

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000695-MR
AND
NO. 2012-CA-000696-MR

MICHAEL J. PAWELCZYK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NOS. 09-CR-00678, 10-CR-00392 AND 10-CR-00392-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, TAYLOR, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Michael Pawelczyk appeals from a conditional guilty plea to conspiracy to commit murder, intimidating a participant in the legal process, conspiracy to intimidating a participant in the legal process, tampering with physical evidence, two counts of carrying a concealed deadly weapon, and second-degree possession of a controlled substance (first offense) in Fayette Circuit Court

Case Number 10-CR-00392. Pawelczyk also entered a conditional guilty plea to first-degree trafficking in a controlled substance in Fayette Circuit Court Case Number 09-CR-00678. He received a total of twenty years' imprisonment and now appeals to this Court as a matter of right. The two cases have been consolidated for purposes of this appeal.

On February 10, 2009, Pawelczyk was arrested by Fayette County Police and charged with trafficking in a controlled substance (cocaine) in the first degree. He was released on bond. On April 28, 2009, Pawelczyk was indicted by the grand jury for the offense.

On April 14, 2010, the Court heard a motion to disqualify defense counsel because he had become a witness in the case. That motion was based upon counsel's conversation with Pawelczyk on February 2, 2010, about whether or not the confidential informant (CI) would appear at trial. The next day Pawelczyk was stopped for a traffic violation. Two guns and a gas can were found inside the vehicle, and the passenger in the vehicle, Mr. Jakovenko, told the police that the two were on their way to the home of the CI's mother, where they planned to shoot into the house and burn her car. This was an effort to intimidate the CI and prevent him from testifying against Pawelczyk. On March 23, 2010, the Fayette County Grand Jury indicted Pawelczyk for the above charges.

This was not the first attempt by Pawelczyk to intimidate the CI. On September 28, 2011, the Commonwealth filed a notice pursuant to Kentucky Rules of Evidence (KRE) 404(c), stating that it intended to introduce evidence of conduct

that occurred in Woodford County aimed at harming and intimidating the CI. That conduct resulted in charges in Woodford County for arson, burglary, and assault. The evidence was relevant to prove that Pawelczyk was trying to keep the CI from testifying against him about the trafficking charge—the subject of the 2009 Fayette County case. The conspiracy to harm and intimidate the CI led to the conspiracy to commit murder charge—the subject of the 2010 Fayette County case. The trial court had a hearing on the KRE 404(b) evidence on November 7, 2011, and the court granted the Commonwealth's motion to admit the evidence in an order entered the following day.

On November 28, 2011, Pawelczyk moved to exclude from evidence references to electrical devices that were allegedly the components of an explosive device. Pawelczyk also asked the court to exclude from evidence pictures and medical records for the CI that depicted the injuries that he received when the CI was beaten during a home invasion in Woodford County. The trial court held a hearing on these motions on December 15, 2011, and ruled that there was no rule of evidence that prohibited the Commonwealth from discussing injuries inflicted on the CI by Pawelczyk and his co-conspirators so long as the items were not duplicative and were not especially gruesome. The court also held that the explosive device components may be admissible but could not be associated with terrorism. The Court proposed that they be called components for an explosive device.

Pawelczyk entered a conditional guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to the charges in Fayette Circuit Court Case Number 10-CR-00392. Pawelczyk also entered a conditional guilty plea to first-degree trafficking in a controlled substance in Fayette Circuit Court Case Number 09-CR-00678. He received a total sentence of 20 years and reserved his right to appeal all pretrial rulings.

In his first argument on appeal to this Court, Pawelczyk argues that the trial court erred to his substantial prejudice when it overruled defense counsel's objection to the admissibility of evidence that Pawelczyk engaged in conduct in Woodford County on prior occasions aimed at harming and/or intimidating the CI. In support of this argument, Pawelczyk argues that a defendant may only be tried for the particular crime with which he is charged and cites to *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982). Pawelczyk argues, and he is correct, that evidence of the commission of crimes other than the one that is the subject of a charge is not admissible to prove that an accused is a person of criminal disposition. *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (Ky. 1991).

KRE 404(a) governs the use of character evidence and prohibits its use to prove "action in conformity therewith." KRE 404(b) states that an exception may exist to the prohibition against other bad acts evidence where it is relevant to and probative of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. KRE 404(b) essentially states that "evidence of criminal conduct other than that being tried is admissible

only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character.” *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). The decision by a trial court to admit or exclude evidence is reviewed only for an abuse of discretion. In order to constitute an abuse of discretion, the trial court’s decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (internal citation omitted).

The Commonwealth argues that Pawelczyk was accused of entering the CI’s home in Woodford County and beating him with a tire iron. In addition, Pawelczyk was also accused of setting the CI’s car on fire. The Commonwealth’s theory in the 2010 case was that Pawelczyk was continuing his campaign of violence against the CI in order to try to keep him from testifying against him in the 2009 drug trafficking case. Specifically, when Pawelczyk’s Woodford County actions were not successful, he planned to attack the CI’s mother and threatened his life. He had Jakovenko call the CI and told Jakovenko what to say to threaten the CI. All of the acts occurred between February 10, 2009, and February 3, 2010. This was the time frame covered by the indictment for conspiracy to commit murder. The Commonwealth contends that this theory of the case was admissible and is not excluded by KRE 404(b) because it was part of a continuing conspiracy against the CI. The Commonwealth argues that KRE 404(b) was not meant to exclude current evidence of acts that formed a part of the charged offense itself.

Even if the Woodford County acts could be considered other prior acts instead of part of a continuing course of conduct (simply because they occurred in a neighboring county), the acts prove motive, intent, preparation, and planning.

We agree with the Commonwealth that the trial court properly allowed evidence of Pawelczyk's continuing course of conduct into the record, as his conduct was proof of his motive to intimidate the CI and the CI's family as well as his intent to prevent the CI from testifying against him. There was no prior action that was being used against Pawelczyk because all of the actions were part of the crimes of conspiracy and intimidating a witness. Further, the evidence in question was not presented to prove that Pawelczyk was "acting in conformity therewith." Instead, it was presented to explain the continued campaign against the CI. KRE 404(b) is not applicable when the evidence is not presented to prove a propensity to commit the charged offense and instead is being used to prove *the* charged offense.

"The totality of the circumstances surrounding the acts complained of and the ensuing arrests are and should be proper evidence to be considered." *Wiley v. Commonwealth*, 575 S.W.2d 166, 169 (Ky. 1978) (internal citation omitted). A defendant may not segregate one course of conduct into several separate steps so as to artificially create a prior or subsequent event for KRE 404 purposes. KRE 404(b)(2); *Morgan v. Commonwealth*, 189 S.W.3d 99, 110 (Ky. 2006) (overruled on other grounds by *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007) (citing *Gilbert v. Commonwealth*, 838 S.W.2d 376, 378 (Ky. 1992)

(“This is no different than Johnny Gilbert’s use of alcohol, marijuana, and pornographic movies to control, force, or induce his stepdaughters into adult sexual activity; wherein we stated, ‘[i]t was necessary that the jury see the entire picture... evidence that provides necessary perspective is competent. Juries do not have to perform their function of fact-finding in a vacuum.’”).

In the instant case, the Commonwealth was not required to limit evidence to any single part of the transaction and was justified in proving everything occurred as a furtherance of the conspiracy. Accordingly, we discern no abuse of discretion in this regard. Evidence of the actual crime that was committed is not unduly prejudicial, and virtually all evidence submitted by the Commonwealth for purposes of prosecuting a defendant is prejudicial to some degree. Here, the prejudice did not substantially outweigh the probative value of the evidence.

Pawelczyk next argues that the trial court improperly allowed the Commonwealth to introduce inflammatory medical records and photographs portraying uncontested and irrelevant facts into evidence. Specifically, Pawelczyk argues that the trial court erred in holding that evidence of the CI’s injuries, incurred when Pawelczyk beat him with a tire iron in order to intimidate him, should have been excluded through a motion in limine.

The Commonwealth argues that it was entitled to present a complete and unbroken picture for the jury, and that contrary to Pawelczyk’s assertions, the fact that he inflicted severe injury upon the CI with a tire iron is part of the course

of the conspiracy and intimidation. We agree. The Commonwealth also points out that the trial court held that the photographs could be admitted so long as they were not duplicative and were not especially gruesome. We agree with the Commonwealth that this ruling conforms with Kentucky case law. *See, e.g., Adkins v. Commonwealth*, 96 S.W.3d 779, 794 (Ky. 2003). There is nothing to indicate exactly which photographs would have been entered into evidence because Pawelczyk pled guilty, and there was no opportunity for the trial court to apply its ruling.

Finally, Pawelczyk argues that the trial court denied him due process by allowing the Commonwealth to introduce testimony depicting items found in his home to be components of explosive devices. Again, the Commonwealth notes that no such testimony was actually presented because no trial occurred. The Commonwealth contends that the trial court properly ruled that such evidence could be presented, so long as there was no association of Pawelczyk with terrorism. The Commonwealth also argues that there was at least one witness who was going to testify that Pawelczyk had threatened to make a bomb that could be detonated with a phone or walkie-talkie/radio, and use the bomb to make sure there was never a trial in the 2009 trafficking case. Given this testimony, the subsequent discovery of the bomb-making materials in Pawelczyk's residence was direct evidence of the conspiracy to kill the CI to prevent him from testifying. Direct evidence of an appellant's guilt of the charged offense cannot be irrelevant and cannot be overly prejudicial.

For the foregoing reasons, the rulings of the trial court should be affirmed.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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