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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000390-MR

FLOYD OAKS — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 97-CR-00080 & 97-CR-00081

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a conviction of two counts of sexual abuse in the first degree. Because the trial court did not abuse its discretion in 1) admitting evidence of prior uncharged acts, 2) denying appellant's motion for mistrial, and 3) not granting probation, and because the prosecutor's remarks during the closing argument were not palpable error, we affirm.

On July 21, 1997, appellant, Floyd Oaks, was indicted by the Russell County Grand Jury on two counts of sexual abuse in the first degree, for having sexual contact with two eleven year old girls, N.P and C.L. The incidents occurred on July 4, 1997,

in the Lake Cumberland area, where appellant owned a vacation house. N.P. and her cousin C.L. had come to the area with their families to visit N.P.'s grandparents. At the time of the incidents, appellant was 91 years old and suffering from prostate cancer.

Appellant's trial was held on September 4, 1998. C.L. and N.P. testified that they went for a walk, saw appellant sitting on his porch, and walked over to say hello. N.P. was acquainted with appellant from previous summer vacations to Lake Cumberland with her family. They testified that appellant was sitting down, and when they came over, he hugged them. N.P. testified that appellant then patted her on the back and squeezed her rear end and legs, then put his hand under her dress and squeezed her rear end and legs. She stated that appellant then pulled her onto his lap and had his arm around her and put his hand between her legs. C.L. testified that appellant touched her hip and her rear end and put his hand between her legs. They testified that appellant held onto both of them, and when they said they had to leave, appellant pretended like he couldn't hear them. They managed to pull away from appellant, after which they went to a nearby trailer where an acquaintance lived. Appellant, who was 92 years old at the time of the trial, testified in his own defense, denying that the incidents happened.

The Commonwealth, over appellant's objection, also presented testimony at trial from four women, J.B., A.B., C.B., and K.P., who claimed they too had been sexually abused by appellant when they were young girls. J.B. testified about an

incident which allegedly occurred in the summer of 1989, when she was nine years old, when she and her parents had gone to their vacation home at Lake Cumberland. J.B. stated that appellant would come on his "4-wheeler" to visit her parents, and would take her and her brother for rides. J.B. testified that when she was sitting behind appellant on the 4-wheeler, he put his hand under her shorts and touched her genital area. She testified that he tried again to put his hand in her shorts on another occasion while riding on the 4-wheeler, but she put her legs together to prevent him from doing so.

A.B. testified about an incident that occurred in either 1979 or 1980, when she was 11 or 12 years old. A.B. testified that she was friends with appellant's granddaughter, and was at appellant's house for dinner. Appellant's wife asked A.B. to go tell appellant to come eat. A.B. stated that she went into the garage of appellant's house to tell him, and appellant grabbed her and put one hand down her shorts and touched her breasts with his other hand. A.B. said that appellant let her go when she told him that his wife was going to be out there in a minute to get him to come eat.

C.B., A.B.'s younger sister, testified that she remembered several encounters with appellant where he touched her inappropriately, which occurred around 1978, 1979 and 1980, when she would have been between 8 and 10 years old. C.B. was friends with appellant's youngest granddaughter. C.B. testified that there were two instances that she remembered particularly. She stated that she was at appellant's house, and that appellant was

pretending to tickle her and touched her breasts and put his hand between her legs, over her clothing. She testified that he tried again on another occasion, when he hugged her and then put his hand under her shorts.

K.P. testified that her family were summer visitors to Lake Cumberland, and described an incident that occurred in the summer of 1982 when she was six or seven years old. K.P. testified that she went with her mother and aunt to appellant's house to visit. K.P.'s mother and aunt went to visit a next-door neighbor, leaving K.P. with appellant in appellant's front yard. K.P. testified that appellant put his hand down the front of her shorts and touched her between her legs. K.P. also testified that in 1985, her mother asked her to go to appellant's house to borrow a tool. K.P. went to appellant's house. Appellant gave her the tool and as she was about to go out the door, appellant grabbed her from behind and pulled her against him. None of these four women reported the incidents when they occurred, but testified that they came forward after hearing about N.P. and C.L.

Appellant argues that the trial court erred when it allowed the Commonwealth to present this evidence of other uncharged sexual acts. KRE 404(b)(1) provides as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, 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;

Evidence of other acts 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, Ky., 843 S.W.2d 890, 892 (1992). "[T]rial courts must apply [KRE 404(b)] cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." Bell v. Commonwealth, Ky., 875 S.W.2d 882, 889 (1994).

The degree of similarity between the charged and the uncharged acts is a critical factor in establishing a direct relationship independent of character. Billings, 843 S.W.2d at 892. It is not sufficient that the charged and uncharged acts are both of a sexual nature. Lear v. Commonwealth, Ky., 884 S.W.2d 657 (1994); Billings, 843 S.W.2d 890. With regard to the degree of similarity required for prior sexual acts to be admissible, the Kentucky Supreme Court stated that

> . . . collateral bad acts evidence offered to prove corpus delicti should satisfy the same criteria as such evidence offered to indicate modus operandi. That is, evidence of other acts of sexual deviance offered to prove the existence of a common scheme or plan must be so similar to the crime on trial as to constitute a so-called signature crime.

Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993); Billings, 843 S.W.2d at 893.

Appellant contends that the trial court erred in admitting the evidence of the uncharged acts because there is a lack of similarity between the uncharged acts and the two charged acts. Appellant contends that there is nothing in the evidence

to indicate any type of "signature" crime. Appellant further argues that the remoteness of the uncharged acts should render them inadmissible, as they occurred anywhere from eight to nineteen years prior to the charged offenses.

We disagree with appellant, and believe that the acts were "strikingly similar" so as to indicate a modus operandi relevant to the charged acts. Gray v. Commonwealth, Ky., 843 S.W.2d 895 (1992). All of the victims were young girls, who knew appellant as a friend of their families. With the exception of the incident on the 4-wheeler testified to by J.B., the encounters all took place when the girls were visiting appellant's Lake Cumberland residence. The girls all trusted appellant, and thought of him as a "grandfather" type figure. Appellant's approach was always the same - he appeared to take advantage of opportunities when he happened to have a moment with young girls when other adults weren't watching. Further, the acts committed by appellant were basically the same - appellant always put his hand between the victim's legs and touched or attempted to touch their genital area. The acts were also similar in that he did not attempt any sexual acts other than touching. Accordingly, we adjudge the acts are "strikingly similar" enough to establish a modus operandi. Id.

We agree with appellant that the uncharged acts were remote in time, particularly the incidents testified to by C.B. and A.B. which allegedly took place 17-19 years prior to when the charged offenses occurred. The Kentucky Supreme Court has not adopted a bright line rule concerning the temporal remoteness of

other crimes with regard to admissibility. Robey v. Commonwealth, Ky., 943 S.W.2d 616, 618 (1997). "The remoteness in time of uncharged acts is a concern which must be carefully weighed as part of the trial court's decision." Lear, 884 S.W.2d at 660. Remoteness tends to lessen the probative value of evidence of prior sexual misconduct. Commonwealth v. English, 993 S.W.2d 941, 945 (1999). However, in English, the Court held that an appellant's uncharged acts of sexual misconduct which appear to be at least, if not more, remote in time than the uncharged acts in the instant case, were not so remote as to render them inadmissible. In English, the appellant was charged with sexually abusing his six- and eight-year-old grand-nieces, by touching them between their legs while they were visiting. At trial, two adult nieces of the appellant's wife, D.B. and T.N., testified that appellant similarly abused them when D.B. was six or seven, and T.N. was eight or nine. Id., at 942. Neither D.B. nor T.N. testified to their present ages at trial, but D.B. testified that she was now married with a six-month-old son, and T.N. testified that she was now married with her oldest child a sixteen year old. Id. at 943. This Court concluded that these instances of prior conduct were too remote in time to the charged offenses to establish a "common scheme or plan" and therefore the evidence should have been suppressed. Id. The Supreme Court reversed, noting that temporal proximity is more significant with respect to evidence offered to prove a common scheme or plan than evidence offered to prove modus operandi. Id., at 944. The Court stated:

> Neither Rule 404 nor Rule 401 mentions temporal proximity as a condition of admissibility. Hicks v. State, 690 N.E.2d 215, 220 (Ind. 1997). Temporal remoteness generally is held to go to the weight of the evidence, but not to render it inadmissible per se. (Citations omitted). Thus, if the prior wrongful act, or a particular aspect thereof, is so similar to the charged offense as to show a modus operandi which tends to prove an element of the charged offense, remoteness alone does not require suppression of the evidence of the prior misconduct. Adrian v. People, 770 P.2d 1243, 1246 (Colo. 1989).

Id. The Court explained that once that test of relevancy is satisfied by proof of a modus operandi, the court will then weigh the probative value of the evidence versus danger of undue prejudice, at which point the issue of temporal remoteness becomes a factor in determining admissibility. Id. at 945; KRE 403. This balancing test is a task reserved for the sound discretion of the trial judge. Id. The decision of the trial court will not be disturbed absent an abuse of discretion. Anastasi v. Commonwealth, Ky., 754 S.W.2d 860 (1988). We have previously determined that the uncharged acts in the instant case were "strikingly similar" to the charged acts so as to establish a modus operandi. Although the remoteness of the acts, particularly those alleged by A.B. and C.B., tends to lessen their probative value, we believe that the probative value is increased by the fact that there were four "uncharged acts" witnesses. Accordingly, we believe that the trial judge did not abuse his discretion in admitting the evidence of appellant's prior acts of sexual misconduct.

Appellant next argues that the Commonwealth committed reversible error by failing to disclose until the penalty phase of the trial that C.L. had received psychological counseling related to the incidents alleged in this case. During the penalty phase, C.L.'s mother testified that C.L. had been under the care of a psychologist since August of 1997. Appellant moved for a mistrial on the basis of the Commonwealth's failure to disclose this information prior to trial, but the motion was denied.

Appellant argues that the Commonwealth was under a good faith obligation to disclose this evidence prior to trial, as it may have been exculpatory to appellant. Appellant contends that the knowledge that C.L. had received counseling was important, as it may have led to evidence which would have impeached the credibility of C.L. While it is true that a defendant is entitled to exculpatory evidence in preparation for trial, Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), concealment of such evidence is reversible only if it is material to guilt or to punishment. Ballard v. Commonwealth, Ky., 743 S.W.2d 21 (1988). Information that affects the credibility of prosecution witnesses falls within the category of exculpatory evidence. Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); Rolli v. Commonwealth, Ky. App., 678 S.W.2d 800, 802 (1984). The Supreme Court has defined the Brady materiality requirement as "a concern that the suppressed evidence might have affected the outcome of the trial". United States v. Agurs, 427 U.S. 97, 104, 96 S. Ct. 2392, 2398, 49 L.

Ed. 2d 342 (1976); see also, United States v. Bagley, 473 U.S. 667, 674, 105 S. Ct. 3375, 3379, 87 L. Ed. 2d 481 (1985). The incidents occurred on July 4, 1997, and C.L.'s mother testified that C.L. went into counseling in August, 1997. We believe it unlikely that this evidence would have been exculpatory to appellant or affected the outcome of the trial. Rather, it seems that the fact that the child went into counseling shortly after the alleged incident would tend to enhance the credibility of the child. Further, the communications between C.L. and her psychologist would be subject to privilege pursuant to KRE 506 or 507. The question of whether there was a Brady violation and whether, because of it, a mistrial was necessary is addressed to the judgment and discretion of the trial court. Carter v. Commonwealth, Ky., 782 S.W.2d 597, 601 (1989). We cannot say that the trial court's ruling was an abuse of discretion.

Appellant's third argument is that the prosecutor's closing argument consisted of impermissible Bible quotations, along with multiple references to the jury's need and responsibility to protect N.P, C.L, and other children, and restore N.P.'s and C.L.'s trust by believing their story. The record reflects that early in her closing argument, the prosecutor stated:

> One of the things that as adults that . . . we have a responsibility for are the children, whether our children, other people's children, the children in our community. In Psalms 127 it says that the children are the heritage of the Lord, and it is for us, as adults, to take that responsibility.

Near the end of her closing argument the prosecutor stated, "Give back that trust in adults to those six that have testified . . . to let them know that there are adults who do believe that children are a heritage of the Lord." Appellant contends that the prosecutor's statements constituted an improper "golden rule" type argument, as well as a prohibited request for a conviction based on religious beliefs. This alleged error was not preserved, nevertheless, we will review it for palpable error under RCr 10.26.

A golden rule argument is "one that urges the jurors collectively or singularly to place themselves or members of their families or friends in the place of the person who has been offended and to render a verdict as if they or either of them or a member of their families or friends was similarly situated." Lycans v. Commonwealth, Ky., 562 S.W.2d 303, 305 (1978). Although the prosecutor made references to the need to protect "our" children, her argument did not rise to the level of asking the jury to put themselves in a similar situation. As such, we conclude there was no "golden rule" problem with the prosecutor's closing argument.

An argument demanding a conviction based on religious beliefs rather than legal grounds, is prohibited, and, depending on the circumstances, reversible error. Estes v. Commonwealth, Ky., 744 S.W.2d 421 (1987). For example, in Estes, the Supreme Court held that the prosecutor's closing argument was such an improper demand, as he quoted from the Old Testament to the

effect that when a man kills, "[t]he avenger of blood may execute the murderer on sight" and then told the jury "you have to act as the avenger of blood on behalf of the [victim's] family". Id. at 426. However, in Lucas v. Commonwealth, Ky. App., 840 S.W.2d 212, 214 (1992), the prosecutor stated in her closing argument that the Ten Commandments say "Thou shalt not kill". This Court held that while the prosecutor's comments were perhaps ill-considered, they were harmless. Id. at 215. Similarly, in the instant case, although the prosecutor's Biblical references were inappropriate, we adjudge them to be harmless error, as the argument did not rise to the level of "demanding a conviction based on religious beliefs". Estes, 744 S.W. 2d at 426.

Appellant's final argument is that appellant's sentence of imprisonment is unlawful, and that appellant should have been placed on probation with an alternative sentencing plan. KRS 533.010 provides, in pertinent part:

> (1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation, probation with an alternative sentencing plan, or conditional discharge as provided in this chapter.
>
> . . . .
>
> (3) In the event the court determines that probation is not appropriate after due consideration of the nature and circumstances of the crime, and the history, character, and condition of the defendant, probation with an alternative sentencing plan shall be granted unless the court is of the opinion that imprisonment is necessary for the protection of the public because:
> (a) There is a likelihood that during a period of probation with an alternative

> sentencing plan or conditional discharge the defendant will commit a Class D or Class C felony or a substantial risk that the defendant will commit a Class B or Class A felony;
> (b) The defendant is in need of correctional treatment that can be provided most effectively by commitment to a correctional institution; or
> (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

Appellant's counsel filed an alternative sentencing plan, which included two years supervised probation with three years conditional discharge, completion of a sex offender treatment program, and restrictions on appellant's access to children. However, at appellant's sentencing on December 21, 1998, the court denied probation and sentenced appellant in accordance with the recommendation of the jury, to four years imprisonment on each count, with the sentences to run concurrently. At the sentencing, the trial court stated that to grant probation would be "tantamount to permitting [appellant] to commit the same kind of crime". Appellant filed a motion pursuant to CR 60.02 to alter, amend, or vacate the judgment and sentence entered on December 21, 1998, on the grounds that the court did not make specific findings of fact, other than the one noted above, as to why appellant was denied probation. On January 20, 1999, the court entered an order setting aside and vacating the final judgment of December 21, 1998 and scheduling a re-sentencing of appellant for February 15, 1999. At the second sentencing hearing, the court again denied probation, sentencing appellant to the same sentence as before. The court made

findings that 1) there is a substantial risk that appellant would commit another crime if probated, 2) that appellant is in need of correctional treatment that can be provided most effectively by appellant's commitment to a correctional institution, and 3) that probation or conditional discharge would unduly depreciate the seriousness of the crime.

Appellant argues that because the court failed to make any of the required statutory findings at the first sentencing, appellant's sentence should be reversed and appellant placed on probation or probation under the Alternative Sentencing Plan. Appellant argues, based on double jeopardy principles, that the court did not have the right simply to vacate the first sentence and reinstate a new sentence with new findings. The determination by the court to grant probation or conditional discharge is discretionary, rather than mandatory. Brewer v. Commonwealth, Ky., 550 S.W.2d 474 (1977). However, the record of the proceedings leading up to the entry of the judgment should clearly reflect the fact that the consideration required by KRS 533.010 has been afforded the convicted person before the judgment is finally entered. Id. at 478. If the record does not indicate that such consideration has been given, the case may be remanded back for re-sentencing. Id. Accordingly, it was proper for the court to vacate the original sentence and hold a subsequent sentencing hearing.

Additionally, appellant contends that the findings made by the trial court at the second sentencing are not supported by

the evidence. As a result, appellant argues that the sentence of imprisonment is unlawful and that appellant is entitled to be placed on probation with the alternative sentencing plan. We disagree. In support of its findings, the court stated that based upon the evidence at trial, appellant had a long-established pattern of fondling and abusing young women. The record shows that the court considered the relevant criteria pursuant to KRS 533.010. Accordingly, we find no abuse of discretion by the court in denying appellant probation with the alternative sentencing plan. Turner v. Commonwealth, Ky., 914 S.W.2d 343 (1996); Brewer, 550 S.W.2d 474.

The judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas G. Eagle
Franklin, Ohio

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Matthew D. Nelson
Assistant Attorney General
Frankfort, Kentucky