in federal court of an electronic eavesdropping offense related to this incident.

though she had been punched in the nose. There was further testimony that Page had abrasions on her neck. Wines objected to this testimony on the grounds there was no proof he had caused any of Page's injuries. The trial court refused to either strike the testimony or to admonish the jury to disregard the testimony.

Wines testified at trial as well, denying that he had been at Crystal's home on the evening of June 11, 2006. His attempt to establish an alibi failed, however, when those potential alibi witnesses testified, contradicting his recollection of the events of that evening.

Analysis

We first review Wines's argument that because the Commonwealth was permitted to introduce evidence of the allegations surrounding the initial charge of second-degree stalking for which he was acquitted, Double Jeopardy and KRS 505.020(1)(a) were both violated. We review evidentiary errors by the court for an abuse of discretion and will not reverse unless the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

The elements of first-degree stalking as set out in KRS 508.140 include:

> (1) A person is guilty of stalking in the first degree,
> (a) When he intentionally:
> 1. Stalks another person; and
> 2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:
> a. Sexual contact as defined in KRS 510.010;
> b. Serious physical injury; or

> c. Death; and
> ....
> (b) 2. A criminal complaint is currently pending with a court, law enforcement agency, or prosecutor by the same victim or victims and the defendant has been served with a summons or warrant or has been given actual notice;
> ....
>
> As used in KRS 508.130:
>
> (1)(a) To "stalk" means to engage in an intentional course of conduct:
> 1. Directed at a specific person or persons;
> 2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and
> 3. Which serves no legitimate purpose.
> (b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.
> (2) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose . . . .

To prove several elements of first-degree stalking, including fear of physical injury, substantial mental distress, and existence of a pending criminal complaint, and to show a course of conduct, it was necessary for the Commonwealth not only to reference the existence of the pending second-degree stalking charge, but also to detail the facts surrounding that charge.

The United States Supreme Court has held that an acquittal in a criminal case does not preclude introduction of evidence of the same conduct in a subsequent trial as a "prior bad act" under Federal Rule(s) of Evidence ("FED. R. EVID.") 404 as the evidence is relevant if the jury merely believes by a preponderance of the evidence that the act occurred and that the defendant was the

actor. A limiting instruction or admonition would have been proper if requested. *Dowling v. United States*, 493 U.S. 342, 348-349, 110 S.Ct. 668, 672, 107 L.Ed.2d 708 (1990); *Hampton v. Commonwealth*, 133 S.W.3d 438, 442 (Ky. 2004). We find no error in the trial court allowing the introduction of the allegations surrounding the prior charge of second-degree stalking.

We next address Wines's contention that he was substantially prejudiced by the introduction of prior bad acts pursuant to KRE 404(b). Prior to trial, the prosecution filed three separate notices setting forth what prior bad acts they were seeking to introduce at trial. Generally speaking, "evidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). Our Courts have repeatedly held that KRE 404(b) is to be interpreted as exclusionary in nature. "It is a well-known fundamental rule that evidence that a defendant on trial had committed other offenses is never admissible unless it comes with certain exceptions, which are well defined as the rule itself." *Jones v. Commonwealth*, 303 Ky. 666, 667, 198 S.W.2d 969, 970 (1947). For this reason, trial courts must apply the rule cautiously, with an eye toward eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime. *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994).

In order to prove the identity, motive, or intent of Crystal's stalker by evidence of *modus operandi*, the facts surrounding the prior misconduct must be so strikingly similar to the June 2006 offenses as to create a reasonable probability that (1) the acts were committed by Wines; and/or (2) the acts were accompanied by the same *mens rea*. "If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible." *Commonwealth v. Buford*, 197 S.W.3d 66, 70 (Ky. 2006).

Even if the prior misconduct is similar to the charged offense, the trial court has the discretion to allow other instances of misconduct to be admitted only if the evidence is "relevant, probative and the potential for prejudice does not outweigh the probative value of such evidence." *Parker v. Commonwealth*, 952 S.W.2d 209, 213 (Ky. 1997), *cert. denied*, 522 U.S. 1122, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998). Moreover, we will not reverse a trial court's decision regarding admission of evidence absent a clear abuse of discretion. *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994); *Anderson, supra* at 119.

Because Wines rebuffed Crystal's claim that he had been at her home on June 11 and 12, 2006, the prosecution sought to introduce his prior behavior as evidence to establish the identity of the stranger in her backyard. "In every case in which evidence of other crimes is sought to be introduced to establish a pattern or scheme, the real question is whether the *method of the commission of the other crime or crimes is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person*." *Dickerson v.*

Commonwealth, 174 S.W.3d 451, 468-469 (Ky. 2005). Prior bad acts may be admissible to establish identity if the prior uncharged act is sufficiently similar to the charged act so as to indicate reasonable probability that the acts were committed by the same person. *Commonwealth v. Maddox*, 955 S.W.2d 718 (Ky. 1997). "[I]t is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi." *Dickerson*, at 469.

The Commonwealth argued that because Crystal's state of mind is an element of the charge of first-degree stalking, any of Wines's prior misconduct known to her was relevant in determining whether she had a reasonable fear of sexual contact or serious physical injury at the hands of Wines.

We agree that under KRE 404(b) the proffered testimony of bad acts allegedly committed by Wines against previous girlfriends was improper. Tammy testified to events which had occurred eight or nine years prior to the time Crystal and Wines dated. Tammy further testified to actions by Wines which never occurred when Crystal dated him: hiding her car keys; moving or blocking her car; placing a pillow over her face; following her new boyfriend; hiding in the back seat of her car; carrying a gun to her new boyfriend's apartment where he ultimately concealed an electronic listening device outside of his apartment. The similarities included only unwanted phone calls and visits, including hiding in the back yards of both women. We disagree that these common events were so strikingly similar as to warrant admission under KRE 404(b). The dissimilarity of the other events clearly made them inadmissible under KRE 404(b).

The facts surrounding Wines's relationship with Page just two years earlier are even more dissimilar from the events concerning Crystal. Wines allegedly physically abused Page. There was no allegation by Crystal of physical abuse. Further, while law enforcement officials found Wines in Page's apartment and Page appeared to have been recently injured, there was no proof as to how she was injured or who may have caused her injuries since she did not testify. The jurors were asked to speculate that Wines had caused Page's injuries and he was, therefore, capable of causing injuries to Crystal.

Because of the dissimilarities between the two previous dating relationships and the case *sub judice*, we believe the trial court's decision to admit the testimony of Tammy and testimony about Page was clearly erroneous.

This Court has established a three-prong test for evaluating the admissibility of evidence under KRE 404(b), which looks to the (1) relevance, (2) probative value, and (3) the prejudice of evidence of the other crimes. *Bell, supra.*, 875 S.W.2d at 889. Because we believe there was no similarity between the allegations involving Page and Crystal, that testimony was clearly prejudicial to Wines.

We conclude that the trial court erred in permitting testimony and evidence regarding the relationships between Wines and Tammy and Wines and Page contrary to the limitations of KRE 404(b). We must now decide whether that error was harmless.

Kentucky Rules of Criminal Procedure ("RCr") 9.24 provides that errors in the admission of evidence do not warrant reversal if they are harmless; that is, if the substantial rights of the parties have not been affected. "[I]f upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969). Upon review of the record, this Court concludes that the error in the admission of the 404(b) evidence involving Tammy and Page was not harmless. The proferred testimony as introduced only served to establish that Wines had the propensity to commit the offense of first-degree stalking.

We therefore reverse and remand this case for a new trial in which the impermissible KRE 404(b) character evidence is not admitted.

ALL CONCUR.

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