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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002614-MR

ADAM JUSTIN WALTERS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 06-CR-00204

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

CAPERTON, JUDGE: Adam Justin Walters appeals as a matter of right his conviction and sentencing in the Kenton Circuit Court of second degree manslaughter. Walters contends that the trial court erred in denying retroactive application of the amendments to KRS Chapter 503 and in admitting evidence of prior bad acts under KRE 404(b) and 403. While we disagree that KRS Chapter 503 has retroactive application in this case, we agree that the introduction of the

KRE 404(b) material constitutes reversible error. Therefore, we reverse and remand for a new trial.

The events which transpired were the result of Walters working alongside a young female named Jasmine at a local fast food chain. According to Jasmine, Walters made lewd comments and sexually explicit remarks to her. Jasmine informed her boyfriend, Mathew Maltaner, of the remarks. Maltaner allegedly became angry and approached Walters outside the fast food establishment where the two exchanged aggressive, profane words.

Two days later, Maltaner came to pick Jasmine up at the fast food establishment with his brother, Chris Kearns, and his best friend, Michael Duvall. Kearns testified that the three dropped Jasmine off at her house and then went back to the fast food restaurant to again confront Walters about the remarks Walters made to Jasmine. Walters was not there. Kearns and Maltaner then dropped Duvall off. At this point the two spotted Walters and his friend Jason Roland (Roland) in a car. Kearns and Maltaner followed Walters and Roland. Walters and Roland apparently believed they had lost the car following them and pulled into a parking spot on the street.

Seconds later, Maltaner's car pulled directly beside Walters and Roland. When Roland got out of the car, Kearns intercepted him. Roland testified that Walters was still in the car when Maltaner started hitting Walters and finally dragged Walters out of the car.[1] Kearns testified that the fight between Walters

[1] Other testimony presented by Walter's girlfriend Nicole Schneider indicated that Maltaner was beating Walters severely. A neighbor also testified to similar events.

and Maltaner lasted only about twenty or thirty seconds. Kearns testified that both men were standing upright when they fought and he did not see Maltaner beat Walters while in the car nor drag him out. All eye witnesses agree that Maltaner went to his car after the fight and physically collapsed. Maltaner died of multiple stab wounds sustained during the fight.

After hearing testimony from the eye witnesses, the investigating police officers, and a forensic pathologist, the jury convicted Walters of second-degree manslaughter.

Prior to trial, Walters counsel made a motion to dismiss the charges in light of the recent amendments to KRS Chapter 503 regarding self defense. As the amendments to KRS Chapter 503 went into effect after the death of Maltaner, counsel asked the trial court to retroactively apply the amendments pursuant to KRS 446.110. Specifically, Walters argued that the newly enacted KRS 503.085 rendered him immune from prosecution. After a hearing on the motion, the trial court disagreed and found that KRS 446.080 foreclosed the retroactive application since the legislature did not expressly make the newly enacted statute retroactive. The trial court further concluded that the newly enacted statute did not mitigate an existing penalty but instead was a substantive change to the law. Walters first claim of error is from the denial of this motion.

The proscription against retroactively applied statutes is found in KRS 446.080. Two exceptions to KRS 446.080 are (1) an express statement by the legislature allowing retroactivity or (2) KRS 446.110 wherein a statute may be

retroactively applied "if any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

Our discussion now turns to KRS 508.085 and whether it falls within the KRS 446.110 exception. The newly enacted KRS 503.085 grants immunity when:

> (1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and *is immune from criminal prosecution* and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "*criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant*.
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency *may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful*.
> (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

Id. (emphasis added). The effective date of the statute was July 7, 2006, five months after the death of Maltaner.

The legislature did not, by any express statement, make KRS 503.085 retroactive. Thus to be retroactive, KRS 503.085[2] must mitigate punishment. Walters argues that the grant of immunity mitigates punishment by precluding it.[3] The Commonwealth argues that KRS 503.085 does not mitigate any penalties. The Commonwealth interprets KRS 446.110 as requiring mitigation of sentence before the new, revised, or amended statute can be retroactively applied. The Commonwealth interprets KRS 503.085 as not addressing itself to any sentencing provisions.

The Kentucky Supreme Court addressed KRS 446.110 in *Phon v. Commonwealth*, 17 S.W.3d 106 (Ky. 2000) and in *Bolen v. Commonwealth,* 31 S.W.3d 907 (Ky. 2000). In *Phon* the court held that the new crime bill which added life without parole to capital sentencing scheme was a mitigating provision that could be retroactively applied as a life sentence without the possibility of parole is a lesser penalty than death. In *Bolen* the court held that an amendment to the persistent felony offender (PFO) statute was a mitigation of sentence. More specifically, the amendment was mitigating as it eliminated an eligible person's sentence from enhancement as a persistent felony offender by reason of a previous conviction for possession of drug paraphernalia. Thus, retroactive application of

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[2] Walters also argues that KRS 503.055, which allows the use of defensive force regarding dwelling, residence, or occupied vehicle, should be combined with KRS 503.085 to show circumstances that, though previously prosecutable, would now be excluded from prosecution.

[3] Walters states that "when a person's eligibility to receive a sentence is eliminated by an amendment, the amendment is definitely mitigating." He views the newly enacted portions of KRS Chapter 503 as amendments and not additions.

the statute was appropriate under KRS 446.110. *Bolen* requires that the amendment be mitigating before KRS 446.110 takes effect. *Id* at 909.

We do not agree with Walters that KRS 503.085 mitigates punishment. In *Bolen* the court undertook an analysis of the PFO statute, which is a hybrid creature. While one may be convicted of a PFO, PFO itself serves only to enhance a sentence of a qualified offender. Simply stated, a person cannot merely commit PFO; it must be based on the commission of another crime.

The newly enacted KRS 503.085 provides immunity from prosecution unlike the PFO statute which has the effect of increasing a sentence. We do not equate Walters's immunity from prosecution argument with mitigation of punishment contemplated by KRS 446.110. KRS 503.085 gives immunity from prosecution, i.e., bars prosecution. This is unlike the PFO statute which enhances sentences for repeat offenders. Thus, there was no error in the trial court's denying retroactive application of KRS 503.085.

Walters and the Commonwealth make various arguments as to the application of KRS 503.085 at the trial court proceedings. In that we have decided not to retroactively apply KRS 503.085, we decline to address the mechanics of its application.

Walters second claim of error is that the trial court improperly admitted KRE 404(b) evidence. The trial court held an evidentiary hearing on the proposed evidence. After the hearing the trial court ruled that the statements could

be introduced at trial. Walters claims that this is error. The Commonwealth argues that the evidence was properly admitted.

For discussion, we note that the comments in question should be divided into two separate statements; one, the lewd statements by Walters to Jasmine and two, the statements of hostility between Walters and Maltaner. Both sets of statements occurred at the fast food restaurant well before the stabbing of Maltaner. Over the objection of Walters, the trial court admitted both sets of statements. The statements between Walters and Maltaner served to escalate the situation between the two of them and given the discretion of the trial court were properly admitted. Our discussion focuses on the statements made by Walters to Jasmine which were sexually explicit and addressed Jasmine's chastity and promiscuity, as well as Walters offering to show his male anatomy to her.

All statements made by Walters fall under KRE 404(b). KRE 404(b) makes evidence of other crimes, wrongs, or acts, inadmissible to prove the character of a person in order to show conformity. Two exceptions exist within the rule. KRE 404(b)(1) allows admission of the evidence if offered for some other purpose, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(2) allows admission of the evidence if it is so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party. In determining the admissibility of "other acts" evidence, it is useful to analyze the evidence using a three-tier inquiry involving

its: (1) relevance, (2) probativeness, and (3) prejudice. *Bell v. Commonwealth,* 875 S.W.2d 882 (Ky. 1994). Moreover, a trial court's decision to admit evidence will not be disturbed absent abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005).

Walters argues that the statements made by him to Maltaner should have been excluded. The Commonwealth argues that the statements of Walters tended to show motive, absence of mistake, preparation, and plan under KRE 404(b)(1). Using the three-tier analysis of *Bell*, the evidence regarding the comments made by Walters to Maltaner were properly admitted. The hostile statements certainly were probative of motive, absence of mistake, preparation, or plan and were not so prejudicial as to warrant exclusion. Therefore, the trial court properly admitted those statements into evidence.

Walters argues that the statements made by him to Jasmine were highly prejudicial and any probative value was substantially outweighed by their prejudicial effect. The Commonwealth argues that the court properly admitted the evidence because the lewd comments to Jasmine were inextricably intertwined with the evidence essential to the case. Therefore, an analysis under KRE 404(b)(2) is appropriate for this set of statements.

"KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation." *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky.2003), citing Robert G. Lawson, Kentucky Evidence Law Handbook § 2.25 at 96 (3d ed. Michie 1993): *see also Major v. Commonwealth*,

177 S.W.3d 700, 708 (Ky. 2005). "[T]he key to understanding this exception is the word 'inextricably.' The exception relates only to evidence that must come in because it is so interwoven with evidence of the crime charged that its introduction is unavoidable." *Funk v. Commonwealth*, 842 S.W.2d 476, 480 (Ky. 1992). (internal citation omitted).

Using the three-tier analysis of *Bell*, the evidence regarding the comments made by Walters to Jasmine should have been excluded as the probative value of the statements were substantially outweighed by the prejudicial effect. *Wilson v. Commonwealth,* 199 S.W.3d 175(Ky.2006). The lewd statements made by Walters were not within the bounds of acceptable parlance between co-workers and would only serve to elicit strong emotional responses from the jury. Moreover, the statements to Jasmine are not so inextricably interwoven[4] that the introduction of the evidence was unavoidable. The jury could have simply been told that the animosity between Walters and Maltaner was the result of an incident between Walters and Jasmine. Certainly the testimony could have elaborated on the conversation between Walters and Jasmine without a verbation recitation. Thus, it was possible for the jury to be apprised that statements were made without the prejudicial effect that would necessarily result if the statements were introduced into evidence verbatim. *See Funk* at 480-481. The introduction of the

[4] We do note that the timing of the statements was crucial. If the lewd statements made by Walters to Jasmine had occurred in front of Maltaner and immediately precipitated the stabbing our analysis might be different.

highly prejudicial evidence exceeded the trial court's discretion and constitutes reversible error.[5]

For the foregoing reasons, we reverse and remand for a new trial.

ALL CONCUR.

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[5] "An error is reversible if the erroneously admitted evidence has a reasonable possibility of contributing to the conviction; it is harmless if there is no reasonable possibility that it contributed to the conviction." *See Anderson v. Commonwealth,* 231 S.W.3d 117(Ky.2007) and RCr 9.24.