

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000842-MR

TRAVIS JAY HENDRIX

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
INDICTMENT NO. 03-CR-00092

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES.

HENRY, JUDGE: Travis Jay Hendrix appeals from his conviction for second degree arson for starting a fire at the home of Wayne and Peggy Lewis, a bi-racial couple. The sole basis for Hendrix's appeal is that the trial court erroneously allowed the introduction of inappropriate KRE¹ 404(b) evidence. On review, we affirm.

¹ Kentucky Rules of Evidence.

On October 25, 2002, Deidre Beshear, Ricky Tapp, and Joe Hayne were setting up a deer stand in the field adjoining the Tapp/Beshear home. Beshear was cutting tree limbs with a chainsaw when Tapp called for her to take a look at a maroon-and-white truck that had pulled into the field. Beshear recognized the truck as belonging to Chris Cullen, Hendrix's step-brother. Beshear knew both Cullen and Hendrix from her job as a bus driver for the Hopkins County school system.

Beshear was worried about the truck's appearance because the Lewises lived with their sons Chris and Benjamin in a home located near the Tapp/Beshear residence. Earlier that morning, after completing her bus route, she had heard about an altercation between Cullen and Chris Lewis, and she had previously heard Cullen make racial slurs against the Lewises. Beshear had never seen a truck in the field before, as the terrain was reclaimed strip mine land that was not easily accessible. She was so concerned that she called home and asked her daughter Amy to check on the Lewises. Amy drove to the Lewis residence after no one answered the phone there, discovered that it was on fire, and called the fire department. A short time later, Beshear, Tapp, and Hayne heard fire engines coming down the road and discovered that the Lewises' home was on fire.

Tapp also recognized the truck as one that was regularly driven by Cullen and Hendrix. When the truck pulled into the field, Tapp observed the driver remove two containers from the back of the truck: something resembling a black quart bottle of oil and a bottle of beer with a silver label. The driver then walked into the woods with the containers in a direction leading towards the Lewis residence. After approximately 15 minutes, Tapp saw the driver, who he now recognized as Hendrix, appear from the woods and run towards the truck. Beshear was also able to identify the driver as Hendrix as he drove away in a hurry, with the truck fishtailing as he left the field. Tapp would later observe large footprints in the woods connecting the field where the truck had been seen and the Lewises' yard and also a path of prints and trampled grass leading from the woods towards the direction of the Lewis house and then back towards the woods.

Frank Gresham, an arson investigator with the Kentucky State Police, investigated the fire and recognized a number of unusual signs that led him to the conclusion that the fire was the result of arson and was specifically caused by an accelerant placed into the dryer vent connected to the utility room of the house. Subsequent testing would confirm the presence of an accelerant at the focal point of the fire. Gresham also observed a "trail" of footprints and trampled grass leading from

the woods adjacent to the Lewis home in the direction of its dryer vent. He also noticed footprints on a dirt path in the woods connecting the Lewises' yard and the field where Hendrix had been seen. Gresham ultimately concluded that the fire had been deliberately set within 20-25 minutes of when it was discovered.

Deputy Sheriff Otis Chamberlain interviewed Beshear and Tapp after being informed that a woman had possibly seen the person who had started the fire. Tapp took him to the field where he had seen the truck parked. Chamberlain noticed that the grass was knocked down where the truck had been, and he also recognized footprints and/or trampled grass all along a path between the spot in the field where the truck had been, through the woods, and into the Lewises' yard towards the northwest corner of the house, where the dryer vent was located. He also noticed a similar pattern of footprints and trampled grass going in the opposite direction back towards the spot where it was determined that the truck was parked. Afterwards, Chamberlain went to Hendrix's home to find out where he had been that morning. Hendrix was asleep when he arrived, but Deputy Sheriff David Morris found some beer (in bottles with silver labels) in a cooler in the back of his truck and discovered that the hood of the truck was still warm. The truck was also covered in mud and grass. Hendrix admitted that he had been drinking that

morning and, after first telling Chamberlain that he hadn't been anywhere that morning, then stated that he may have driven to Dawson Springs to return a video and get something to eat.

On April 29, 2003, Hendrix was indicted by the Hopkins County Grand Jury pursuant to KRS² 513.030 on a charge of second-degree arson for "starting a fire with the intent to destroy or damage the (building) owned by Julius & Hildegard Lewis." The indictment also indicated that the arson count would be charged as a "hate crime" pursuant to KRS 532.031. Hendrix was subsequently arrested and released under the terms of a real estate bond and a "no contact" order. He entered a "not guilty" plea to the charges against him, and the matter ultimately proceeded to trial, where the jury found him guilty of second-degree arson and sentenced him to 13 years' imprisonment. Hendrix subsequently filed a motion for a new trial that was denied by the trial court, and on April 12, 2004, a judgment and sentence was entered in accordance with the jury verdict. The trial court, however, did conclude that there was not enough evidence to classify Hendrix's offense as a "hate crime." This appeal followed.

On appeal, Hendrix's general argument is that the trial court erroneously allowed the introduction of unfairly prejudicial "other bad acts/bad character" KRE 404(b) evidence.

² Kentucky Revised Statutes.

Hendrix specifically takes issue with the following items: (1) testimony from Christopher Lewis, former Deputy Sheriff David Morris, and Belle Davis, a retired Hopkins County school bus driver, about a school bus fight between Lewis and Cullen on the morning of October 25, 2002—before the fire—and what led up to it, including an earlier incident in which Cullen pulled into the Lewises' driveway, blew his horn, and called Lewis a vulgarity, and which included a number of racial slurs directed at Lewis by Cullen and a threat that Cullen "wasn't finished with him"; (2) testimony from Wayne Lewis and Chris Lewis that, during the summer of 2002, someone had smashed the family mailbox, egged the house, left a "hate letter" in the new mailbox, and repeatedly pulled into the driveway and sounded his horn; and (3) testimony from Deputy Sheriff Jeremy Crick and Benjamin Lewis about the "hate letter" sent to the Lewis address, in which the family was "invited" to 1020 Huckleberry Road, the address of a local cemetery. At least one of the horn-blowing incidents, occurring in the days before the fire, was discovered by Wayne Lewis to have been perpetrated by Cullen, and after he and his son attempted to find the Cullen residence to obtain the street address to notify the police, they were confronted by Hendrix, who directed obscenities at them and told them not to go anywhere near his house and that if they ever went near his house again, he would kill them.

Hendrix argues that none of these incidents were shown to have been committed by him or to connect him with the Lewis fire, and they accordingly should have been excluded as evidence.

"It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion."

Commonwealth v. King, 950 S.W.2d 807, 809 (Ky. 1997) (Citation omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v.

English, 993 S.W.2d 941, 945 (Ky. 1999) (Citations omitted).

Accordingly, we will adhere to these standards in reviewing the trial court's decision to admit the evidence in question.

On February 6, 2004, just prior to trial, the Commonwealth, "in an abundance of caution," filed a KRE 404(b) notice with the trial court that it would be using the evidence noted above at trial. However, the Commonwealth indicated in the notice that it did not believe that the proposed evidence was actually KRE 404(b) evidence, and it maintains that position here. The Commonwealth specifically argued in the notice that the incidents in question were part of a specific pattern of harassing conduct leading up to October 25, 2002, and that Hendrix was a participant in some of these acts. The Commonwealth also noted that the incidents provided a motive for

the burning of the Lewis home. In response, Hendrix took the position that the evidence did fit within the boundaries of KRE 404(b), and that it should be excluded because of its prejudicial nature and the fact that Hendrix was not shown to be involved in all of the incidents in question. The trial court ultimately concluded that the evidence did tend to establish motive and specifically held that the prejudice of said evidence did not outweigh its probative value.

We acknowledge that the evidence in issue—with the possible exception of Hendrix's threat towards Wayne and Chris Lewis—does not fit within the common framework of KRE 404(b) evidence given that Hendrix was not directly involved in the incidents in question. However, the language of the rule contains nothing to limit itself only to "other crimes, wrongs, or acts" committed by the defendant in question.³ Indeed, commentators have noted that the rule "is applicable to crimes, wrongs or acts committed by persons other than a criminal defendant." See Robert G. Lawson, The Kentucky Evidence Law

³ KRE 404(b) reads in its entirety as follows:

"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; 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."

Handbook, § 2.25[2], pgs. 125-26 (4th ed. 2003). With this said, we are of the opinion that the evidence in question here fits within the boundaries of KRE 404(b) and it will be examined accordingly.

We do not believe that the trial court abused its discretion in admitting the testimonial evidence relating to the fight between Chris Cullen and Chris Lewis on the day of the fire or the testimonial evidence relating to the horn-blowing incidents leading up to the fight. Even though Hendrix was only shown to be directly involved in one of those incidents, we believe that they could reasonably be considered relevant to establishing a possible motive for the arson of the Lewis home, particularly given that a member of Hendrix's family was involved in each incident. The incidents occurred shortly before the fire, and they demonstrated a clear animus towards the Lewises on the part of the Cullen/Hendrix family.⁴ KRE 404(b)(1) specifically recognizes "motive" as one of the grounds under which "other bad acts" evidence may be admissible. Moreover, our courts have consistently held that prosecutors are afforded wide latitude in determining the motive that actuated the commission of a charged crime. See Brainard v.

⁴ We include the horn-blowing incidents that were not directly connected to Cullen or Hendrix in this category because, while the decision whether or not to allow them into evidence presents a close question, they were similar enough in nature to the one in which Cullen was implicated for a jury to infer that he was the culprit and for us to conclude that the trial judge did not abuse his discretion in allowing them into evidence.

Commonwealth, 551 S.W.2d 829, 831 (Ky.App. 1977); Rake v. Commonwealth, 450 S.W.2d 527, 528 (Ky. 1970). Furthermore, given the general rule that “[r]elevancy is established by any showing of probativeness, however slight,” Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999); see also Tuttle v. Perry, 82 S.W.3d 920, 922 (Ky. 2002), we believe that the trial court did not abuse its discretion in allowing the aforementioned items to be introduced into evidence.

We are inclined to believe, however, that the testimony relating to the cemetery invitation letter, the house-egging, or the mailbox-bashing should not have been admitted into evidence as none of these incidents was demonstrated to have been perpetrated by Hendrix or anyone else in his family. Indeed, the trial judge specifically acknowledged that admission of the letter was probably a mistake in a post-trial hearing. Nevertheless, even assuming, arguendo, that admission of this evidence was error, after reviewing the entire record we believe any such error was harmless. “Under RCr⁵ 9.24, any error or defect must be disregarded if it ‘does not affect the substantial rights of the parties.’” Smith v. Commonwealth, 164 S.W.3d 508, 511 (Ky.App. 2004). “An error is deemed harmless if, upon consideration of the entire case, there appears to be no likely possibility that the result would have been different

⁵ Kentucky Rules of Criminal Procedure.

in the absence of error." Id. (Citations omitted). As to evidentiary issues in particular, the relevant inquiry under the harmless error doctrine "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Ernst v. Commonwealth, 160 S.W.3d 744, 756 (Ky. 2005) (Internal quotations and citations omitted).

Here, other evidence presented at trial overwhelmingly implicated Hendrix in starting the fire in question. For example, eyewitnesses saw Hendrix walk to the Lewis house with a container and then return and leave in a hurry during the timeframe in which the fire was determined to have been started. Moreover, testimony from the arson investigator who handled the case clearly demonstrated that the fire was the result of arson. We also note that the trial judge did not find Hendrix's actions here to be in the nature of a "hate crime" pursuant to KRS 532.031, so no argument can be made that the evidence in question was prejudicial in that respect. Given these facts, we cannot say that there is a "likely possibility that the result would have been different in the absence of error" as to the improper items admitted into evidence.

For the same reasons, we reject Hendrix's other related contentions set forth in his brief. Accordingly, the judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

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