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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001832-MR

TONY LEE INGRAM

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 12-CR-00518

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Tony Lee Ingram appeals from a Daviess Circuit Court judgment after a jury convicted him of first-degree attempted rape and being a first-degree persistent felony offender. Ingram argues he was entitled to a directed verdict, that the trial court abused its discretion in admitting evidence of prior bad acts, and hearsay testimony was erroneously admitted.

The victim, Amanda Clark, who was nine months' pregnant, was walking in a park when she passed an unknown man. The man then ran up behind her and walked beside her. While the two were talking, Clark observed the man appeared to be masturbating. After the man continued and she refused to watch, Clark turned away and started walking toward her car. The man approached Clark from behind, grabbed her vaginal area and turned her around. Clark immediately told him, "No. Stop," and screamed for help. The man pushed Clark to the ground causing her to fall. The man ran in the direction of Clark's car and Clark ran in the opposite direction. Clark stopped a jogger and told him she thought she had been almost raped.

Clark reported the crime to police and gave the police a description of the man, including his clothing and tattoos. A few days later, Clark identified Ingram as her attacker in a series of twenty photographs sent to her phone by police. She later indentified Ingram from a six-picture lineup and in the courtroom as her attacker.

Ingram argues he was entitled to a directed verdict on the charge of attempted rape. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The evidence presented by the prosecution must be more than a mere scintilla. *Id.* at 188.

The elements of "criminal attempt" are defined as follows:

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.

KRS 506.010.

Ingram contends that evidence of his masturbation, pursuit of Clark, and aggression toward her cannot constitute a “substantial step” because there was no evidence he attempted to undress Clark or have sex with her. We disagree.

“There is no absolute applicable to this [criminal attempt] statute except to say that the overt acts, the substantial step, must be considered under all of the circumstances of the case to discover whether they manifest a clear intent to commit the crime.” *Commonwealth v. Prather*, 690 S.W.2d 396, 397 (Ky. 1985). In *Long v. Commonwealth*, 559 S.W.2d 482 (Ky. 1977), for example, the defendant forced the victim into a bathroom at gunpoint, kissed her, told her to do as he said and ordered her to remove her clothes. The *Long* Court concluded there was no reasonable doubt that he intended to rape her and completed a substantial step in pursuing that intention. *Id.* at 485.

Likewise, in this case, the same reasonable conclusion can be reached. Based on Clark's testimony that Ingram engaged in overtly sexual conduct and physical violence, it was not clearly unreasonable for a jury to determine he intended to rape her and completed a substantial step in committing that crime. *Quist v. Commonwealth*, 338 S.W.3d 778, 785 (Ky.App. 2010).

Ingram further argues the trial court erred in allowing the Commonwealth to introduce evidence of two prior bad acts under KRE 404(b). Both were the subject of a motion in limine.

A park worker reported to police that on the morning of the attack, he chased away a man loitering around the women's restroom and watching women. Additionally, Captain Bill Thompson recalled that approximately one month earlier, he received a report that a man was in a women's restroom at a nearby gas station. A woman provided the man's license plate number to the police. Captain Thompson found the address associated with the vehicle and discovered that a registered sex offender, Ingram, resided at that address. After Clark reported the crime against her, Captain Thompson contacted Clark and directed her to a web page of the Kentucky Sex Offender Registry. Ingram's photograph was one of twenty on the page and Clark identified Ingram as the man who attacked her in the park.

Following a hearing, the trial court ruled that Clark's identification of Ingram would be presented to the jury as a regular lineup, with no reference to his appearance on the sex offender registry. As to the two restroom incidents, the

court ruled the evidence was prejudicial, but not overly so, and was admissible because it showed a common plan, scheme or design by Ingram.

At trial, the park worker testified about the episode which occurred on the morning of the attempted rape and identified the man he saw loitering near the women's restrooms as Ingram. Captain Thompson testified about the episode at the gas station and how it led him to suspect Ingram.

KRE 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Such evidence may be admissible under the following circumstances:

- (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 every case in which evidence of other crimes is sought to be introduced to establish a pattern or scheme, the real question is whether the method of the commission of the other crime or crimes is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person.”

Billings v. Commonwealth, 843 S.W.2d 890, 893 (Ky. 1992) (quoting *Adcock v. Commonwealth*, 702 S.W.2d 440, 443 (Ky. 1986)). We agree with Ingram that the

two incidents at the restrooms were not sufficiently similar to the crime at issue to be evidence of a common plan, scheme or design.

The Commonwealth argues the evidence was nonetheless properly admitted under KRE 404(b)(2), because it was inextricably intertwined with admissible evidence regarding the police investigation of the case, how Ingram was developed as a suspect and how the police came to show the victim photo arrays containing his picture. The Commonwealth relies on *Kerr v. Commonwealth*, 400 S.W.3d 250 (Ky. 2013), a case in which evidence of the defendant's prior arrest warrants was deemed admissible under KRE 404(b)(2).

In *Kerr*, the police set up surveillance of a hotel room after receiving a tip that Kerr, who had two outstanding arrest warrants at the time, was trafficking in drugs. They observed Kerr enter the room carrying a duffel bag and during the following six hours, several other individuals entered and left the room. The police knocked on the door, arrested Kerr, and found the duffel bag containing pill bottles and baggies.

On appeal, Kerr argued that the admission of evidence regarding arrest warrants irrelevant and barred by KRE 404(b). Our Supreme Court disagreed. The Court concluded that the existence of the arrest warrants was “inextricably intertwined” with the police surveillance of the hotel and with Kerr's initial arrest because it presented a complete picture of the crime and how the crime was discovered. *Id.* at 261.

Unlike the evidence in *Kerr*, the evidence of the incidents at the restrooms did not assist the jury's understanding of how the crime occurred. It explained only how the police came to include Ingram in the photo array presented to the eyewitnesses.

The park worker's testimony was admissible to show Ingram was at the park the day of the attack. However, the worker's description of Ingram loitering around the restrooms watching women was highly prejudicial and had no probative value as to whether Ingram committed the crime charged. The testimony regarding the prior acts at the restrooms is precisely the type of propensity evidence KRE 404(b) is designed to exclude because "it is offered as proof that the person, being the sort of person who does that sort of thing or acts that way, is likely to have done the same sort of thing or acted that same way on the occasion at issue in this case." *Darcy v. Commonwealth*, 441 S.W.3d 77, 88 (Ky. 2014) (quoting *Trorer v. Estate of Burton*, 423 S.W.3d 165, 172 (Ky. 2014)).

However, to constitute reversible error, the error must have affected Ingram's substantial rights. Kentucky Rules of Criminal Procedure 9.24 requires that we disregard harmless error:

No error in either the admission or the exclusion of evidence and nor error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the

proceeding that does not affect the substantial rights of the parties.

“An error is reversible if the erroneously admitted evidence has a reasonable possibility of contributing to the conviction; it is harmless if there is no reasonable possibility that it contributed to the conviction.” *Anderson v. Commonwealth*, 231 S.W.3d 117, 122 (Ky. 2007).

The main issues for the jury to resolve were whether Clark was credible, whether she correctly identified Ingram, and whether the events she described constituted an attempted rape. Here, the evidence for the Commonwealth was overwhelming. The park worker testified that he saw Ingram in the park on the morning of the attack and Clark was able to identify him with certainty, describing in detail his tattoos and appearance. Evidence of Ingram’s past conduct at the restrooms could not have reasonably contributed to his conviction.

Ingram further argues Captain Thompson was erroneously permitted to testify regarding hearsay statements made by the woman at the gas station in violation of his Sixth Amendment right to confrontation. In light of the overwhelming evidence of guilt, even if the testimony was inadmissible hearsay, any error was harmless beyond a reasonable doubt.

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

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