RENDERED: MARCH 12, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001885-MR

TRAVIS RAY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 07-CR-001470

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO, AND WINE, JUDGES.

ACREE, JUDGE: Travis Ray appeals a conviction for violation of a protective order of the Jefferson Circuit Court. For the following reasons, we affirm.

Ray and Veronica Fields lived together with their son for approximately two months in 2005 until Fields requested and was granted a domestic violence order (DVO) restraining Ray from committing or threatening further abuse, from contacting Fields, from coming within 600 feet of Fields or her family, and from damaging or disposing of the parties' property.

Fields accused Ray of raping and sodomizing her after breaking into her home on March 3, 2007. Ray was charged with two counts of first degree rape, first degree sodomy, first degree burglary, first degree wanton endangerment, violation of a protective order, and being a persistent felony offender in the first degree. A jury convicted Ray only of violating the protective order. This appeal followed.

On appeal, Ray argues that the trial court committed reversible error by: (1) improperly permitting evidence of his past bad acts; (2) refusing to grant a mistrial following the Commonwealth's introduction of evidence which did not comply with the notice requirement of Kentucky Rule of Evidence (KRE) 404(c); (3) failing to sever the trial on his violation of a protection order count from his trial on the other charges; and (4) improperly allowing the Commonwealth to use three peremptory challenges to exclude African-American members of the jury pool.

Ray's first argument is that evidence of his past bad acts should have been excluded.[1] At trial, the Commonwealth presented evidence of the protective order Ray was accused of violating, the assault that served as grounds for the protective order, and past incidents in which Ray allegedly harassed Fields. Ray

[1] Ray asserted in his brief that he made a motion *in limine* to exclude this evidence but he failed to comply with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(iv-v) by citing where in the record the motion could be found. Although the Court has found the motion on its own and will now address the merits of Ray's argument, this Court is not required to find where error was preserved or the support in the record for any argument; no one should expect the Court to do so in the future. CR 76.12(8)(a); *and see Vandertoll v. Commonwealth*,110 S.W.3d 789, 797 (Ky. 2003).

argues this violated KRE 404(b), which precludes the admission of "other crimes, wrongs, or acts" as evidence of the defendant's character or predisposition, but permits them,

> (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.

KRE 404(b). The Commonwealth claims to have presented the evidence at issue to show Ray's state of mind, absence of mistake or accident, and lack of the victim's consent, and also claimed the prior bad acts were inextricably intertwined with the alleged crimes of March 3, 2007.

The Kentucky Supreme Court in *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994), articulated a three-part test for determining whether the admission of such evidence was proper: "Is the other crimes evidence relevant for some purpose other than to prove the criminal disposition of the accused? . . . Is evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence? . . . Does the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value?" *Bell* at 889-91.

The standard of review for the admission of prior bad acts is whether the trial court abused its discretion, and "[t]he test for abuse of discretion is

whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted). We will address the admission of evidence of the assault and the DVO separately from the admission of evidence of the alleged harassment.

The existence of the DVO and the underlying assault which formed its basis were clearly probative of whether Ray violated a DVO; in fact, they were necessary to the Commonwealth's case because Ray was charged with violating a protective order. It is logically impossible to prove violation of a protective order without first establishing that a protective order existed with respect to the alleged victim.

Next, the DVO and assault conviction are sufficiently probative to warrant their inclusion at trial. A court found, after a hearing in which both parties were allowed to participate, that there was enough evidence of domestic violence to issue an order preventing Ray from coming in contact with Fields. There is no reason to believe the assault did not occur or the DVO did not exist.

Finally, we examine the likelihood that admission of this evidence caused Ray prejudice, in comparison to its probative value. The court in *Bell* noted "evidence of this sort is inherently and highly prejudicial to a defendant." *Id.* at 890. Here, however, any potential for prejudice was outweighed by the probative value of the evidence. Again, evidence of the DVO was necessary to prove it had been violated, rendering it "inextricably intertwined" with the offense of which

Ray was convicted. The trial court did not abuse its discretion in admitting this evidence.

Ray also argues that admission of evidence of his past alleged harassment of Fields was improper. At trial, Fields testified about one instance in which Ray pushed and hit her in public. She also testified about another instance in which an unknown person knocked on her door, and she initially accused Ray of violating the DVO, but later recanted the accusation. Fields further testified about unwanted contact initiated by Ray prior to the alleged sexual assault and burglary, and particularly about her interactions with Ray in the days leading to the alleged rape**.** As we will discuss, while most of this evidence should not have been admitted, admitting it was harmless error.

The Commonwealth argued the evidence of past harassment was relevant to show Ray's state of mind, the absence of mistake or accident, and lack of the victim's consent. The Commonwealth also argued Ray's pattern of behavior was inextricably intertwined with the events of March 3, 2007. The trial court ruled the challenged evidence was admissible because the parties' course of conduct was so intertwined with the alleged events of March 3, 2007, they should have been admitted.

The trial court's analysis was incomplete. The trial court was correct in undertaking the first step in the *Bell* inquiry to determine whether the prior bad acts evidence was "relevant for some purpose other than to prove the criminal disposition of the accused[.]" *Id*. at 889-91. However, that is not the end of the

matter. Even if the nature of the allegations of past harassment did render them relevant to the question before the jury, the trial court was still required to analyze the probative value of the evidence and the potential for prejudice. The court did not do so in this case. In *Bell*, the Supreme Court made clear that it is the responsibility of the trial court to determine this issue "*before* evidence of uncharged crimes is admitted." *Id.* at 890 (emphasis in original).

The reason the trial court did not complete the analysis is likely that the motion was presented in a confusing manner. Counsel for Ray argued the motion to sever the charge for violation of the DVO at the same time she moved to exclude evidence of prior bad acts. The court's ruling seems to confuse the two issues and explains why the court did not conduct separate analyses.

Despite admission of evidence of past harassment without a proper analysis, the error was harmless. "A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-689 (Ky. 2009), *citing Kotteakos v. United States,* 328 U.S. 750 (1946). The Commonwealth presented sufficient additional evidence of Ray's violation of the DVO on which a jury could base its verdict; indeed, testimony regarding any past harassment constituted a relatively small portion of the evidence presented at trial. Fields testified that Ray was in her home on March 3, 2007, without her permission. The prosecutor entered records of phone calls made and received by Ray around the time of the alleged DVO violation, which corroborated

Fields' testimony. The jury heard evidence from a forensic biologist that Ray's DNA was found on the victim, and that the DNA had likely been there no more than twelve to eighteen hours preceding its recovery as evidence. Given such evidence indicating Ray had been in Fields' presence in violation of the DVO, it is unlikely the exclusion of evidence of prior alleged harassment would have resulted in a different outcome.

Ray's next argument is that certain portions of Fields' testimony was improperly admitted in violation of KRE 404(c) and therefore warranted a mistrial. Specifically, Ray objects to Fields' testimony that Ray had previously examined the caller identification feature on her phone, called the phone numbers listed, and threatened men who answered at those numbers.

KRE 404(c) requires the Commonwealth to provide defendants notice of evidence of prior "crimes, wrongs, or acts" intended for presentation at trial pursuant to KRE 404(b). It is undisputed that evidence of the incident was not listed in the Commonwealth's notice. Ray argues the introduction of such evidence warranted a mistrial, which the trial court did not grant. The Commonwealth responds by insisting Ray had actual notice because a transcript of Fields' interview with a detective, produced pursuant to a discovery order, included her complete description of the caller identification incident.

However, we need not address the parties' arguments about whether admission of the evidence violated KRE 404(c) because Ray did not request the appropriate remedy for such a violation. At trial, the prosecutor asked Fields, "Did

he [Ray] see his son?" Fields responded directly, stating, "One day he did come over." She then elaborated, explaining the course of events leading to the caller identification incident. That subsequent portion of her testimony was clearly not responsive to the Commonwealth's question. After Ray's objection to the testimony on the caller identification incident, the prosecutor offered to redirect Fields away from the topic. The prosecutor did so, but Fields made an indirect reference to her previous testimony about Ray's threatening behavior. Ray objected and asked for a mistrial. The judge instructed the parties to move away from the issue, and ruled that the testimony did not "rise to the level of mistrial." We believe the trial court ruled correctly.

In situations such as this, it is proper for a judge to admonish the jury to disregard the testimony, and not to grant a mistrial. *Matthews v. Commonwealth*, 163 S.W.3d 11, 18 (Ky. 2005) ("an admonition to the jury cures an unsolicited reference to prior criminal acts"). This is especially true when the reference to inadmissible evidence was isolated, as it was here. Ray's attorney did not request an admonition; she requested a mistrial. Had Ray requested an admonition, the trial court could have easily cured any issue of improper presentation of evidence to the jury. *Id.*

Ray next argues the trial court should have severed the trial for violation of the DVO from the trial on the other charges. The standard of review on this matter is abuse of discretion. *Debruler v. Commonwealth*, 231 S.W.3d 752,

760 (Ky. 2007). Here, the trial court did not abuse its discretion in denying the motion to sever the charges.

Kentucky Rule of Criminal Procedure (RCr) 9.16 requires a court to separate charges when it appears joinder of offenses would be prejudicial. In particular, Ray argues the jury would not have convicted him of violating the DVO had they not heard evidence regarding the other allegations. To be entitled to a severance of charges, a defendant must show "joinder would be so prejudicial as to be 'unfair' or 'unnecessarily or unreasonably hurtful.'" *Commonwealth v. Rogers,* 689 S.W.2d 839, 840 (Ky. 1985). A significant factor in determining whether charges may be joined is "the extent to which evidence of one offense would be admissible in a trial of the other offense." *Commonwealth v. Collins*, 933 S.W.2d 811, 816 (Ky. 1996). Here, for Ray to have raped or sodomized Fields or entered her house illegally, he would necessarily have had to violate the DVO by coming within 600 feet of her or having contact with her. Evidence regarding the alleged rape and burglary would have been relevant to whether Ray violated the DVO.

Furthermore, joinder of offenses is also appropriate when "the crimes are closely related in character, circumstances, and time." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 264 (Ky. 2006), *citing Seay v. Commonwealth*, 609 S.W.2d 128, 130-31 (Ky. 1980). Again, there is significant overlap in the crimes alleged. The behavior alleged to form the basis of the charges is virtually identical for the DVO and the other charges. It would have been unduly

burdensome for the trial court to order the charges to be severed. The trial court did not abuse its discretion here.

Finally, Ray challenges the prosecutor's peremptory exclusion of three African-American members of the jury pool. The Equal Protection Clause of the United States Constitution prohibits a prosecutor from excluding jurors because of their race. *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712 (1986). To establish a *prima facie* case of purposeful discrimination in selecting the jury, a defendant must first show that he is a member of a cognizable racial group, that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94, 96. After a defendant has made his *prima facie* case, the court must assess "the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859 (1991). Furthermore, the Supreme Court "emphasize[d] that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. As an issue of fact, a trial court's ruling on a *Batson* challenge is afforded great deference, and will not be overturned unless clearly erroneous. *Henderson*, 500 U.S. at 364.

Here, whether Ray made a *prima facie* showing of prosecutorial discrimination is moot because the prosecutor articulated legitimate reasons for

excluding the potential jurors. *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992). Those reasons related to the potential jurors' ability to fairly render a verdict based on their individual circumstances, and not their racial identities. The prosecutor dismissed one African-American woman from the jury pool because she had a sister she believed had been treated unfairly by the police and a brother in prison for robbery. The second potential juror's cousin had recently been released from prison for rape; the prosecutor was unsure the juror could put her personal experiences aside for this case. The prosecutor noticed the last juror sleeping through the entire *voir dire*, and found him unresponsive.

Ray now argues those reasons were pretextual because the jurors indicated they would not be prejudiced by their experiences; however, a trial court – and not a reviewing court – is in the best position to evaluate prosecutors and the validity of their stated reasons for excusing the jurors. *Thomas v. Commonwealth*, 153 S.W.3d 772, 778 (Ky.App. 2004). Because the prosecutor did give legitimate reasons for her peremptory challenges, we will not second-guess the trial court to overrule them. There was nothing inherently discriminatory in the prosecutor's stated reasons for excusing the three African-American jurors; there was, therefore, substantial evidence for the trial court to rule the prosecutor's justification acceptable and overrule Ray's *Batson* challenge.

For the foregoing reasons, we affirm the Jefferson Circuit Court's conviction of Travis Ray of violating a protective order.

ALL CONCUR.

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