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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000089-MR
AND
NO. 2008-CA-000327-MR

MICHAEL WAYNE ASHLEY

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NO. 05-CR-00180

COMMONWEALTH OF KENTUCKY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
APPEAL NO. 2008-CA-000089-MR AND
AFFIRMING CROSS-APPEAL NO. 2008-CA-000327-MR

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BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Michael Wayne Ashley brings Appeal No. 2008-CA-000089-MR from a January 8, 2008, judgment upon a jury verdict finding him guilty of rape in the third degree and sodomy in the third degree and sentencing him to six-years' imprisonment. The Commonwealth of Kentucky brings Cross-Appeal No.

2008-CA-000327-MR from the same judgment. We affirm in part, reverse in part, and remand Appeal No. 2008-CA-000089-MR and affirm Cross-Appeal No. 2008-CA-000327-MR.

Michael Wayne Ashley was indicted by a Harlan County Grand Jury upon the offenses of rape in the third degree and sodomy in the third degree. The charges stemmed from events that occurred in 2004 and 2005 while Ashley was a teacher at Green Hills Elementary in Harlan County and the victim, K.K., was a fourteen-year-old eighth-grade student. Following a jury trial, Ashley was convicted upon both offenses and was sentenced to six-years' imprisonment. These appeals follow.

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Ashley brings essentially three claims of error for our review: (1) the trial court improperly admitted into evidence "prior bad acts" in contravention of Kentucky Rules of Evidence (KRE) 404(b); (2) the trial court improperly admitted certain hearsay evidence; and (3) the trial court erred by allowing the jury to review the official videotaped trial testimony of select witnesses, which included bench conferences held outside of the jury's presence. We have thoroughly reviewed the relevant trial proceedings and considered the Commonwealth's counterarguments to Ashley's claims of error. We are also cognizant of the serious nature of the crimes Ashley was convicted, which underscores our constitutional burden to ensure that Ashley's conviction was the result of a fundamentally fair trial. We are, however, compelled to conclude that Ashley did not receive a

fundamentally fair trial, thus necessitating reversal of his judgment of conviction and remand to the trial court for a new trial. To aptly explain our reasoning, we address Ashley's claims of error in reverse order and initially address his third claim, as we view it to be most egregious.

In Ashley's third claim of error, he alleges the trial court committed reversible error by allowing the jury to view the official videotaped trial testimony of select witnesses. A review of the record reveals that after the jury retired to deliberate it submitted the following written questions to the trial court:

Can't find social worker's journal
Kimberly Spurlock
Need Detective Halcomb's testimony
Sheila Grant's testimony
Need Mr. Ashley's testimony

In response to the questions, the trial court informed the jury that Spurlock's journal was not admitted into evidence and also informed the jury that it could review the trial testimony of Kimberly Spurlock, Detective Doyle Halcomb, Shelia Grant, and Ashley by viewing the official videotaped recording of the trial proceedings. The jury was then allowed to view the pertinent videotaped testimony on a television in the courtroom. The trial court told the jury that the "clerk" would first "key up" the testimony of Spurlock; the jury would be permitted to view Spurlock's testimony and was to notify the bailiff when finished. Per the trial court's directions, the clerk would then return and key up the testimony of each subsequent witness. Presumably, the jury viewed the entire recorded trial testimony of all four witnesses in this manner. There is no indication

by either party that the official videotaped proceedings were redacted in any manner prior to the jury's review of these four witnesses' testimony.¹

Upon our review of the videotaped testimony of the four witnesses, it is clear the jury also viewed bench conferences that occurred between the trial court and attorneys. Of particular import is a bench conference that occurred during Ashley's testimony. This bench conference took place on November 13, 2007, and began at 11:57 a.m. after the jury left the courtroom. It ended at 12:15 p.m. when the court proceedings were suspended for lunch. And, at 1:20 p.m., the bench conference resumed and only ended at 1:38 p.m. Thus, the bench conference lasted a total of approximately thirty minutes.

During the bench conference, the trial court, defense attorney, and Commonwealth Attorney discussed at great length the admissibility of certain evidence. This evidence consisted of three emails purportedly sent to a former eighth-grade female student, A.C., by Ashley and an August 22, 2005, letter from the Superintendent of Harlan County Board of Education to Ashley terminating Ashley's employment as a teacher. The Commonwealth sought to introduce the emails and letter as exhibits to which Ashley objected. During the bench conference, the trial court ruled that the three emails were inadmissible for lack of

¹ Based on the record before this Court, it appears that the jury's review of the videotaped witness testimony violated Kentucky Rules of Criminal Procedure 9.74, although Michael Wayne Ashley did not object to the jury's review of the tapes at trial. *See also, Mills v. Commonwealth*, 44 S.W.3d 366 (Ky. 2001), where a similar error was found to be of "constitutional magnitude."

proper authentication and also redacted significant portions of the August 22, 2005, letter before admitting the residue of the letter as Commonwealth's Exhibit #6.

During the parties' arguments to the trial court concerning admissibility of said evidence, the contents of one of the three emails Ashley purportedly sent to A.C. was discussed in detail. This email was graphically described as depicting a male cartoon character with an erection and as containing a statement "I kind of feel like old Chuck [cartoon character] in that cartoon." This email, as was the case with the other two emails, was sent from an anonymous email account. However, during the bench conference, the Commonwealth repeatedly argued that these three emails could be authenticated by A.C., who would testify that Ashley acknowledged to her that he had sent the three emails.

Also, at the bench conference, the trial court redacted certain paragraphs of the August 22, 2005, letter terminating Ashley's employment. In so doing, the trial court read aloud some of the redacted portions of the August 22, 2005, letter. Specifically, the trial court recited the Board of Education's findings that Ashley had engaged in inappropriate conduct with underage female students and had misused email at school.

As these discussions concerned the admissibility of evidence and occurred during a bench conference, it is clear that neither the trial court nor the parties intended for the jury to hear same. Indeed, the trial court remarked that it would constitute reversible error to admit the three emails into evidence. Yet, the jury was privy to these discussions and the content of the aforementioned excluded

evidence when it viewed the unredacted trial testimony of Ashley via the official videotaped record. The Commonwealth has acknowledged the error but argues that Ashley failed to object at trial. Thus, the Commonwealth believes any error was unpreserved for appellate review.

As an appellate court, we may review an unpreserved error under Kentucky Rules of Criminal Procedure (RCr) 10.26, which provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

To constitute a palpable error under RCr 10.26, the unpreserved error must affect a substantial right of a party and result in manifest injustice. *Schoenbachler v. Com.*, 95 S.W.3d 830 (Ky. 2003). To determine if a palpable error resulted under RCr 10.26, we must initially determine whether the evidence was properly excluded and, if so, the effect of the inadvertent admission of such evidence. We begin our analysis with the three emails.

We have searched the record for the three emails; however, it does not appear that the Commonwealth or Ashley offered the emails into the record by avowal or by proffer. From the discussions that occurred between the parties and the trial court at the bench conference, it appears that the three emails were sent to A.C. sometime in 2002 and were sent from an anonymous email account. Hence, the sender of the emails was not apparent from the face of the emails. Also, at

least one of the emails contained explicit sexual references and content, which was previously described in this opinion. During the bench conference, the Commonwealth Attorney repeatedly stated that Ashley acknowledged to A.C. that he sent the emails to her, including the sexually explicit email. The Commonwealth believed these emails could be properly authenticated by A.C.'s testimony. The trial court ruled that the three emails were not properly authenticated and excluded the emails.

Under KRE 901(a), a document is authenticated by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Generally, there must exist sufficient evidence to establish the genuineness of the document. *Horn v. Com.*, 258 Ky. 718, 81 S.W.2d 576 (1935). A trial court's determination under KRE 901 as to authentication is given broad discretion and will only be disturbed where a clear abuse of that discretion is demonstrated. *Johnson v. Com.*, 134 S.W.3d 563 (Ky. 2004).

In this case, the three emails were sent from an anonymous email account and, thus, did not identify Ashley as the sender. And, the three emails did not appear to contain any distinctive indicia of authorship, such as the use of Ashley's nickname or information known solely by Ashley. The only offered evidence of genuineness was A.C.'s own testimony that she received the emails from Ashley and that Ashley acknowledged to her that he sent them. Given the unique opportunities that emails present for fabrication, we are unable to conclude

that the trial court abused its discretion by concluding that A.C.'s testimony was insufficient to authenticate the three emails under KRE 901(a).

Considering that Ashley vehemently denied having any inappropriate sexual contact with either A.C. or K.K. at trial, the emails constituted the only documentary evidence wherein Ashley impliedly admits to such sexual contact with A.C. by the very explicit sexual content of at least one of the emails. With this email, the jury was presented with ostensibly Ashley's own statements demonstrating his sexual deviance, as concerns A.C. only, not K.K.

The prejudicial effect of such evidence cannot be overlooked. At trial, the jury was essentially presented with two versions of events, and the verdict was dependent upon which the jury found more credible. Upon the whole, we conclude that a substantial right of Ashley's was affected by the jury's viewing of the bench conference and that manifest injustice resulted therefrom. *See Schoenbachler*, 95 S.W.3d 830.² As such, we view the error as being palpable error under RCr 10.26, thus entitling Ashley to a new trial. We next address Ashley's second claim of error.

Ashley contends that the trial court committed reversible error by admitting certain hearsay evidence. In particular, Ashley argues that the August 22, 2005, letter terminating his employment, a journal kept by the victim, K.K., and four emails allegedly sent by Ashley to A.C. should have been excluded as constituting hearsay evidence. We address each item of evidence separately.

² As we decide that palpable error resulted in regard to the three emails, we do not reach the effect of the inadvertent admission of the redacted portions of the August 22, 2005, letter.

As to the August 22, 2005, termination letter, Ashley testified on direct examination that he was the recipient of the 1997 Teacher of the Year award in Harlan County, was nominated for Who's Who of American Teachers, and was nominated by students for Walt Disney's Teacher of the Year program. On cross-examination, the Commonwealth asked Ashley about disciplinary action taken against him as a teacher. The Commonwealth specifically inquired as to the August 22, 2005, termination letter and then questioned Ashley concerning the termination letter.

The trial court ruled that the August 22, 2005, letter was admissible to impeach Ashley's direct testimony concerning his teaching awards and nominations. The trial court redacted significant portions of the August 22, 2005, letter by deleting specific instances of misconduct that led to Ashley's termination. In this case, we think Ashley "opened the door" by his own testimony concerning his various professional achievements. *See Smith v. Com.*, 904 S.W.2d 220 (Ky. 1995). Moreover, the August 22, 2005, letter was not admitted "to prove the truth of the matter asserted" but was rather admitted solely to impeach Ashley's direct testimony. KRE 801(c). As such, we do not believe that the trial court erred by admitting into evidence the redacted version of the August 22, 2005, letter. We next address the admissibility of the journal kept by the victim, K.K.

K.K. was the second witness to testify at trial. During K.K.'s testimony on direct examination, the Commonwealth asked K.K. if she kept a journal, and she responded affirmatively. Next, the Commonwealth questioned

K.K. about the journal. Relevant to this appeal, K.K. testified that she wrote in the journal about Ashley's sexual abuse of her, that the dates in the journal were correct, and that the entries accurately reflected the events recorded therein. The journal was entered into the record as Commonwealth's Exhibit 4.

K.K.'s journal clearly constituted hearsay. The journal was undisputedly out-of-court statements offered to prove the truth of the matters asserted therein. KRE 801(c). The trial court ruled that K.K.'s journal constituted a present sense impression under KRE 803(1) and was admissible thereunder.

KRE 803(1) reads:

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

- (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Under the present sense impression exception to the hearsay rule, a hearsay statement is admissible if the statement describes or explains an event perceived by the declarant. Such a statement is not admissible under KRE 803(1) if it is merely "about" the perceived event. Robert G. Lawson, *The Kentucky Evidence Law Handbook* §8.60(3) (4th ed. 2003). Moreover, to qualify as a present sense impression, the statement must be made contemporaneous to the event it describes or immediately thereafter. *Young v. Com.*, 50 S.W.3d 148 (Ky. 2001). Although "immediately thereafter" is not defined in KRE 803(1), it is clear that only a slight lapse of time between the event and statement is permissible.

Young, 50 S.W.3d 148; Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.60(3) (4th ed. 2003). Indeed, the Supreme Court held that an eyewitness's statement describing the physical characteristics of a murderer and given to a police officer seven minutes after the murder was not made "immediately after" an event so as to constitute a present sense impression. *Young*, 50 S.W.3d 148. In the case *sub judice*, the evidence clearly did not establish that K.K.'s statements in the journal were made immediately after the events described therein. Thus, we do not think the journal was admissible as a present sense impression under KRE 803(1).

Additionally, the Supreme Court of Kentucky has held that prior hearsay statements of a witness are admissible as substantive evidence under three circumstances:

(1) [W]hen the prior statement is inconsistent with the witness's present testimony; (2) when the prior statement is consistent with the witness's present testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or (3) when the prior statement is one of identification of a person made after perceiving the person. KRS 801A(a).

Miller v. Com., 77 S.W.3d 566, 570 (Ky. 2002). In this appeal, none of the above three circumstances are present. The journal was not offered as a prior inconsistent statement of K.K. It also was not offered to rebut a charge of fabrication as the journal was introduced into evidence by the Commonwealth and during K.K.'s direct examination. *See Miller*, 77 S.W.3d 566. Moreover, there is no suggestion that the journal was offered for identification purposes. Upon the whole, we

conclude that the trial court erred by admitting K.K.'s journal into evidence. We finally address the admissibility of the emails allegedly sent by Ashley to A.C.

Ashley argues that the four emails received by A.C. constituted inadmissible hearsay. As previously noted, three of the four emails were sent from an anonymous email account. The trial court ruled that these three emails were inadmissible for lack of proper authentication, and we have affirmed this ruling. As to the remaining email, the trial court ruled that this email was admissible, and it was entered into evidence as Commonwealth's Exhibit 2. The record reveals that this email was sent from an email account in Ashley's name and Ashley was identified as the "sender" on the face of the email. Additionally, A.C. testified that Ashley acknowledged sending the email to her.³

We believe the email was properly admitted as an admission of a party under the hearsay exception found in KRE 801A(b)(1), which provides:

(b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:

(1) The party's own statement, in either an individual or a representative capacity[.]

Thereunder, a hearsay statement is admissible if the statement is made by a party and it is offered against the party. Robert G. Lawson, *The Kentucky Law Evidence Handbook* § 8.15 (4th ed. 2003). Here, the email clearly satisfies the requirements

³ We note that the email admitted into evidence clearly identified the sender's account as being that of Ashley's. This fact distinguishes it from the other three emails that were excluded from evidence.

of KRE 801A(b)(1) as an admission by a party – there was evidence that the email was made by Ashley from his admitted email account and the email was offered by the Commonwealth against him at trial. Thus, we hold that the trial court properly admitted this email into evidence.

In his last remaining claim of error, Ashley contends the trial court erred by admitting into evidence certain prior bad acts. Specifically, Ashley asserts that the trial court improperly admitted the testimony of A.C., including an email she purportedly received from Ashley. Ashley claims that A.C.’s testimony should have been excluded as evidence of prior bad acts under KRE 404(b).

KRE 404(b) provides, in relevant part:

- (b) 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.

Simply put, KRE 404(b) provides that evidence of other crimes, wrongs, or acts is generally not admissible to prove character. However, the rule provides for an exception – such evidence may be admissible to show “motive, identity, absence of mistake or accident, intent, or knowledge, or common scheme or plan.” *Martin v.*

Com., 170 S.W.3d 374, 380 (Ky. 2005)(citing *Pendleton v. Com.*, 685 S.W.2d 549 (Ky. 1985)). Where evidence is offered to demonstrate a common scheme or plan, “the facts surrounding the prior bad acts must be so strikingly similar to the charged offense as to show ‘(1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*.’” *Martin*, 170 S.W.3d at 380 (quoting *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). The relevant inquiry is whether “common facts” exist between both acts and is not whether there exists a common criminality. *Martin*, 170 S.W.3d at 380. By establishing the presence of a common scheme or plan, relevancy is also established. Once relevancy is established, the evidence should be admitted “unless the danger of undue prejudice outweighs the probative value.” *Id.* at 380. This determination is within the trial court’s discretion and will not be disturbed absent an abuse of that discretion. *Id.*

In the case *sub judice*, the Commonwealth sought to introduce A.C.’s testimony, including an email purportedly sent from Ashley to A.C. At trial, A.C. testified as to Ashley’s statements and acts toward her while she was a student at Green Hills Elementary. Specifically, she testified that Ashley proposed to have a sexual relationship with her but she refused to do so.

The Commonwealth has identified several similarities in the acts of Ashley toward A.C. and toward the victim, K.K. The Commonwealth argues that A.C.’s testimony was admissible under KRE 404(b)(1), as demonstrating a common scheme or plan. In support thereof, the Commonwealth points out that

both girls: (1) were thirteen or fourteen years old and in the seventh or eighth grade, (2) were taken out of other classes by Ashley, (3) were allowed not to complete class assignments, (4) were told by Ashley that he wanted to kiss them during class, (5) were invited to Ashley's home when his wife was out of town, (6) were complimented by Ashley on their appearance and intelligence, (7) were told by Ashley that his sex life with his wife was awful, (8) were hugged by Ashley and told that the hugs "excited" him, and (9) were told that he would take "precautions" that younger boys would not take. In both instances, Ashley purportedly used the teacher/student relationship to engage in inappropriate conduct with both female students and specifically used similar methods to "groom" both female students to have sexual relations with him.

Upon review of A.C.'s testimony, we believe Ashley's prior acts toward A.C. were sufficiently similar to Ashley's acts toward K.K. to demonstrate a "common scheme or plan" under KRE 404(b)(1). As such, we do not believe the trial court abused its discretion by admitting A.C.'s testimony, including the email, pursuant to 404(b)(1).

CROSS-APPEAL NO. 2008-CA-000327-MR

The Commonwealth asserts that the trial court erred by ruling that the three emails sent to A.C. from an anonymous email account were inadmissible as lacking proper authentication. We addressed this very issue in Ashley's direct appeal and concluded that the trial court properly excluded the three emails upon

authentication grounds. Consequently, we view the Commonwealth's assertion to be without merit.

In sum, we reverse Ashley's judgment of conviction and remand this cause for a new trial.

For the foregoing reasons, the judgment of the Harlan Circuit Court is affirmed in part, reversed in part, and remanded in Appeal No. 2008-CA-000089-MR and affirmed in Cross-Appeal No. 2008-CA-000327-MR.

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