

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002718-MR

WILLIAM M. ANDREWS

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 97-CR-0771

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: The appellant, William M. Andrews (Andrews), appeals from the judgment of the Fayette Circuit Court convicting and sentencing him for fourth-degree assault. Finding no error, we affirm.

On May 22, 1997, Andrews's home, located at 730 Florida Street in Lexington, Kentucky, was apparently burglarized. Officer Tracy McIntrye responded to the complaint and interviewed Andrews at the scene of the alleged crime. At that time, Andrews indicated that he thought that Derek Hughes (a/k/a "Dirkie") may

have been the person who had broken into his home. Andrews and Hughes were friends and had talked together earlier in the evening; they had had no previous altercations. After Andrews asked his neighbors concerning the possible whereabouts of Hughes, Officer McIntrye instructed Andrews to return home.

A short time later, Andrews left his apartment and found Hughes talking to some other friends down the street from Andrews's apartment. As Andrews proceeded towards Hughes, Andrews grabbed something from a garbage bin and struck Hughes in the head with it. Although there is some conflicting testimony as to whether the object used to strike Hughes was a board with a nail (or something else), the blow caused Hughes to slump to the ground and opened a cut along his forehead. Hughes was taken to Central Baptist Hospital, where he received stitches for his injury. At some point after Hughes had regained his full senses but before being taken to the hospital by his wife, he discovered \$110 missing from the pocket of his sweatpants. While at the hospital, Hughes spoke with Officer Craft concerning the details of his encounter with Andrews -- including his concern over the missing money.

Based upon the events of May 22, 1997, Andrews was indicted by the Fayette County Grand Jury for assault in the second degree and persistent felony offender in the first degree (PFOI). The case proceeded to trial, and Andrews was found guilty of assault in the fourth degree; the court had dismissed the PFOI charge upon motion of the Commonwealth. On October 20,

1997 the court entered final judgment, sentencing Andrews to five months' imprisonment and assessing him a fine of \$500. This appeal followed.

Andrews's first argues that it was error to admit evidence of the uncharged crime of robbery. He contends that it was not necessary to offer evidence of the robbery in order to prove the crime of assault and that, therefore, any evidence of a possible robbery should have not been admitted. Andrews maintains that evidence of a possible robbery was improper character evidence and that its admission was a violation of due process. We disagree.

Rule 404 (b) (2) of the Kentucky Rules of Evidence allows evidence of other crimes to be admissible if it is "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. " Professor Lawson, The Kentucky Evidence Law Handbook, 3rd Ed., §2.25 explains this rule as follows:

KRE 404(b) (2) uses the language 'inextricably intertwined with other evidence essential to the case' to describe the circumstances under which interwoven crimes may be received as evidence. The case law from which this provision is extracted suggests that the rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, setting, background, and perspective.

In interpreting the admissibility of this type of evidence, the Kentucky Supreme Court in the case of Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 116 (1990) quoted from Smith v. Commonwealth, Ky., 366 S.W.2d 902, 906 (1962) as follows:

'the rule (is) that all evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also approve or tend to prove the commission of other crimes by him or to establish collateral facts.'

We agree that evidence of Andrews's possible robbery of Hughes was so interwoven with the circumstances surrounding the assault that its inclusion was necessary for the Commonwealth to present the case fully. Even if it could successfully be argued that evidence of a possible robbery should have been excluded, Andrews was nonetheless not prejudiced by the evidence in light of the minimal mention and inclusion of the testimony alluding to the possible robbery. Thus, despite the fact that the evidence of a possible robbery may have revealed collateral, uncharged criminal activity, we conclude that the jury was entitled to be apprised of the entirety of the circumstances surrounding the assault; therefore, we find no reversible error in the trial court's ruling as to this testimony.

Andrews's next argument on appeal is that the medical records of Derek Hughes offered by the Commonwealth should not have been admitted into evidence. Andrews contends that the records were not properly authenticated and were not relevant to the assault charge. The medical records offered by the

Commonwealth were clearly hearsay and thus have been admitted properly must have fallen under one of the recognized exceptions to the rules excluding hearsay. "It is now well settled that the medical record of a patient in a hospital is admissible in evidence under the regular business entries exception to the hearsay rule." Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122, 123 (1991).

Although there was no testimony as to the authentication of the medical records, they fell within the foundation exemptions set forth in KRE 803(6)(A). These exemptions reference to KRS 422.300 to 422.330 and provide an alternative to normal authentication methods. "This statute (K.R.S. 422.300) is merely a convenient device for authenticating medical records." Young v. J.B. Hunt Transportation Inc., Ky., 781 S.W.2d 503, 508 (1989). Because of the authenticity exemption for medical records of a hospital, the records from Central Baptist Hospital offered by Commonwealth were properly admitted into evidence notwithstanding any possible concerns as to relevance and probative value.

The record does not indicate that the medical records were admitted for any purpose other than to show the injuries and treatment administered to Derek Hughes while he was at the hospital. Clearly this information was relevant to the facts and circumstances of the case. Nonetheless, appellant claims that the admission of these records into evidence was merely cumulative and, therefore, that they should have not been

allowed. It is true that evidence may be excluded because its "probative value is substantially outweighed by the danger of undue prejudice ... or needless presentation of cumulative evidence." KRE 403. However, "[t]he trial court has discretion to control the presentation of evidence. In the absence of any abuse, the reviewing court will not reverse the decision of the trial judge." Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 544 (1985). There was no clear abuse of discretion by the trial court in admitting the records of the hospital pertaining to the treatment of Derek Hughes.

Andrews's final contention is that the trial court erred by failing to give an "extreme emotional disturbance" instruction to the jury. In McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468, 469 (1986) extreme emotional disturbance was defined as:

a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.

Two separate factors must be shown to warrant an instruction of extreme emotional disturbance in an assault case: (1) evidence of extreme emotional disturbance and (2) reasonable justification or excuse under the circumstances as the accused believes them to be. Creamer v. Commonwealth, Ky. App., 629 S.W.2d 324, 325 (1981).

Andrews has failed to meet the threshold requirements of this two-part test. The evidence revealed that appellant became angry upon discovering that his apartment had been broken into and that some time after reporting the break-in to Officer McIntrye, he decided to seek his own revenge upon the victim. Although it is highly tenuous that such an occurrence could constitute extreme emotional disturbance, the action taken by Andrews could not be justified even under the circumstances as Andrews may have believed them to exist. The state of being "upset" or "uneasy" simply does not rise to the level of extreme emotional disturbance by legal definition. Thompson v. Commonwealth, Ky., 862 S.W.2d 871, 877 (1993).

An instruction as to extreme emotional disturbance may not generally be invoked merely to mitigate an alleged crime. The evidence submitted must meet the threshold requirements described above. Andrews has failed to meet these requirements and thus was properly denied an extreme emotional disturbance instruction. "The reasonableness of an excuse or justification must ordinarily be submitted to the jury. Where there is no excuse or justification , there is nothing to submit." Thomas v. Commonwealth, Ky. App., 587 S.W.2d 264, 265 (1979).

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

ALL CONCUR.

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