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Modified pursuant to KRS 431.076(5) by order entered on July 6, 2020.

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001823-MR

COMMONWEALTH OF KENTUCKY APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 12-CR-00067

J.D.E. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MOORE, JUDGES.

CLAYTON, JUDGE: The Commonwealth appeals from an order of the Bourbon Circuit Court granting Appellee J.D.E.'s *motion in limine,* which precludes the Commonwealth from introducing numerous statements J.D.E. is alleged to have

made within the year before the charged crimes in this matter. After careful review, we affirm.

On June 5, 2012, J.D.E. was indicted for Sexual Abuse, First Degree (Kentucky Revised Statutes [KRS] 510.110) by the Bourbon Grand Jury stemming from allegations made by a former student (Child), claiming that J.D.E. grabbed her, pulled her leg around his, and stated in offensive terms that he wanted to have sex with her.

On December 3, 2012, J.D.E. filed a *motion in limine* requesting that an Order be entered preventing the Commonwealth from introducing any evidence of cell phone contacts with another student, "K.J.," or allowing any trial testimony relating to contacts with K.J. On February 26, 2013, the Bourbon Circuit Court granted J.D.E.'s first *motion in limine*. The Commonwealth did not appeal this order.

On September 27, 2013, responding to the Commonwealth's notice of its intent to introduce additional evidence of various statements the Appellee is alleged to have made to Child and others, J.D.E. filed a second *motion in limine* requesting that an Order be entered precluding introduction of this additional evidence at trial. This motion was granted by Order of the court on October 14, 2013. It is from the Order granting J.D.E.'s second *motion in limine* that the Commonwealth appeals.

As an initial matter, we address a motion that J.D.E. made to this Court to strike portions of the Commonwealth's brief. In its brief to this Court regarding the Order currently under appeal, the Commonwealth makes reference to evidence that was specifically excluded by the trial court's Order granting J.D.E.'s first *motion in limine*. More specifically, the Commonwealth mentions J.D.E.'s contacts with, as well as attempts to contact the minor, K.J. J.D.E. filed a motion to strike the portion of the Commonwealth's brief that makes any mention of evidence specifically excluded from the record via the trial court's order regarding his first *motion in limine*. The Commonwealth, in its reply to the motion, concedes that the mention of cell phone contacts between J.D.E. and K.J. is proper for exclusion, but objects to striking any remaining references to K.J., as it believes that they were not excluded by the Order.

The trial court, in its Order granting J.D.E.'s first *motion in limine* regarding contacts and attempted contacts with K.J., held that all contacts with K.J. should be excluded as evidence. The Commonwealth focuses on the word "contacts" and argues the court intended that only the cell phone contacts between J.D.E. and K.J. to be the subject of the order, insisting that other references to K.J. can be properly admitted. However, in his motion, J.D.E. specifically requested that any information regarding K.J. be excluded.

We believe that it is clear from J.D.E.'s motion and the court's reasoning that the trial court intended that *any* mention of contacts, or any suggestion of an inappropriate relationship between K.J. and J.D.E. be excluded when it granted J.D.E.'s first *motion in limine*. The portions of the Commonwealth's brief referring to contacts will not be considered by this Court in its review of the trial court's Order granting J.D.E.'s second *motion in limine*.

On appeal from the Bourbon Circuit Court's order granting J.D.E.'s second *motion in limine,* the Commonwealth claims that the trial court abused its discretion when it excluded evidence of persistent sexual comments and innuendo directed by J.D.E. toward Child and other students. The Commonwealth contends that the excluded evidence is particularly pertinent to J.D.E.'s mindset, intent, and motives, and that withholding this evidence denies the finder of fact the necessary information to accurately evaluate guilt, which imposes a lens of artificial facts and circumstances upon the jurors. The Commonwealth further argues that the excluded comments expose J.D.E.'s mindset, intent, and motive to gratify his sexual desire for minor female students under his direct supervision by illuminating elements of the grooming process and as such is permitted pursuant to Kentucky Rules of Evidence (KRE) 404(b).

J.D.E. first argues that the Commonwealth did not raise the "grooming" argument at the trial court level and thus the argument cannot be made

before this court as it has not been preserved by the record. We agree. The Kentucky Supreme Court has held that an argument not raised at any time in the lower trial court cannot be considered by the Appellate Court. *Commonwealth v. Lavit*, 882 S.W.2d 678, 680 (Ky. 1994).

Even if we believed that the trial court did have an opportunity to consider "grooming," it was in the Commonwealth's response to the first *motion in limine* that it arguably presents this theory to the court. That order was not appealed.

The disputed evidence in J.D.E.'s second *motion in limine* is alleged comments made by J.D.E. to Child and to classmates of Child, E.B. and K.D., which were sexual in nature. Specifically, Child would testify that:

- J.D.E. stated that his brother had a bigger penis than he does.
- J.D.E. stated that his brother's wife will only have sex with the lights off.
- J.D.E. stated that Child's stepfather had the biggest penis he has ever seen.
- J.D.E. made a hand gesture (similar to the ok sign) and said that was how thick his penis was.
- J.D.E. told Child that he took another female's phone and rubbed it between his legs. He then demonstrated how he rubbed it between his legs.
- J.D.E. told dirty jokes in front of the class and talked about the size of his penis.

E.B. would testify:

- She observed J.D.E. and another student holding hands with interlocked fingers on a bus trip.

K.D. would testify:

- J.D.E. would tell her she "looked hot" and also tell her sexually laden jokes, including vulgar topics such as anal sex.

The Bourbon Circuit Court in granting J.D.E.'s motion found that the only purpose of introducing these statements to the jury would be to improperly show that J.D.E. has a criminal predisposition to discuss sexual matters with his students. It further found that the undue prejudice of the evidence and testimony far outweighs any probative value or relevance it may have to the facts of the case. We agree.

We review the trial court's ruling on the admission of evidence for an abuse of discretion. Abuse of discretion occurs when the trial judge's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson v. Commonwealth*, 231 S.W.3d 177, 119 (Ky. 2007).

J.D.E. argues that the evidence in question is irrelevant and inadmissible pursuant to KRE 401 and 402, that it is improper propensity evidence pursuant to KRE 404(a) and (b), and that even if it has probative value, it is greatly outweighed by its prejudicial effect. The Kentucky Supreme Court summarized the combined application of these rules in *Billings v. Commonwealth,* 843 S.W.2d 890, 892 (Ky. 1992):

> Against the hoary proposition that we welcome any evidence tending to make a material fact, i.e., an element of the offense, appear more likely or less likely than it

> would appear absent that evidence, is counterpoised the equally venerable rule that a defendant may not be convicted on the basis of low character or criminal predisposition, *even though* such character or predisposition makes it appear more likely that the defendant is guilty of the charged offense. The upshot is that 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.

KRE 404(b) allows such evidence of prior bad acts if "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The Commonwealth argues that the proffered evidence is indicative of J.D.E.'s overall plan to increase his female students' comfort level with sexuality and behavior, thereby making his targets more susceptible to his future sexual advances. We agree with the trial court's reasoning. None of these statements are connected to the incident in this case. The test for admissibility of evidence pursuant to KRE 404(b) is set out in *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994).

As discussed in *Bell,* at pages 889, 890:

> … the thrust of KRE 404(b) has always been 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 within certain exceptions, which are well-defined in the rule itself." *Jones v. Commonwealth*, 303

Ky. 666, 198 S.W.2d 969, 970 (1947). For this reason, trial courts must apply the rule cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime.

There are three inquiries, which together, provide a useful framework for determining the admissibility of other crimes evidence. Lawson, *supra,* at Sec. 2.25(II). Using these inquiries into relevance, probativeness, and prejudice, it is clear that the testimony of T.C. should have been excluded at trial.

Is the other crimes evidence relevant for some purpose other than to prove the criminal disposition of the accused?

When "pattern of conduct" is the purpose for which evidence is sought to be introduced, "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." *Adcock v. Commonwealth*, Ky., 702 S.W.2d 440, 443 (1986).

Is evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence?

The question is whether the bare testimony of T.C., who had never come forward with allegations of sexual abuse against appellant until he learned of his little brother's abuse, is sufficiently probative of the uncharged act to warrant its introduction.

> *Does the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value?*
>
> A ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that a trial court has abused its discretion. *Rake v. Commonwealth,* Ky., 450 S.W.2d 527 (1970).

In this case, there is no "pattern of conduct" which connects the statements of J.D.E. and his alleged action against the Child. The incident involving K.J. did not result in any charges against J.D.E. K.J. denied any improper conduct with J.D.E. Therefore, the interaction between J.D.E. and K.J. is not sufficiently probative on an uncharged act to warrant its introduction. This is also true of any statements that J.D.E. made to any other minor. The trial court determined that the statements of J.D.E. are more prejudicial than probative. There was no abuse of discretion by the trial court in excluding these statements.

For the foregoing reasons, we affirm the order of the Bourbon Circuit Court.

ALL CONCUR.

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