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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001715-MR

TARAS ISOM, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CR-00418

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CAPERTON, AND KELLER, JUDGES.

KELLER, JUDGE: Taras Isom, Jr. (Isom), entered a conditional guilty plea to possession of a forged instrument second degree and to being a persistent felony offender, second degree. The trial court entered a judgment and sentence consistent with that plea. It is from that judgment that Isom now appeals. On appeal, Isom argues that the trial court improperly ruled that the Commonwealth could introduce evidence of a prior crime at trial. Isom also argues that the trial

court's ruling denied him due process of law. Having reviewed the record and the arguments of counsel, we affirm.

FACTS

The underlying facts are not in dispute. In September 2006, Lexington-Fayette Urban County police officers responded to a call that a young black man was taking mail from mail boxes. After a short chase, the officers caught and arrested Isom and charged him with a number of counts of possession of stolen mail matter.

Four weeks later, a Lexington-Fayette Urban County police detective received a call from Bobby Jones (Jones), a security specialist employed by Central Bank & Trust Company. Jones told the detective that one of the bank's customers, Laura Blake, reported that her mail had been stolen on August 26, 2006. The stolen mail included a check made payable to Allstate. Jones stated that Isom cashed the stolen check after first scratching out Allstate as the payee and inserting his name. When cashing the check, Isom presented his Kentucky driver's license as proof of identity. Isom was then charged with an additional count of possession of stolen mail matter and with one count of second-degree possession of a forged instrument. Isom ultimately pled guilty to six counts of possession of stolen mail matter and to one count of second-degree possession of a forged instrument,¹ and, in January 2007, the court sentenced him to five years' imprisonment probated for five years.

¹ The guilty plea involved other crimes; however, the possession of stolen mail matter and possession of a forged instrument are the only ones relevant to this appeal.

Eight months later, in August 2007, Isom cashed a check drawn on the account of Trudy Bubenhofer (Bubenhofer). The check had been made payable to Kentucky Utilities (KU); however, KU's name was scratched out and Isom's was inserted on the payee line. When cashing Bubenhofer's check, Isom again provided his Kentucky driver's license information as proof of identity. Based on his actions, a grand jury indicted Isom for second-degree criminal possession of a forged instrument and for being a persistent felony offender in the second degree

Approximately two weeks before trial, the Commonwealth filed notice that it intended to introduce into evidence Isom's January 2007 convictions of six counts of possession of stolen mail matter and one count of possession of a forged instrument in the second degree. Following a hearing, the trial court found that one of the January 2007 convictions for possession of stolen mail matter and the January 2007 conviction for possession of a forged instrument amounted to "signature crimes" and would be admissible. However, the court stated that the other January 2007 convictions for possession of stolen mail matter would not be admissible. Shortly thereafter, Isom entered into a conditional guilty plea, reserving the right to contest the trial court's evidentiary ruling. This he now does on appeal, arguing that the trial court's ruling violated the Kentucky Rules of Evidence (KRE) and his right to due process.

STANDARD OF REVIEW

We review a trial court's rulings regarding the admission or exclusion of evidence for abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95

(Ky. 2007). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

ANALYSIS

In attacking the trial court’s ruling under KRE 404(b), Isom makes four arguments; however, we believe those arguments can be reduced to two: (1) whether the January 2007 possession of a forged instrument conviction is similar enough to the August 2007 crime to be admissible; and (2) whether the January 2007 possession of stolen mail matter conviction is relevant to the August 2007 crime. We will address these arguments in the order presented.

1. Similarity of Crimes

In its notice that it would be offering into evidence Isom’s January 2007 convictions for possession of stolen mail matter and possession of a forged instrument, the Commonwealth stated it was doing so in order to establish a course of conduct, *modus operandi*, or signature crime. In its order permitting the Commonwealth to introduce evidence regarding Isom’s January 2007 convictions, the court noted the following similarities: (1) in both cases checks were taken from the mail; (2) in both cases the correct payee’s name was scratched out and Isom’s substituted in its place; and (3) in both cases Isom presented his driver’s license as identification when cashing the checks.

KRE 404(b) provides that evidence of other crimes, wrongs, or acts generally is not admissible. However, such evidence is 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.

Isom argues that the Commonwealth did not present sufficient evidence to establish that the two possession of forged instrument crimes were unique enough or so strikingly similar as to constitute signature crimes or to establish *modus operandi*.

In order to prove the elements of a subsequent offense by evidence of *modus operandi*, the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*. If not, the evidence of prior misconduct proves only a criminal disposition and is inadmissible.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

[A]s a prerequisite to the admissibility of prior bad acts evidence, we now require the proponent of the evidence to ‘demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual.

Clark v. Commonwealth, 223 S.W.3d 90, 97 (Ky. 2007) (quoting *Commonwealth v. Buford*, 197 S.W.3d 66, 71 (Ky. 2006)). In analyzing this issue, the court must keep in mind that “[i]t is inevitable, particularly when the prior act amounts to an earlier violation of the charged offense, that there will be some basic similarities

between the prior bad act and the new criminal conduct.” *Id.* at 97-98 (*quoting Buford*, 197 S.W.3d at 71).

Isom argues that there is nothing unique about how he committed his crimes. In support of this argument, he states that “many other criminal defendants – hundreds, perhaps – have committed the crime of second-degree possession of a forged instrument by crossing off the name of the payee, writing in their own name, and cashing the altered check.” While that may be true, Isom has not pointed to any such crimes wherein the defendant crossed out the name of the payee, wrote Isom’s name in its place, and presented Isom’s driver’s license as proof of identity when cashing the check. These factors make it more than a reasonable probability that Isom committed both crimes and fulfill the prerequisite for admissibility set forth in *Clark* and *Buford*.

However, our analysis does not end there. We must next determine if the evidence was offered for a purpose recognized under KRE 404(b). As admitted by Isom, evidence of a similar crime is admissible to prove *modus operandi* and/or a signature crime. Isom argues that such evidence may only be offered to prove identity or *mens rea*, and that, based on the evidence against him, neither was at issue.

Isom’s argument puts the “cart before the horse” because it presumes that Isom’s conviction was a foregone conclusion. While the evidence against Isom may have been overwhelming, a jury was required to presume his innocence and the Commonwealth was required to prove that Isom knowingly forged or

altered Bubenhofer's check and cashed it with the "intent to defraud, deceive or injure another." Kentucky Revised Statute (KRS) 516.060. Proof that Isom had committed a similar crime was therefore relevant to prove the requisite intent by showing a "plan, knowledge . . . or absence of mistake or accident" and was therefore properly admissible.

Similarly, Isom's argument that evidence of his January 2007 conviction of possession of stolen mail material was "utterly irrelevant" is not persuasive. Isom is correct that how a person comes into possession of a forged instrument is not an element of KRS 516.060. However, knowledge of the forgery is such an element. While it is unclear from the record what defenses Isom might have raised, we cannot say that how he came into possession of the check is utterly irrelevant. Such evidence goes to the element of knowledge regarding the forgery, which is relevant. Furthermore, the fact that Isom previously was in possession of stolen mail matter as well as Bubenhofer's statement that her check had been stolen from the mail, go to the element of knowledge that the check was forged. Therefore, we cannot say that the trial court abused its discretion when it ruled that evidence of the conviction of possession of stolen mail matter was admissible.

2. Due Process

Isom's due process argument is that "the *erroneous* admission of 'highly prejudicial' and 'dangerous' bad act evidence, which 'impugn[ed]'" his character denied him a "fundamentally fair trial in violation of the state and federal constitutional guarantees of due process." (Emphasis in original). This argument

is inexorably tied to whether evidence of the January 2007 convictions was properly admissible. Because we have held that the trial court properly ruled that evidence admissible, we need not address Isom's due process argument.

CONCLUSION

For the foregoing reasons, we affirm.

ALL CONCUR.

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