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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-000817-MR

WILLIAM BRADFORD ALTES — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 98-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: The appellant, William Bradford Altes, entered a conditional plea of guilty to one count of sexual abuse in the first degree and one count of second degree sexual abuse. Altes reserved his right to appeal several adverse evidentiary rulings by the trial court. Finding no error, we affirm.

On October 27, 1999, the appellant William Bradford Altes was arrested on two counts of sexual abuse. In January 1998, the Oldham County Grand Jury returned a two count indictment against Altes, charging that on October 13, 1997 he had committed first degree sexual abuse against K.E.N.; and that

during July 1997 he committed second degree sexual abuse against B.M.F. Both victims were under the age of 14 at the time of the commission of the offenses.

On November 25, 1997, while he was being held in the Oldham County Jail, Altes attempted to commit suicide. During the course of his treatment, he made a number of potentially incriminating statements to the emergency room staff. Shortly thereafter, Altes was transferred to an inpatient psychiatric facility where he was further evaluated and received additional counseling and treatment.

Prior to trial, Altes moved to sever the counts of the indictment. The Commonwealth did not object to the motion to sever. Rather, the Commonwealth filed written notice pursuant to KRE 404(c) of its intention to present evidence of sexual abuse by Altes against K.E.N. and B.M.F., as well as allegations involving uncharged sexual abuse against B.M.F. and another child, B.E.B., in each trial. Altes filed a motion in limine to exclude evidence of other allegations of sexual abuse during the trial of either count of the indictment.

In January 1999, the Commonwealth moved the trial court to order production of Altes's medical records, including those pertaining to psychiatric or psychological treatment or counseling. Altes objected to the production order. Altes also filed a motion in limine to exclude any reference to his suicide attempt. The trial court granted the order for production of the medical records, but it ordered that the records be placed under seal and it reserved a ruling on the matter.

Shortly before jury selection was to begin, the trial court ruled that the testimony of the other victims was sufficiently similar to the charged offenses, and allowed the Commonwealth to introduce the evidence. The trial court also allowed the Commonwealth to introduce statements which Altes made during his psychiatric evaluation and counseling following his suicide attempt. Lastly, the trial court denied Altes's motion to exclude any reference to his suicide attempt, provided that the Commonwealth present proof prior to the introduction of such evidence to establish a link between the suicide attempt and the charged offense. Rather than proceed to trial, Altes entered a conditional guilty plea to one count of sexual abuse in the first degree and one count of sexual abuse in the second degree. The trial court accepted the plea, and sentenced Altes to two years on the first degree sexual abuse charge, and to twelve months on the second degree sexual abuse charge, to be served concurrently with the felony sentence. The court probated Altes's sentence for a period of five years, provided that Altes first serve six months in jail. The trial court also ordered Altes to complete a sex offender treatment program, to make reparation or restitution for the victims' counseling expenses, and to abide by all other conditions of his probation. This appeal followed.

Altes first argues that the accusations of sexual abuse made by other victims were not sufficiently similar to establish a common scheme or plan. Rather, he contends that the evidence only tends to show that he is pre-disposed to commit sexual abuse crimes against children, and that the evidence is not admissible

for this reason. KRE 404(b). The Commonwealth stated that it intended to present the testimony of K.E.N. and B.M.F. against Altes in each separate trial. K.E.N. would have testified that in October 1997, when she was 11 years old, Altes persuaded her to "play dead" on her bed while he was alone with her. When the game began, Altes allegedly got on top of her, he blew into her mouth, stuck his tongue into her mouth, rolled up her shirt, and kissed her stomach and between her breasts. Thereafter, he put his hand down her pants and touched her vagina, placed her hand on his penis and finally exposed himself to her. Later, Altes allegedly told K.E.N. that he would "come back" if she told anyone about what happened. B.M.F. would have testified concerning an incident which occurred in July of 1997. B.M.F., who was 12 at the time, alleged that on three occasions when she was spending the night with K.E.N., Altes crawled into her bed and put his hand in or on her vagina. B.M.F. also intended to testify concerning other acts of sexual abuse against her by Altes which occurred between April and October 1997. These other acts were not charged in the indictment. In addition, the Commonwealth stated that it intended to present evidence of additional acts of sexual abuse which Altes committed against B.E.B. B.E.B. would have testified that in 1995, when she was approximately 14 years old, she and Altes were "play wrestling" at her mother's house. She alleged that Altes pinned her down on the bed with his knees on her shoulders, and exposed himself to her. This incident was not charged in the indictment.

Admissibility of evidence of prior crimes or bad acts is governed by KRE 404(b), which provides:

> 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:
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> (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.

Even prior to the adoption of the Kentucky Rules of Evidence, our courts had always recognized the general prohibition against proving character or criminal predisposition by evidence of prior wrongful acts. *See, e .g.*, Jones v. Commonwealth, 303 Ky. 666, 198 S.W.2d 969 (1947). However, Kentucky courts also recognized that evidence of prior conduct is admissible, if it is "probative of an element of the crime charged . . . even though it may tend to prove the commission of other crimes." Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 674 (1990), *cert. denied,* 502 U.S. 831, 112 S. Ct. 107, 116 L. Ed. 2d 76 (1991). Specifically, evidence of other crimes, wrongs or acts was held to be admissible if it tended to show "motive, identity, absence of mistake or accident, intent, or knowledge, or common scheme or plan." Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 552 (1985). "Common scheme" is not included in the "other purpose" exceptions listed in KRE 404(b)(1), though "plan" is specifically included. Nonetheless, this omission or variance in terminology does not constitute an alteration of this

long-standing legal concept, for "the specifically listed purposes are illustrative rather than exhaustive." Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 29 (1998), (quoting R. Lawson, The Kentucky Evidence Law Handbook, § 2.25, at 87 (3d ed. Michie 1993)).

In order to prove the elements of a subsequent offense by evidence of a common scheme or plan, the facts surrounding the misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, or (2) the acts were accompanied by the same *mens rea*. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). Temporal remoteness generally is held to go to the weight of the evidence, but not to render it inadmissible per se. However, temporal remoteness tends to lessen the probative value of the evidence. When "pattern of conduct" is the purpose for which evidence is sought to be introduced, the more significant question is whether the method of the commission of the other crime or crimes is so similar as to indicate a reasonable probability that the crimes were committed by the same person. Bell v. Commonwealth, 875 S.W.2d 882, 889 (1994) *(citing* Adcock v. Commonwealth, Ky., 702 S.W.2d 440, 443 (1986)). The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge. English 993 S.W.2d at 944-45.

The facts related by K.E.N., B.M.F., and B.E.B. are sufficiently similar to establish a common scheme or plan. In the cases of K.E.N. and B.M.F., the charged instances involved

young girls of approximately the same age, both instances occurred in the same bed, both instances involved Altes exposing himself to the girls and then touching or rubbing their genitals, and the instances occurred within a short period of time. The uncharged allegations by B.M.F. follow a similar pattern. The allegations made by B.E.B. are more temporally remote from those made by K.E.N., B.M.F., and B.E.B. was slightly older than the other girls. However, the circumstances are otherwise sufficiently similar to the incidents involving K.E.N. and B.M.F. so that the trial court did not abuse its discretion in allowing admission of the evidence.[1]

Altes next argues that the trial court erred in denying his motion to exclude statements which he made during his psychological evaluation at the emergency room and during his subsequent psychiatric counseling. The trial court concluded that KRS 620.050(2) abrogates any claim of privilege which Altes might have for these statements. KRS 620.050(2) provides:

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[1] *See also* Commonwealth v. English, supra, (probative value of prior acts of sexual abuse against children was heightened by the multiplicity of victims, the multiplicity of occurrences, and the fact that the abuse was perpetrated against members of several generations of the same family); Violett v. Commonwealth, Ky., 907 S.W.2d 773 (1995) (prior acts separated in time by four years held admissible); Lear v. Commonwealth, Ky., 884 S.W.2d 657 (1994) (prior acts of sexual misconduct against children admissible to show pattern of conduct which was ongoing over a period of years); Anastasi v. Commonwealth, Ky., 754 S.W.2d 860 (1988) (prior acts of sexual abuse against children eight years earlier were sufficiently similar to the charged act);. and Pendleton v. Commonwealth, supra, (prior acts of sexual misconduct against older daughter were sufficiently similar and not too remote in time to be admissible as showing a method of operation of sexual activity with young daughters and to indicate a common and continuing pattern of conduct on the part of the accused).

> Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglected, or abused child or the cause thereof, in any judicial proceedings resulting from a report pursuant to this section. This subsection shall also apply in any criminal proceeding regarding in District or Circuit Court regarding a dependent, neglected, or abused child.

Altes contends that KRS 620.050(2) eliminates the psychiatrist/psychotherapist-patient privilege in judicial proceedings only when the statements were made pursuant to a report under KRS Chapter 620. Although he is technically correct, Altes construes the purpose of KRS 620.050(2) too narrowly. In construing a statute, the general rule is that we are to give effect to the intent of the legislature as expressed in the statutory language and context and revealed by the evil the law was intended to remedy. Sisters of Charity v. Raikes, Ky., 984 S.W.2d 464 (1998); Democratic Party of Kentucky v. Graham, Ky., 976 S.W.2d 423 (1998). Thus, the context of KRS 620.050(2) is significant.

KRS 620.030(1) requires any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused to report it to the authorities. KRS 620.030(2) places special reporting obligations on, among other persons, teachers and medical personnel. KRS 620.040 and KRS 620.050(3)-(8) deal with how reports of abuse, neglect, or dependency shall be investigated and prosecuted. In addition, KRS 620.050(1) grants immunity to any person who makes a good faith report of abuse, neglect, or dependency involving a child. When considered in

this context, the purpose of KRS 620.050(2) is to allow allegations of child abuse to be reported, investigated and prosecuted without interference from the evidentiary rules which privilege communications with a spouse or with a medical professional.

Thus, in Mullins v. Commonwealth, Ky., 956 S.W.2d 210 (1997), the defendant attempted to claim a marital privilege for statements made by his wife reporting to the police his sexual misdeeds with a child. The Supreme Court of Kentucky held that KRS 620.050(2) "abrogates the professional-client/patient privilege, as well as the marital privilege, if it is used in the case of dependent, neglected or abused children." Id. at 211. The statute improves the truth finding function of the judicial process "by refusing to allow a shield to a child abuser in the form of the husband-wife privilege." Id. at 212. By the same token, the statute also furthers the reporting requirements set out in other provisions of KRS Chapter 620 by refusing to allow an alleged child abuser to thwart reporting of or testimony about child abuse by assertion of a psychotherapist-patient privilege.

In this case, the Commonwealth sought to introduce inculpatory statements which Altes made during the course of his psychological evaluation at the emergency room, and during his psychiatric counseling thereafter. We conclude that KRS 620.050(2) expressly abrogates the privilege for such evidence.[2] Therefore, the trial court did not err in denying Altes's motion to exclude the evidence.

[2] However, see footnote 4.

Lastly, Altes contends that the trial court erred by permitting the Commonwealth to introduce evidence regarding his suicide attempt. The Commonwealth concedes that the admissibility of such evidence is a matter of first impression. However, the Commonwealth asserts that a defendant's attempt to commit suicide shortly after being charged with a crime constitutes circumstantial evidence showing consciousness of guilt. The Commonwealth argues that a suicide attempt is analogous to an attempt to flee or evade arrest. The Commonwealth contends that attempted suicide, like flight, is a circumstance to be considered with the other circumstances of the case in determining the defendant's guilt or innocence.

We realize that the prevailing rule in other jurisdictions is that evidence that the accused attempted to commit suicide is relevant as a circumstance tending to show consciousness of guilt or as showing an attempt to flee and escape forever from the temporal consequences of one's misdeeds. The courts of other states in almost every instance have allowed evidence of attempted suicide to go to the jury for whatever weight it chooses to place upon it.[3]

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[3] *See* Annotation, Admissibility of Evidence Related to Accused's Attempt to Commit Suicide, 22 A.L.R. 3d 840 (1968 & 2000 Supp.). *See also* Aldridge v. State, 229 Ga. App. 544, 494 S.E.2d 368 (1997) (suicide attempt while in custody is relevant as possibly indicating a consciousness of guilt); Commonwealth v. Sheriff, 425 Mass. 186, 680 N.E.2d 75, 83 (Mass. 1997) (instruction that attempted suicide is evidence of consciousness of guilt not error); Harper v. State, 930 S.W.2d 625, 630 (Tex. App. 1996) (evidence of flight and attempted suicide was properly admitted); State v. Mitchell, 450 N.W.2d 828, 831-832 (Iowa 1990) (admission of evidence of suicide attempt after arrest not abuse of discretion); and State v. Hunt, 305 N.C. 238, 287 S.E.2d 818,

(continued...)

Nevertheless, we find several problems with this position. First, the rule in Kentucky is that the flight of a person or concealment (of himself or evidence) *after the commission of a crime and before his arrest* is a circumstance to be considered with the other circumstances of the case in determining his guilt or innocence. Fugate v. Commonwealth, Ky., 445 S.W.2d 675, 681 (1969). Altes's suicide attempt occurred while he was in custody, so the analogy to flight is somewhat more attenuated in this case.

Moreover, flight or concealment (of self or evidence of a crime) is relatively unambiguous conduct. Such conduct is more likely to be consistent with consciousness of guilt than it is not. At least, it is conduct which, in the average experience of most jurors, could be equated with consciousness of guilt. Consequently, evidence of flight or concealment is admissible as a circumstance to be considered by the finder of fact, along with all other evidence. Of course, if a defendant chooses to testify, he or she may attempt to explain such conduct.

The inferences to be drawn from a suicide attempt are not as clear. While a suicide attempt may, as the Commonwealth argues, be evidence of consciousness of guilt, it could just as likely be caused by depression, by mental illness, or by stress or fear caused by the confinement. The inferences to be drawn from a suicide attempt while in custody are arguably are as consistent with innocence as with guilt. Furthermore, evidence

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[3](...continued)
823 (N.C. 1982) (flight and attempted suicide in jail are implied admissions of guilt).

of a post-confinement suicide attempt would open the trial to collateral matters such as the state of mind and the mental health of the defendant at a time which is not relevant to the offense charged. Thus, there is a significant danger that such evidence would result in a confusion of the issues. KRE 403.

In addition, we believe that allowing the Commonwealth to present an unsupported inference to the jury and then require a defendant to refute it is simply unfair. Unless there is evidence to link the suicide attempt to the charged offenses, any correlation between the suicide attempt and the charged offense is entirely speculative. The bare fact that a defendant attempted to commit suicide after being charged may or may not indicate a consciousness of guilt. The prevailing rule, which allows such evidence to be presented to the jury and then leaves the jury to decide what weight to give to it, shifts the burden of refuting the inference of consciousness of guilt to a defendant. This approach excuses the prosecution from first establishing that the evidence is relevant and probative to the charged offense. *See* KRE 401. Thus, we decline to establish a firm rule that such evidence should be admissible as a matter of law.

Conversely however, we cannot agree with Altes that such evidence is irrelevant as a matter of law. Instead, the approach taken by the Supreme Court of New Jersey in State v. Mann, 132 N.J. 410, 625 A.2d 1102 (1992), seems most reasonable to this Court:

> The possible ambiguity of an accused's suicide attempt requires a careful

> consideration of the probative value such evidence offers. A suicide attempted to "flee" arrest or prosecution may, in some circumstances, reveal a defendant's consciousness of guilt. However, a defendant's psychological, social or financial situation may underlie a suicide attempt. In addition, introduction of evidence of that attempt may be unduly prejudicial under certain circumstances.
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> To ensure a proper balancing of the interests at stake, a trial court ordinarily should hold an [evidentiary] hearing to determine whether evidence of a defendant's suicide attempt is sufficient to support a reasonable inference that the suicide attempt was prompted by a desire to avoid the ordeal of prosecution and punishment or was otherwise evidence of consciousness of guilt. As with evidence of flight, the chain of inferences leading from an attempted suicide to the inference of consciousness of guilt must be soundly supported. [citation omitted]. The court should consider alternative explanations of the suicide attempt offered by a defendant, as well as the possible prejudice to a defendant from the introduction of the attempted suicide evidence or from a defendant's effort to offer a different explanation of that evidence. The trial court also should ensure that a defendant has been given adequate notice of the State's intention to offer proof of the attempted suicide.
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> If evidence of a defendant's suicide attempt is admitted, the trial court should charge the jury on its proper use. The jury should be instructed that it first must find that an actual suicide attempt had occurred. It should then consider whether that attempt was made to avoid the burdens of prosecution and punishment. The jury should also determine whether defendant's attempted suicide demonstrated consciousness of guilt. The trial court should instruct the jury that if it credits any alternative explanation offered by the defendant, it may not infer consciousness of guilt from the evidence of a suicide attempt.

Id. at 423-24, 625 A.2d at 1108-09.

Therefore, we hold that evidence that a defendant attempted to commit suicide while in custody may not be

introduced by itself as circumstantial evidence demonstrating consciousness of guilt. Rather, such evidence may only be introduced if the prosecution presents additional evidence to establish a link between the crimes charged and the suicide attempt. The trial court's handling of this matter implicitly followed this approach. The court held that evidence of Altes's suicide attempt would be admissible if the Commonwealth could establish a link between the charged crimes and the suicide attempt. The Commonwealth sought to introduce the medical records to establish that connection.[4] Since Altes pleaded guilty prior to trial, no question ever arose concerning jury instructions and we need not reach that issue.

Accordingly, the judgment of the Oldham Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS WITH RESULT.

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[4] We recognize that in most cases, the psychotherapist-patient privilege will remain in force, and it will be more difficult for the prosecution to establish the link. However, there may be unprivileged testimony or evidence which is sufficient to establish the link in those cases. Furthermore, we question whether KRS 620.050(2) abrogates the psychotherapist-patient privilege to this extent. As noted above, there is no privilege for direct evidence in prosecutions for child abuse (i.e.: eyewitness testimony; admission to a third party). Mullins, 956 S.W.2d at 211-12. However, there is no indication that KRS 620.050(2) intended to eliminate the privilege for all purposes. The Commonwealth is attempting to use Altes's medical records to establish a link between his suicide attempt and the charged offense. The use of otherwise privileged records to raise a circumstantial inference of guilt from a collateral act appears to be outside of the scope of KRS 620.050(2). Nevertheless, Altes did not reserve this issue in his conditional guilty plea, so the matter is not properly presented on appeal.

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