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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000535-MR

BRYSON EMBREY

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 07-CR-00168

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, KELLER, AND LAMBERT, JUDGES.

CLAYTON, JUDGE: Bryson Embrey appeals from a judgment of the Muhlenberg Circuit Court sentencing him to seven years' imprisonment in accordance with a guilty plea to four counts of obtaining a controlled substance by fraud, subsequent offense. Prior to pleading guilty, Embrey filed a motion to prohibit the Commonwealth from introducing certain evidence at trial concerning wrongful

acts that took place outside of Kentucky and after the offenses outlined within the subject indictment. The circuit court found that evidence of those acts could be admitted for the purpose of establishing a common goal or scheme pursuant to Kentucky Rules of Evidence (KRE) 404(b)(1). Embrey subsequently entered a conditional guilty plea to the four controlled substance charges. In doing so, he reserved the right to appeal the aforementioned evidentiary ruling. After review, we hold that the circuit court did not abuse its discretion in concluding that the wrongful act evidence could be introduced at trial. Therefore, we affirm.

On October 19, 2007, the Muhlenberg County grand jury indicted Embrey on four counts of obtaining a controlled substance by fraud, subsequent offense, in violation of Kentucky Revised Statutes (KRS) 218A.140, and on one count of being a first-degree persistent felony offender in violation of KRS 532.080. The indictment specifically stated that between October 13, 2006, and July 27, 2007, Embrey fraudulently obtained, on four separate occasions, prescriptions for controlled substances from practitioners within the Commonwealth of Kentucky. Embrey pled “not guilty” to each count and was released on bail.

Prior to the scheduled trial date, the Commonwealth informed Embrey that it intended to introduce at trial certain pharmacy records showing that Embrey had been prescribed controlled substances by a minimum of thirteen different physicians in five different states and that he had received controlled substances from at least thirteen different pharmacies. The Commonwealth sought to

introduce these records pursuant to KRE 404(b)(1) because they purportedly established Embrey's use of out-of-state doctors and pharmacies in a manner similar to the allegations set forth in the indictment. Thus, they were proof of motive, preparation, plan, or absence of mistake or accident.

After being informed of the Commonwealth's intentions regarding the pharmacy records, Embrey filed a motion *in limine* to prevent the Commonwealth from introducing these records into evidence at trial. The circuit court subsequently held a hearing on the matter. Embrey argued that, because the records were related to uncharged acts or alleged acts of wrongdoing that had occurred outside of Kentucky and outside of the time frame of the events set forth in the indictment, they could not be used as evidence. He also argued that the probative value of the evidence was outweighed by its prejudicial effect. Following the hearing, Embrey's motion *in limine* was denied on the grounds that the records could be used as evidence of a plan or scheme on Embrey's part. Embrey subsequently entered into a conditional guilty plea as to the four controlled substance charges,¹ reserving his right to appeal the circuit court's decision regarding the pharmacy records. This appeal followed.

Embrey raises three issues on appeal: 1) whether the circuit court performed the proper evidentiary analysis in regards to the pharmacy records prior to admitting them for trial; 2) whether the circuit court erred in allowing the evidence in question to be presented to the jury because the records concerned

¹ The persistent felony offender charge was dismissed as part of the plea agreement.

wrongful acts that took place after the time frame outlined within Embrey's present indictment; and 3) whether the circuit court's use of *Wonn v. Com.*, 606 S.W.2d 169 (Ky. App. 1980), as a basis for its decision regarding the pharmacy records creates reversible error.

When reviewing issues regarding evidence, this Court's standard of review is whether there has been an abuse of discretion. *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999). To determine whether there has been an abuse of discretion, this Court must determine whether the trial judge's decision regarding the evidence "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

The first issue presented by Embrey is whether the circuit court abused its discretion when it allegedly failed to perform a proper evidentiary analysis prior to admitting the pharmacy records for trial. According to Embrey, the circuit court failed to perform a proper evidentiary analysis because it failed to balance the probative value of the pharmacy records against the potential prejudice to the accused. However, we disagree with Embrey and hold that the circuit court did perform a proper evidentiary analysis.

Generally, evidence of the commission of other crimes is not admissible to prove that the accused has a criminal disposition. However, an exception exists under KRE 404(b)(1) that allows such evidence to be presented to the jury if it is offered for the purpose of establishing "motive, intent, knowledge, identity, common plan or scheme, or absence of mistake or accident." *Anderson v.*

Com., 231 S.W.3d 117, 120 (Ky. 2007); *Lambert v. Com.*, 835 S.W.2d 299, 302 (Ky. App. 1992). In order to be admitted under any of these exceptions, the other criminal or wrongful acts must be relevant for some purpose other than criminal predisposition and sufficiently probative to warrant introduction. The court determined that these records were relevant. The probative value of the evidence of other wrongful acts must also outweigh its potential for prejudice to the accused at trial. *Anderson*, 231 S.W.3d at 120-21.

It is clear from a review of the hearing that the court did not believe that the prejudicial effect of admitting the records outweighed the probative value because it rejected Embrey's reliance on caselaw that presented instances in which wrongful acts were excluded on these grounds; further, the appellant concedes that he provided no testimony or made no objection as to the specific acts which would result in prejudice to him. Therefore, we hold that the circuit court did perform a proper evidentiary analysis regarding the pharmacy records prior to allowing them to be presented to the jury.

The second issue presented by Embrey is whether the circuit court erred in admitting evidence of other wrongful acts when those acts took place after the events for which Embrey was charged under the present indictment. Embrey argues that the pharmacy records are not relevant for the purpose of establishing common goal or scheme because they concern wrongful acts that took place at a later date. However, we disagree with Embrey because the temporal remoteness of certain evidence is a probative issue, not a relevancy issue. Therefore, since the

circuit court found that the probative value of the pharmacy records outweighed its prejudicial effect on the jury, the court did not abuse its discretion by admitting the records into evidence.

In *English*, 993 S.W.2d at 943-944 the Kentucky Supreme Court established the rules regarding the temporal remoteness of evidence. In *English*, the Supreme Court reiterated that evidence of other wrongful acts was admissible if it tended to show, among other things, common scheme or plan. *Id.* With respect to evidence of a common scheme or plan, the Court held that the temporal remoteness of that evidence in relation to the wrongful acts being prosecuted is a probative factor that is determined by the trial judge, not a relevancy factor. *Id.* Furthermore, the temporal proximity of certain evidence is not a condition of admissibility; instead, it goes to the weight of the evidence. *Id.*

Therefore, since the court reviewed the issue of temporal remoteness of the pharmacy records prior to its finding that the probative value of the records outweighed its prejudicial effect, the circuit court did not abuse its discretion by admitting the pharmacy records into evidence.

The third issue presented by Embrey is whether the circuit court's use of *Wonn*, 606 S.W.2d at 169, as a basis for its decision regarding the pharmacy records creates reversible error. Embrey argues that *Wonn* is factually distinguishable from the present case because the acts in question there occurred within the same time period as those for which the appellant was charged; therefore, its use as a basis for the circuit court's evidentiary decision creates

reversible error. Embrey contends that the wrongful acts here were acknowledged by the Commonwealth during the hearing to have occurred within a day or two of the indictment itself, which occurred on October 19, 2007. Since the last incident for which Embrey was charged occurred in July 2007, he argues that the wrongful acts did not occur within the same time period – as in *Wonn* – and it was therefore error to rely on that decision.

However, even though Embrey is perhaps correct in his observation that *Wonn* is factually distinguishable, its use does not necessarily create reversible error. “[I]f the prior wrongful act, or a particular aspect thereof, is so similar to the charged offense as to show a modus operandi which tends to prove an element of the charged offense, remoteness alone does not require suppression of the evidence of the prior misconduct.” *English*, 993 S.W.2d at 944. The evidence in question was asserted to be so similar to the acts for which Embrey was charged that it was properly admissible to demonstrate intent or a common scheme – even if they occurred a few months after the acts for which he was charged. An affidavit for a search warrant in the record notes that Embrey had filled twenty-four different prescriptions for controlled substances in multiple states during the time frame set forth in the indictment. Therefore, the circuit court’s reliance on *Wonn*, as a basis for its evidentiary decision regarding the pharmacy records does not create reversible error.

In sum, we hold that the circuit court did not abuse its discretion by allowing the pharmacy records to be presented to the jury at trial. Accordingly, the judgment of the Muhlenberg Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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