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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002348-MR

RONALD EDWARDS — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 07-CI-00082

JARRED HENSLEY AND
JORDAN GRUVER — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham completed and concurred in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

BUCKINGHAM, SENIOR JUDGE: Ronald Edwards appeals from a Meade Circuit Court judgment against him and in favor of Jordan Gruver in excess of $1 million following a jury trial. Finding error, we reverse and remand for a new trial.

Jordan Gruver was assaulted by multiple assailants at the Meade County Fair in July 2006. The assailants were Jarred Hensley, Andrew Watkins, Josh Cowles, and Matthew Roberts. All were members of the Imperial Klans of America (IKA). Hensley and Roberts were visiting from Ohio. Edwards, who lived in Hopkins County, Kentucky, was the head of the IKA.

On the day of the assault, the assailants went together to the Meade County Fair. All wore steel-toed boots with red laces that signified they had spilled blood for the white race. While at the fair, they handed out IKA cards. One of the assailants testified that the Meade County Fair was a great place to recruit new members because Meade County is a "redneck county."

The assailants confronted Gruver and called him a "spic" and a "border hopper." Gruver was 16 years old at the time and was thought by the assailants to be "an illegal spic." Gruver was, in fact, a native-born U.S. citizen whose father was from Panama and whose mother was from Kentucky.

Watkins threw whiskey in Gruver's face, and Hensley knocked him to the ground. The assailants then repeatedly kicked Gruver with their steel-toed boots while he lay on the ground in the fetal position. There was evidence that Gruver suffered a broken jaw, permanent damage to his left arm, and severe emotional trauma. After the police took Hensley and Watkins into custody,

Cowles called Edwards to report their arrests. Edwards asked Cowles to keep him posted.

In addition to criminal charges, Gruver filed a civil action in the Meade Circuit Court against three of the assailants (Hensley, Watkins, and Cowles) and also against Edwards, who was not present when the assault occurred. Gruver also named IKA, which was an unincorporated association controlled by Edwards, as a defendant.

Gruver settled his claims against Watkins and Cowles prior to trial, and he dropped IKA as a defendant in the case. Gruver pursued his claims against Hensley and Edwards in a jury trial that was held in November 2008. The jury in the case returned a verdict in favor of Gruver in excess of $2.5 million. Of that amount, over $1.5 million was in compensatory damages against Hensley and Edwards, with Edwards being found to be responsible for 20% of the amount, and $1 million in punitive damages for which Edwards was solely responsible. Edwards appealed from the final judgment.[2]

The IKA claims to be a Christian organization that hates "Muds [mixed-race persons], spics, kikes, and niggers." It claims to be active in thirty-eight states and five foreign countries. Edwards was the head of the IKA and he lived off of the group's dues, contributions, and merchandise sales. IKA functions were sometimes held on Edwards's property in Hopkins County, with speakers and live bands participating.

[2] Hensley did not appeal.

Edwards encouraged members of the organization to recruit new members and further encouragement was set forth in an IKA handbook. Members understood that it was not necessary for Edwards to specifically give his approval before they engaged in recruiting activities.

Gruver's claim against Edwards was that Edwards was reckless in selecting and supervising his recruiters and that he encouraged their violence. There was evidence that at least three of the assailants had criminal records that indicated their violent tendencies. Hensley, an Ohio IKA leader, pled guilty to a criminal charge of assaulting Gruver and had the word "violence" tattooed on his knuckles. He had a criminal record that included convictions for assault, aggravated menacing, and illegal use of a firearm. Cowles was an IKA unit leader and was active in IKA recruiting. He had recently been released from prison for wanton endangerment. Roberts, who accompanied Hensley from Ohio, had been convicted of robbery, assault, and burglary. While Watkins had no prior criminal record, Edwards testified that Watkins was the IKA "Imperial Gothi," or IKA religious leader, and that he appeared at IKA functions on Edwards's property to glorify skinhead violence against "spics" and other minorities through music.

Three of the four assailants testified that they went to the fair to have fun and not for the purpose of recruiting. There was no evidence that Edwards had encouraged or instructed any of the assailants to go to the fair, no evidence that he had encouraged or instructed the assailants to engage in recruiting or to assault

Gruver or anyone else while there, and no evidence that Edwards even knew the assailants were at the fair.

Edwards, who represented himself at trial but who is now represented by an attorney, raises three allegations of error at the trial level. We agree with Edwards as to one of his allegations of error; thus, we reverse and remand for a new trial.

The first issue raised by Edwards that must be addressed is whether the trial court erred in not granting a directed verdict in Edwards's favor. "When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party." *Previs v. Dailey*, 180 S.W.3d 435, 437 (Ky. 2005). Further, "the reviewing court is not at liberty to assess the credibility of the witnesses or determine what weight must be given the evidence." *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 25 (Ky. 2008). "[A] reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

Years ago, Kentucky's highest court held in *John v. Lococo*, 256 Ky. 607, 76 S.W.2d 897 (1934), as follows:

> Another equally well-known principle is: "It is not, as a general rule, within the scope of the servant's employment to commit an assault upon a third person and the master is not liable for such an assault, though

> committed while the servant was about the master's business." 3 Cooley on Torts, § 396, p. 78.

76 S.W.2d at 898. In the case before us, however, Gruver did not allege liability based on respondeat superior or the master/servant relationship. Rather, his cause of action was for the negligent hiring, retention, and supervision of the assailants.

Neither Edwards nor Gruver have cited any case directly on point. Rather, both argue that the case of *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840 (Ky. 2005), is applicable. In that case a 19-year-old woman who had consumed alcoholic beverages while attending a social function on premises leased by a local chapter of a national fraternal organization was killed later that night in a single-car accident. *Id*. at 843. Her parents and the administrator of her estate filed suit against the national organization, claiming that it had negligently supervised the local chapter by allowing it to unlawfully serve alcoholic beverages in a dry county and to unlawfully serve alcoholic beverages to the underage decedent. *Id*. at 845.

The Court began by stating the general rule that "an actor whose own conduct has not created a risk of harm has no duty to control the conduct of a third person to prevent him from causing harm to another." *Id*. at 849. The Court further stated as follows:

> A duty can, however, arise to exercise reasonable care to prevent harm by controlling a third person's conduct where: "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a

> special relation exists between the actor and the other which gives to the other a right to protection."

Id., quoting Restatement (Second) of Torts § 315 (1965). In *Carneyhan*, as in this case, there is no allegation that there was a special relationship between the actor and the injured person. *Id*. Rather, the issue in both cases was whether a special relationship existed between the actor (here, Edwards) and the tortfeasor (here, the assailants).

The Court in *Carneyhan* stated that there are two distinct types of claims based upon a defendant's special relationship with the person causing the harm: the negligent failure to warn and the negligent failure to control. *Id*. at 850-51. In both *Carneyhan* and this case, "the alleged tortfeasor's *ability to control* the person causing the harm assumes primary importance." *Id.* at 851 (citation omitted). The Court further stated, "[m]oreover, the defendant's ability to control the person who caused the harm must be real and not fictional and, if exercised, would meaningfully reduce the risk of the harm that actually occurred." *Id*. Also,

> Not only must the control be "real," but it also must be related in some manner to the harm caused by the person under control, such that its exercise would restrict the person's ability to cause harm. Absent such control, there is no special relationship giving rise to a duty of reasonable care.

Id. at 853.

Whether there was a special relationship between a national fraternal organization and one of its local chapters was a question of first impression in Kentucky in the *Carneyhan* case. *Id*. at 850. Likewise, we have been unable to

find any authority where Kentucky courts have addressed whether there is a special relationship between the head of an unincorporated association, such as the IKA, and its members so as to create in the association head an affirmative duty of supervision and control over the activities of the members. The Restatement (Second) of Torts § 319 (1965) states that

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

We know of no case in this state that has specifically adopted this portion of the Restatement, although the Court in *Carneyhan* mentioned it. *Id*. at 850.

We conclude that such a special relationship did not exist in this case. Edwards was the head of the association and the assailants were members. Although the members were encouraged to recruit new members, we cannot see where Edwards had any ability to control their activities in this regard. *See Carneyhan* at 851.

Edwards did not command or direct the assailants to assault Gruver or anyone else. He did not direct the assailants to go to the Meade County Fair, and he had no knowledge that they had done so. The fact that some of the assailants may have also attempted to recruit members for the IKA while at the fair is of no consequence.

Under the standards of the *Carneyhan* case, it cannot be said that Edwards had any duty of reasonable care toward Gruver or anyone else the

assailants might have assaulted that day. He did not have the requisite degree of control over them as is required by the *Carneyhan* case. Thus, we conclude that the trial court erred in not granting a directed verdict in favor of Edwards.

While Edwards, who represented himself, was entitled to a directed verdict, he failed to also move the trial court for a motion for judgment notwithstanding the verdict. As in *Carter v. Driver*, 316 S.W.2d 378 (Ky. 1958), the judgment here should be merely reversed for a new trial rather than reversed for the entry of a judgment notwithstanding the verdict because of Edwards's failure to so move. *See id*. at 381. *See also Royal Crown Bottling Co. v. Smith*, 303 S.W.2d 270, 271-72 (Ky. 1957); *Flynn v. Songer*, 399 S.W.2d 491, 493 (Ky. 1966). Nevertheless, should the evidence in a new trial be the same as in the first trial, then the trial court should grant Edwards's motion for a directed verdict. *See Carter, supra; Royal Crown, supra.*

Two issues raised by Edwards remain to be addressed since they are likely to reoccur in a new trial. The first of these is whether the testimony of Kale Kelley that ten years earlier Edwards had encouraged him to kill Morris Dees, who was Gruver's attorney in this case, was inadmissible. Edwards contends that the testimony was inadmissible under Kentucky Rules of Evidence (KRE) 404(b) as evidence of prior crimes or bad acts. Gruver, on the other hand, contends that such evidence was admissible to contradict or impeach Edwards's testimony that he did not encourage or tolerate any kind of violent or illegal behavior.[3]

[3] In response to a question that "So, the only rule you got is you don't do something illegal," Edwards responded, "Yeah. Stay within the letter of the law, yes." Also, in response to a

"Evidence of collateral criminal conduct is admissible for the purpose of rebutting a material contention of the defendant." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005). *See also Moore v. Commonwealth*, 771 S.W.2d 34, 39 (Ky. 1988), *abrogated on other grounds by McGuire v. Commonwealth*, 885 S.W.2d 931, 935 (Ky. 1994). We conclude that the testimony by Kelley was admissible for the purpose of rebutting Edwards's contention that he did not encourage IKA members to engage in violent or illegal activities. In a new trial of this matter, such testimony may be allowed if Edwards raises the same defense or contention.

The final issue is whether the trial court erred in allowing testimony concerning the past criminal records of the assailants. Edwards argues that the criminal records of the assailants were irrelevant and unduly prejudicial and that the effect of the evidence was to inflame the jury and cause it to disregard the facts. Gruver, on the other hand, asserts that the evidence was admissible to show the violent propensities of the assailants and Edwards's knowledge of those propensities.

Concerning negligent supervision claims, the Kentucky Supreme Court in the *Carneyhan* case stated as follows:

> [T]he plaintiff must allege that the defendant knew or had reason to know of the employee's harmful propensities; that the employee injured the plaintiff; and that the hiring, supervision, or retention of such an employee proximately caused the plaintiff's injuries.

question about whether Edwards promoted and encouraged violence by the IKA members, Edwards responded, "No, I do not. No."

Id. at 844, quoting 27 Am. Jur. 2d *Employment Relationship* § 401 (2004). Because Gruver's cause of action against Edwards was for the negligent or reckless hiring, retention, or supervision of the assailants, we conclude that the evidence was admissible.

The judgment of the Meade Circuit Court is reversed and remanded for a new trial as to Edwards.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CLAYTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion except in so far as the majority's opinion finds no error with the admission of the testimony of Kale Kelley, which inculpates Edwards in an attempted murder plot against Morris Dees, counsel for the Appellee and the Plaintiff below. Thereupon, I dissent.

Certainly, as established by KRE 402, all evidence of relevance has potential for admission during a trial. However, mere relevance is not the touchstone by which the evidence is admitted. As set forth in KRE 403, evidence, though relevant, must not be of such character that its probative value is substantially outweighed by undue prejudice, nor should it lead to confusion of the

issues, mislead the jury, result in undue delay, or be a needless presentation of cumulative evidence.

In the trial below, the admission of the testimony of Kale Kelley concerning the plans to murder Morris Dees inculpated Edwards and, I believe, resulted in undue prejudice to Edwards. Its admission was error because the alleged victim, Morris Dees, was an attorney appearing before the jury as counsel for the plaintiff in the trial of this matter. Necessarily, Morris Dees, as counsel for a litigant, was in a position to endear himself to the jury by his dress, demeanor, mannerisms, personality, eloquence of speech, proximity to the jury, continued appearance before the jury and participation in the trial of the matter as counsel for a litigant. This "endearment," combined with the admission of the collateral facts surrounding the attempted murder plot of Dees, invited the jury to make a decision on the liability of Edwards on irrelevant grounds. It is true that evidence of collateral facts may be admissible under certain circumstances. However, their probative value must not be substantially outweighed by undue prejudice. I believe that the testimony of Kale Kelley was unduly prejudicial and that its admission as evidence *sub judice* was reversible error.

As a second basis for the exclusion of the testimony of Kale Kelley, inculpating Edwards in the murder plot, I believe that the testimony was improper evidence of other crimes, wrongs, or acts under KRE 404(b), and was properly excludable as not within either of the KRE 404(b) exceptions. The admission of

the testimony of Kale Kelley was improper and gives rise to a second reversible error.

CLAYTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent. While the majority has written a well-reasoned opinion, I dissent because I do not believe that the trial court committed an error in denying Edwards's motion for a directed verdict. I concur with the balance of the majority's opinion.

The majority correctly discussed the requirements of the *Carneyhan* case. Pursuant to *Carneyhan*, the question is whether the proof was sufficient to establish that Edwards controlled Hensley and Watkins and, therefore, should be held liable for the injuries they inflicted upon Gruver. I believe that this question is best answered by the trial court judge and the jury. Both the trial court judge and the jury had the ability to assess the credibility of the witnesses and to weigh the evidence. "All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Witten v. Pack*, 237 S.W.3d 133,135 (Ky. 2007), citing *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). Further, the "verdict is not to be disturbed unless the appellate court finds that it is 'palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or

prejudice.'" *Id. See also NCAA v. Hornung*, 754 S.W.2d 855 (Ky. 1988); *Lewis v. Bledsoe Surface Min. Co.,* 798 S.W.2d 459 (Ky. 1990).

In *Adams v. Hilton*, 270 Ky. 818, 110 S.W.2d 1088, 1093 (1937), the Court held:

> The final contention of appellant is that the verdict of the jury, in each case, was flagrantly against the evidence. There can be no doubt but that there was sufficient evidence to carry the cases to the jury. The fact that it conflicts on material questions, or that this court would have believed one set of witnesses against the other, or that the verdict may be against the weight of evidence, gives us no ground to set the verdict aside; nothing short of its being palpably against the evidence authorizes this court to reverse on the ground suggested. *Interstate Coal Co. v. Shelton's Adm'r*, 160 Ky. 40, 169 S.W. 546; *Denker Transfer Co. v. Pugh*, 162 Ky. 818, 173 S.W. 139.

There was certainly conflicting evidence in the case *sub judice*. Edwards testified that he did not know that Hensley and Watkins were going to the Meade County fair and that he did not ask them to recruit or commit any acts of violence at the fair. Hensley, Watkins, and two other members of the Klan testified that they went to the fair to have fun. Conversely, Edwards also testified that the Klan could be very violent and deceptive; that everybody is responsible for recruiting, which is emphasized in the IKA official handbook; and that members were to bring in new members. Testimony was also given that the members understood that they were responsible for recruiting and, moreover, that they did not need Edwards's approval in advance. Evidence was provided that these individuals were, in fact, recruiting the night of the incident. Two members

admitted to handing out Klan cards at the fair and a third had a calling card in his pocket when he was caught. In addition, evidence was presented that Hensley had a prior criminal record and Watkins appeared at IKA functions on Edwards's property. Testimony established that these functions glorified skinhead violence against minorities.

Here, the jury, with regard to the violence against Gruver, attributed only 20% of the fault to Edwards. This percentage of fault reflects that the jury considered Edwards's role and responsibility for the beating of Gruver. And there is no argument that the court's instructions were wrong or that the jury did not follow the law or that the jury's decision was the result of passion or prejudice. Hence, as explained in *McCrocklin's Adm'r v. Lee*, 247 Ky. 31, 56 S.W.2d 564 (Ky. App. 1932), "[i]t is urged that the verdict is flagrantly against the evidence, but, when a verdict can be reasonably explained by what is in the record, it is not flagrantly against the evidence." *Halls Adm'r v. Burton Produce Co.*, 262 Ky. 36, 88 S.W.2d 938 (1935). I would maintain here that the verdict is reasonably explained by what is in the record. Furthermore, "[t]his jury had the right to believe some witnesses and to disbelieve others[.]" *Id.*

The majority noted that the *Carneyhan* case cites the Restatement (Second) of Torts § 319 (1965), wherein is said:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

As the majority says, the ability to control the person causing harm assumes primary importance. In the case at hand, the trial court judge and the jury listened to evidence and made a decision about Edwards's control and ability to control Hensley and Watkins. Among the evidence they heard was that Hensley and Watkins were violent men, the IKA is always seeking new members, and that Edwards, in particular, had everything to gain by the addition of new members.

A jury is directed to be fair, to listen to all the evidence, and not to leave commonsense outside the courtroom. I do not believe that the decision of the trial judge in denying the directed verdict was clearly erroneous or that the jury verdict was flagrantly against the evidence. Therefore, I would affirm the decision of the trial court.

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