

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001705-MR

WILLIAM NICKY MORRIS

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE DENNIS FOUST, JUDGE  
INDICTMENT NO. 97-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: DYCHE, GARDNER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Following a jury verdict finding William Morris guilty of first degree stalking, terroristic threatening and two counts of harassing communications, Marshall Circuit Court sentenced him to serve a four and one-half year term of imprisonment. Morris claims that the court erred to his prejudice by admitting evidence of other crimes and bad acts and that, as a result, his conviction should be set aside.

The jury heard the following evidence. On Morris and Jackie Murphy's wedding day, August 8, 1996, Morris verbally abused her. Murphy testified that Morris subsequently grabbed her, threw

her down and threatened to crush her car with his bulldozer. Within the first two months of the marriage, Murphy sought and obtained an emergency protective order (EPO) against him. After a brief period of separation, they again lived together. Yet, their tumultuous relationship did not abate. Murphy testified that the situation became worse. Morris would throw her down and ram his chest into her. Morris also continued to verbally accost Murphy. Murphy obtained another EPO on November 13, 1996. The couple separated again, but another brief period of reconciliation followed. Murphy asserted that on December 30, 1996, Morris forced her to have sex. More allegations of physical and verbal abuse followed. Morris was then incarcerated for three months. On April 1, 1997, the day following his release, Morris called Murphy using a fictitious name and made threats. Morris was again arrested.

The indictment charged that from April 18, 1997, through July 15, 1997, Morris stalked Murphy. Morris argues that the trial court erred by allowing introduction of his alleged bad acts and other crimes that occurred before April 18, 1997.

Kentucky Rule of Evidence (KRE) 404(b) governs the admissibility of other crimes, wrongs or acts evidence. According to the rule, "[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." In Bell v. Commonwealth,<sup>1</sup> the Supreme Court said that the trial court should make three inquiries to determine "the admissibility of other crimes evidence:"

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<sup>1</sup> Ky., 875 S.W.2d 882, 889, 890 (1994).

[1] Is the other crimes evidence relevant for some purpose other than to prove the criminal disposition of the accused? [2] Is evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence? [3] Does the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value?<sup>2</sup>

Morris argues that the crimes and bad acts that occurred before April 18, 1997, were irrelevant. Morris states that he offered to stipulate the existence of the EPO, an element of the crime of stalking.<sup>3</sup> Morris also argues that the Commonwealth did not have to introduce the pre-indictment bad acts and crimes to establish that he intended to harass, alarm, intimidate or annoy Murphy.<sup>4</sup> According to Morris, these events were unnecessary to show a course of conduct. Because he offered to stipulate to the

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<sup>2</sup> Id. See also Robert G. Lawson, The Kentucky Evidence Handbook § 2.25, at 88 (3d ed. 1974) (noting that "[b]ecause evidence of other crimes is inadmissible to prove the criminal propensity or predisposition [sic] of the accused, determinations of admissibility depend first and foremost upon finding that such evidence has relevancy to the dispute other than to show propensity or predisposition").

<sup>3</sup> Ky. Rev. Stat. (KRS) 508.140 provides in part that "[a] person is guilty of stalking in the first degree, [w]hen he intentionally: Stalks another person; and makes an explicit threat or implicit threat with the intent to place that person in reasonable fear of: Sexual contact . . . [s]erious physical injury; or [d]eath; and [a] protective order or other judicial order . . . has been issued by the court to protect the same victim or victims and the defendant has been served with the summons or order or has been given actual notice . . . ."

<sup>4</sup> KRS 508.130 defines stalking as "engag[ing] in an intentional course of conduct: Directed at a specific person or persons; [w]hich seriously alarms, annoys, intimidates, or harasses the person or persons; and [w]hich serves no legitimate purpose."

existence of the EPO and because the other crimes and bad acts were not important to show a course of conduct, Morris argues that the events that occurred before April 18, 1997, were irrelevant.

The Supreme Court observed in Chumbler v. Commonwealth that "[a] defendant is not entitled to stipulate away the parts of the case which he does not want the jury to see."<sup>5</sup> While it may have benefitted Morris to have prevented the jury from learning of the circumstances which led Murphy to seek an EPO, the Commonwealth was not required to accept his offer of stipulation. The real issue is not whether the Commonwealth had to accept Morris's offer, but rather whether evidence of other crimes and bad acts was relevant and, if relevant, whether the evidence's probative value was substantially outweighed by its prejudicial effect.<sup>6</sup>

According to KRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Whether Morris intentionally engaged in a course of conduct that placed

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<sup>5</sup> Ky., 905 S.W.2d 488, 492 (1995) (citing Gall v. Commonwealth, Ky., 607 S.W.2d 97 (1980), overruled on other grounds by Payne v. Commonwealth, 623 S.W.2d 867, 870 (1981)). See also Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 103 (1998) (citing Chumbler and noting that the "[a]ppellant further argues that his offer to stipulate to the seriousness of Harding's injury would have eliminated the possibility of undue prejudice, and made the admission of the photographs unnecessary. Generally, however, the prosecution is permitted to prove its case by competent evidence of its own choosing, and the defendant may not stipulate away the parts of the case that he does not want the jury to see").

<sup>6</sup> See Old Chief v. United States, 519 U.S. 172, 179, 117 S. Ct. 644, 649, 136 L. Ed. 2d 574, 587 (1997) (noting that the exclusion of relevant, undisputed evidence should be based on considerations like unfair prejudice or waste of time).

Murphy in reasonable fear of sexual contact, physical injury or death is a fact that is of consequence to the determination of his guilt. The prior bad acts and crimes that occurred before the indictment gave the jury the contextual background upon which to base a finding that Murphy had an objectively reasonable fear of contact, injury or death. Therefore, evidence of prior bad acts and crimes was "relevant for some purpose other than to prove the criminal disposition of [Morris]." <sup>7</sup>

The evidence was also probative of whether Morris had committed the crimes for which he was on trial. Regarding the second prong of the other crimes inquiry, the Court in Bell said that "[t]he question is whether the . . . testimony . . . is sufficiently probative of the uncharged act to warrant its introduction." <sup>8</sup> Murphy's testimony regarding her relationship with Morris supported her assertion that Morris had physically and verbally abused her. Unlike the witness in Bell, "who had never come forward with allegations of sexual abuse against appellant until he learned of his little brother's abuse," <sup>9</sup> Murphy had sought two EPOs against Morris before he was indicted for stalking. Accordingly, the evidence of Morris's prior bad acts and crimes was both relative and probative.

The final prong of the other crimes and bad acts inquiry involves a balancing of prejudicial effect and probative value.

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<sup>7</sup> Bell, 875 S.W.2d at 889.

<sup>8</sup> Id. at 890.

<sup>9</sup> Id.

Prejudicial evidence is generally admissible, while evidence that is unduly prejudicial is not.

Evidence of other crimes and bad acts was undoubtedly prejudicial. It gave a context to Morris' abusive conduct which provided the basis for understanding why Murphy reasonably feared Morris. However, allowing the finder of fact to hear prejudicial evidence of other crimes is not error per se. Virtually all evidence is prejudicial to one side or the other, but only if the danger of undue prejudice substantially outweighs the evidence's probative value may the trial court exclude it.<sup>10</sup>

The circuit court found that evidence of other crimes and bad acts was not unduly prejudicial. The Supreme Court said in Barnett v. Commonwealth<sup>11</sup> that "[a]n appellate court should reverse a trial court's ruling under KRE 403 only if there has been an abuse of discretion."<sup>12</sup> Regarding other crimes evidence, the Court noted in Bell that "there exists universal agreement that evidence of this sort is inherently and highly prejudicial to a defendant."<sup>13</sup> Thus, in reviewing a trial court's ruling on the admissibility of other crimes and bad acts evidence, this Court must examine the

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<sup>10</sup> KRE 403.

<sup>11</sup> Ky., 979 S.W.2d 98 (1998).

<sup>12</sup> Id. at 103 (citing Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996); Simpson v. Commonwealth, Ky., 889 S.W.2d 781, 783 (1994)). See also Bell, 875 S.W.2d at 890 (noting that "[a] ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that a trial court has abused its discretion").

<sup>13</sup> Bell, 875 S.W.2d at 890.

ruling utilizing the abuse of discretion standard in light of the inherently and highly prejudicial nature of such evidence.

Although the testimony concerning the bad acts and other crimes that pre-dated the dates on the indictment was highly prejudicial, the trial court did not abuse its discretion by admitting the evidence because it was probative of the course of conduct Morris engaged in which seriously alarmed, annoyed, intimidated or harassed Murphy and because it tended to show Murphy had a reasonable fear of sexual contact, serious physical injury or death.

Morris also argues that the Commonwealth failed to give him reasonable pretrial notice of its intent to use other crimes evidence. KRE 404(c) provides that "if the prosecution intends to introduce evidence [of other crimes] as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence." Lawson notes that "[t]he intent of the provision is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in limine and to deal with reliability and prejudice problems at trial."<sup>14</sup> Morris made a motion in limine regarding the other crimes evidence and the court repeatedly dealt with the issue at trial.

The judgment is affirmed

ALL CONCUR.

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<sup>14</sup> Lawson, supra, N.2, § 2.25, at 106.

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