

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001162-MR

ROBERT WHITESIDE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 07-CR-003458

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Robert Whiteside appeals from the June 10, 2009, judgment of conviction and sentence of the Jefferson Circuit Court. As the trial court did not abuse its discretion in permitting certain evidence and as the indictment was not faulty, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Appellant's home was burglarized on November 22, 2004. He made a claim to his insurance company, State Farm, requesting payment of \$27,000.00 in personal property losses. Appellant was paid approximately \$14,000.00 on the claim, of which sum approximately \$4,000.00 was for stolen wheels and tires. In May of 2005, Appellant filed a second claim, based on another burglary. At that time, State Farm decided to investigate the first claim and discovered that the receipt that had been tendered for the wheels and tires appeared to have been falsified. Appellant was subsequently indicted in the Jefferson Circuit Court for one count of fraudulent insurance acts over \$300.00.

At trial, the Commonwealth asserted that Appellant's November 2004, claim for compensation for wheels and tires was fraudulent. Included in the Commonwealth's evidence was information regarding the second insurance claim made in May 2005. Appellant was found guilty of the crime, sentenced to two years' imprisonment to be probated for five years, and was ordered to pay a fine and restitution to State Farm. This appeal followed.

On appeal, Appellant first argues that the Commonwealth failed to comply with the notice requirement of KRE² 404(c) when it introduced the evidence of the second insurance claim. Appellant further argues that the trial court erred by allowing the evidence.

“[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings.” *Goodyear Tire & Rubber Co. v. Thompson*, 11

² Kentucky Rules of Evidence.

S.W.3d 575, 577 (Ky. 2000) (citations omitted). “The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* at 581.

KRE 404(c) requires that the prosecution give reasonable pretrial notice to the defendant of its intent to introduce KRE 404(b) evidence. KRE 404(b) evidence is evidence of “other crimes, wrongs, or acts” and “is not admissible to prove the character of a person in order to show action in conformity therewith.” KRE 404(b). However, such evidence may 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.

Id.

In response to Appellant’s arguments regarding the evidence of the May 2005 insurance claim, the Commonwealth argues that the trial court did not abuse its discretion in allowing the evidence, because the evidence did not fall within the purview of KRE 404(b). KRE 404(b) addresses the introduction of other crimes, wrongs or acts. Although the rule does not specifically state what is included in “acts”, Kentucky Courts have traditionally considered “acts,” for the purpose of the rule, to mean bad acts. *See, e.g., Dant v. Commonwealth*, 258 S.W.3d 12 (Ky. 2008); *Garland v. Commonwealth*, 127 S.W.3d 529 (Ky.

2003)(overruled on other grounds); *Dillman v. Commonwealth*, 257 S.W.3d 126 (Ky.App. 2008). The Commonwealth never alleged that the second insurance claim was a crime, a wrong, or a bad act, and no charges were ever brought against Appellant with regard to this second claim. Instead, the evidence was introduced in order to illuminate the sequence of events that led to the insurance company's investigation of Appellant's first claim. The trial court allowed the evidence for this purpose and the Commonwealth agreed to avoid any specifics regarding the second insurance claim. Accordingly, there was no violation of KRE 404(b) and the trial court did not abuse its discretion in allowing the evidence.³

Finally, Appellant argues that his indictment was faulty because it failed to contain any language regarding materiality. This issue was raised at trial and the trial court allowed amendment of the indictment.

The trial court may allow amendment of an indictment "any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." RCr⁴ 6.16. Furthermore, it has been held that an indictment "need not detail the essential elements of the charged crime, so long as it fairly informs the accused of the nature of the charged crime . . . and if it informs the accused of the specific offense with which he is charged and does not mislead him." *Ernst v. Commonwealth*, 160 S.W.3d 744, 752 (Ky.2005) (quotations omitted).

³ The Commonwealth makes the alternative argument that if the evidence was KRE 404(b) evidence, it was properly admitted. However, because we have already held that the evidence does not fall within the scope of KRE 404(b), we need not address that argument.

⁴ Kentucky Rules of Criminal Procedure.

The indictment at issue provides, in relevant part:

defendant, Robert L. Whiteside, committed the offense of Fraudulent Insurance Acts Over \$300, when he knowingly and with intent to defraud or deceive, presented or caused to be presented to State Farm Fire and Casualty Co., false and/or altered documents in support of an insurance claim, knowing that the documents contained false, incomplete, or misleading information and the claim benefit or money exceeded \$300.

The indictment apprised Appellant of the nature of the crime with which he was charged, the specific offense with which he was charged, and it was not misleading. Accordingly, we discern no flaw in the indictment.

For the foregoing reasons, the June 10, 2009, judgment of conviction and sentence order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Casey McCall
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Christian K.R. Miller
Assistant Attorney General
Frankfort, Kentucky