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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002038-MR

RHONDA JUSTICE — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 05-CR-00277

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Rhonda Justice appeals from a Final Judgment and Order of Imprisonment of the Pike Circuit Court entered upon a jury verdict convicting her of second-degree manslaughter and sentencing her to a ten-year

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

term of imprisonment. Because the trial court prejudicially erred in permitting prior bad acts evidence to be introduced against Justice, we reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2005, Justice was living in a mobile home in Pike County with her four children, including her four-year old son, Joshua. Joshua was developmentally slow and lagged behind normal four-year-olds in verbal and cognitive skills. Neighbors frequently observed Joshua playing outside by himself, unsupervised.

Joshua's great aunt, Betty Johnson, lived two doors down from the Justice family. Because of previous disagreements between Johnson and Justice, a court order directing Johnson not to have contact with Justice and her children had been placed into effect in May of 2004. According to Justice, the order was no longer in effect in July 2005, though Johnson believed it was.

On the morning of July 10, 2005, at about 8:45 a.m. Joshua went to Johnson's residence and knocked on the door. Believing the no-contact order to still be in effect, Johnson did not answer the door. Johnson watched through her window as Joshua played in her yard. He left Johnson's residence at about 12:00 p.m. Johnson had a video security system which recorded visits to Johnson's property by Joshua on July 9 and the morning of July 10. The video was shown to the jury at trial.

At about 1:00 p.m. neighbors who lived a few houses down from the Justice residence in the opposite direction from Johnson, Dorothy and Paul Billitter, arrived home. Dorothy found Joshua's red t-shirt in her front yard. She folded the shirt, placed it on a table, and went inside. She then looked out her window and observed Joshua floating face down in the above-ground pool located at the next-door residence of Lee Hampton. While Dorothy called 911, Paul pulled Joshua from the pool and began performing CPR. The ambulance arrived at 1:15 p.m. and transported the child to the hospital. The hospital staff, however, was unable to resuscitate him. The cause of death was determined to be by drowning.

In the meantime police arrived at the scene. Despite the nearby events and commotion involving her child, Justice was not on the scene. The police went to her trailer and knocked repeatedly but got no response. They eventually began beating the siding of the trailer with their batons in an attempt to get an answer. Finally, after 10 minutes of knocking and pounding Justice answered her door. Based upon her appearance, it was obvious to the officers that she had been sleeping. Other than by inference, there is no evidence that the police's difficulty in arousing Justice was as a result of her being under the influence of alcohol or drugs.

Justice was transported to the hospital, where she gave inconsistent statements concerning the events leading up to the drowning. Detective Hayes of the Pikeville Police Department attempted to interview Justice and obtain her consent to search her trailer and determine whether she would voluntarily provide

a blood or urine sample. Justice, however, refused to consent to have her residence searched, refused to give a biological sample, and invoked her rights to an attorney and to remain silent. On September 23, 2005, Justice was indicted for second-degree manslaughter, KRS 507.040, a Class C felony. The indictment, as amended on May 30, 2007, charged "[t]hat during a period of time from on or about the 1st day of April 2004 to on or about the 10th day of July, 2005[,]" Justice:

> committed the offense of Manslaughter, Second Degree, when she engaged in a course of conduct that continually subjected her child, Joshua Alexandria Justice, to a situation or situations that resulted in a substantial and unjustifiable risk of serious physical injury or death; that the Defendant was aware of such risk and consciously disregarded it by failing to adequately care for or supervise said child such that her acts constituted wanton conduct which conduct did lead to the death of such child on the last above-mentioned date due to drowning.

The eight-day trial in the case commenced on June 5, 2007, and concluded on June 18, 2007. At the conclusion of the guilt phase, the jury returned a verdict finding Justice guilty of second-degree manslaughter. The jury was unable to reach a unanimous verdict regarding a sentencing recommendation. Justice's motion for a new trial was denied. The Final Judgment and Order of Imprisonment was entered on September 6, 2007, adjudging Justice guilty of second-degree manslaughter and sentencing her to ten-years' imprisonment. This appeal followed.

DISCUSSION

Before us, Justice raises four allegations of error: 1) that the trial court abused its discretion when it permitted testimony that she had refused to furnish a biological specimen; 2) that the trial court abused its discretion when it permitted testimony that she had invoked her Fifth Amendment right to remain silent; 3) that the trial court abused its discretion by permitting testimony concerning her prior bad acts; and 4) that the trial court abused its discretion when it permitted the child's great-aunt to testify regarding a previous no-contact order Justice had obtained against her. We reverse the conviction upon the issue of prior bad acts evidence; however, we discuss the remaining issues because they may recur upon retrial.

REFUSAL OF BIOLOGICAL SPECIMAN

Pikeville City Police Detective Hayes interviewed the appellant on the evening of July 10, 2005, at the hospital. In the course of her interview, Detective Hayes asked Justice if she would provide a biological specimen (blood or urine). Justice refused to voluntarily provide a biological specimen, and police did not seek a warrant to obtain a sample.

At trial, during direct examination by the Commonwealth, Detective Hayes testified about Justice's having refused to consent to having a biological sample drawn. Justice argues that the Commonwealth referred back to the implications of this testimony (that Justice was under the influence of alcohol or drugs and wanted to cover it up) during its closing argument by referring to her as "passed out" at the time of the drowning. Because of the difficulty police had in

arousing her, it is reasonable to infer that drugs or alcohol may have played a role in Justice's abnormally deep sleep when Joshua wandered away. But we must agree that evidence of her refusal to voluntarily give biological samples was improperly admitted.[2]

This exact issue was addressed by the Supreme Court of Kentucky in *Deno v. Commonwealth*, 177 S.W.3d 753 (Ky. 2005). In that case the defendant, Deno, was charged with rape. When police questioned him prior to his arrest, Deno refused to voluntarily give a DNA sample which could be compared to semen samples collected from the victim. Police officers obtained a search warrant and returned to Deno's home the following day and collected the sample. Deno's DNA matched that of the samples collected from the victim, and this evidence was admitted at the trial. In his summation, the prosecutor brought to the jury's attention the fact that Deno refused to voluntarily give a biological sample. The Supreme Court cited *Commonwealth v. Hager,* 702 S.W.2d 431 (Ky. 1986), for the proposition that "no Fifth Amendment or due process violation occurs when evidence of a DUI suspect's refusal to submit to a breath or blood test is admitted as evidence of his guilt." *Deno,* 177 S.W.3d at 760. But the Court went on to hold that it was "a violation of Appellant's rights under the Fourth Amendment and Section 10 of the Constitution of Kentucky" to allow the introduction of evidence

[2] As the Commonwealth notes in its brief, there were a series of questions surrounding the disclosure of this information. After Justice's initial objection, the Commonwealth continued to attempt to lay a foundation to admit the statement. Given Justice's initial objection, and additional objections as the Commonwealth continued to seek the admission of the refusal, despite the Commonwealth's suggestion to the contrary, we believe the issue is properly preserved.

of Deno's refusal to voluntarily give biological samples as evidence of his guilt. *Deno*, 177 S.W.3d at 762. Under the Supreme Court's holding in *Deno,* Justice's passive refusal to consent to give biological samples is "privileged conduct which cannot be considered as evidence of criminal wrongdoing." *Id.* (Citation omitted).

In our view, it was error under the *Deno* holding to allow the introduction of evidence concerning Justice's refusal to consent to the taking of a biological sample. While we believe that, standing alone, the error was harmless, upon retrial, Detective Hayes should not be permitted to testify concerning Justice's refusal to submit to a biological sample.

INVOCATION OF RIGHT TO REMAIN SILENT

In the course of her testimony, Detective Sue Hayes stated that Justice had exercised "her rights." This statement is somewhat ambiguous, and it is somewhat unclear whether this was intended to specifically refer to her Fifth Amendment right to remain silent. The Commonwealth argues that Detective Hayes's reference to Justice exercising her rights was not intended as a comment on her right to remain silent but, rather, referred to her exercising her Sixth Amendment right to counsel. Though there is some ambiguity, we address the issue as raised by Justice on the merits.

The Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of her rights and taken into custody. *See*, e.g., *Romans v. Commonwealth*, 547 S.W.2d 128, 130 (Ky. 1977); *Doyle v. Ohio*, 426 U.S. 610, 96

S.Ct. 2240, 49 L.Ed.2d 91 (1976). The time period referred to in Detective Hayes's testimony, however, apparently occurred before Justice was informed of her rights, arrested, or placed into custody. But "[t]he giving of a *Miranda* warning does not suddenly endow a defendant with a new constitutional right. The right to remain silent exists whether or not the warning has been or is ever given." *Green v. Commonwealth*, 815 S.W.2d 398, 400 (Ky. 1991). Thus, although it may alter the section of the constitution under which the error is analyzed, s*ee Combs v. Coyle*, 205 F.3d 269, 280-283 (6th Cir. 2000) (holding that prosecutor's comment on defendant's silence preceding giving of *Miranda* warnings during case-in-chief could not violate due process but, instead, violated Fifth Amendment privilege against self-incrimination), similar comments have been found to be error, regardless of whether a defendant had been given her *Miranda* rights. *Green*, 815 S.W.2d at 400. Accordingly, the fact that Justice had not been taken into custody and been advised of her rights when she declined to speak to Detective Hayes did not give the Commonwealth leave to comment upon her silence.

Of course, if the right is invoked post-*Miranda*, the same rule apples. In *Romans*, the Supreme Court of Kentucky held that it was error to permit the Commonwealth to elicit from a police detective that at the time of arrest and interrogation, and after receiving *Miranda* warnings, that the defendant "did not come forth with the explanation . . . upon which he ultimately relied for his defense." *Id.* at 130. *See also Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241, 49 L.Ed.2d 91 (1976); *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37, 86 S.Ct.

1602, 1624-25 n. 37, 16 L.Ed.2d 694 (1966). The idea is that because *Miranda* warnings implicitly assure their recipient that his silence will not be used against him, it would be fundamentally unfair to allow a defendant's post- *Miranda* silence to be used for impeachment.

On the other hand,

> [I]t [is] clear that not every isolated instance referring to post-arrest silence will be reversible error. It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by reference to the exercise of his constitutional right. The usual situation where reversal occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool.

Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky. 1983) (citation omitted).

Detective Hayes's testimony concerning Justice's exercise of her right to remain silent was but a single, fleeting comment in an eight-day trial. It was not repeated, emphasized, or used as a prosecutorial tool. As such, we are not persuaded that the ambiguous reference to invoking her right to remain silent resulted in reversible error.[3] Nevertheless, upon retrial, Detective Hayes should not be permitted to testify that Justice invoked her right to remain silent (or, similarly, invoked her right to an attorney).

PRIOR BAD ACTS

[3] As noted, the Commonwealth argues that the ambiguous testimony actually referred to an invocation by Justice of her Sixth Amendment right to counsel.

Prior to trial, the Commonwealth gave notice that, pursuant to Kentucky Rules of Criminal Procedure (RCr) 404(c), it intended to introduce prior bad acts evidence against Justice at trial. The motion listed twenty-one instances of such acts dating back as far as 1989. Justice opposed the motion.

Following an evidentiary hearing, the trial court granted the motion to introduce the prior bad acts evidence. A substantial portion of the incidents was introduced through various witnesses over the course of the eight-day trial. Without addressing the various prior bad acts objected to individually, Justice contends collectively and generally that the admission of the prior incidents violates the provisions of KRS 404.

DISCUSSION

In her brief, Justice cites us to eleven witnesses who testified to a host of prior bad acts evidence. We limit our review to the instances contained in the citations Justice provided (we note that this does not include all of the twenty-one instances contained in the Commonwealth's 404(c) motion; we decline, however, to search the video recording of the eight-day trial for other instances). The testimony contained at the citations provided by Justice are summarized as follows:

> 1. Social Worker Josie Wright testified that on November 4, 1991, her office received a referral involving Justice. Upon investigation, Wright determined that Justice had left her three-year old son, Aaron (Aaron was born in 1988), by himself overnight. At approximately 10:00 a.m. the next day the child wandered over to his grandmother's trailer. Wright testified that she determined this incident to be a case of substantiated neglect.

2. Social Worker Shawna Branham testified that on July 26, 1991, Justice had left Aaron with a babysitter and that after about an hour the babysitter then took the child to his grandmother; the relevant issue here being that Justice had hired an unreliable babysitter. Branham further testified that on August 3, 1991, Justice left Aaron with his grandmother on a Friday and was supposed to return the next day, but did not return until Sunday, and was then under the influence of alcohol and with several friends who were also under the influence. Based upon the foregoing events, the Cabinet filed a petition in District Court, which resulted in the imposition of conditions on Justice. Branham also testified concerning an incident that occurred on January 28, 1993. On this occasion Justice had left son Aaron (age 5) and daughter DezzaRae (age one month) with a babysitter and did not timely return to pick the children up. The original babysitter then left the children with someone else, who then contacted the children's grandmother to pick them up. Branham's investigation indicated that Justice was also intoxicated on this occasion. Branham also testified that on June 14, 1993, that Aaron and DezzaRae were in a vehicle with a drunk driver. Justice herself was arrested for DUI on this occasion, though she denied she was driving the vehicle; however, she did admit that the driver of the vehicle had been drinking. Branham also testified regarding various occasions upon which Justice was referred for substance abuse counseling.

3. Sgt. Shaun Fearin of the Kentucky State Police testified to an incident he responded to on August 29, 1995. A complaint was called in to the State Police that an unsupervised child was playing in the road. When Fearin arrived, he found two-year old DezzaRae playing outside in Justice's yard unsupervised. Fearin knocked on the door and Justice answered. Fearin could smell a strong odor of alcohol on the appellant. Justice stated that she had been asleep. She denied having ingested any alcohol that day. Fearin called Social Services, and when they arrived, that ended his involvement.

4. Debra Price of the Department of Social Services also testified concerning the August 29, 1995, incident. She received a call from Sgt. Fearin and responded to Justice's residence. Price testified that Justice appeared intoxicated, that she could smell alcohol on her, and that she was belligerent and uncooperative. Justice eventually admitted to drinking that day. Price testified that DezzaRae had bug bites and a cigarette burn on her. As a result of this incident, the Department of Social Services, by petition, removed the children from Justice's home and placed them in foster care. Price also testified that

the Department substantiated neglect as a result of the incident. She further testified that conditions placed upon Justice as a result of the incident included inpatient alcohol counseling, that she attend alcoholics anonymous, and that she take parenting classes.

5. Agatha Johnson, a social worker, testified concerning an event that occurred on July 25, 1997, at the Cumberland Valley Daycare Center. She testified that she received a call that Justice had not shown up to pick up DezzaRae at the scheduled time of 6:00 p.m. Johnson arrived at 8:55 and Justice still had not arrived. When Justice finally arrived after 9:00 p.m., she was intoxicated and admitted as much. DezzaRae was placed in protective custody and placed in foster care. Johnson further testified that between January 1996 and the July 1997 incident, Justice had been late eight times picking up the children from day care. Johnson further testified concerning the multiple conditions imposed upon Justice necessary to obtain the return of DezzaRae.

6. Jeri Holloway, a social worker, testified concerning an event that occurred on September 14, 1997. On that occasion, Justice was arrested for fourth-degree assault as a result of a domestic violence incident involving Clinton Justice, Joshua's father. The police contacted Holloway to inform her that they had no one with whom to place Aaron and DezzaRae and requested that she take the children into protective custody, which she did. The children were then placed in foster care. Holloway further testified that she substantiated neglect as a result of this incident. She also testified that a case on Justice had been opened in 1990 and that since that time there had been several removals based upon substance abuse and domestic violence. The children were out of the home for approximately forty-five days on this occasion. Among the conditions placed in force at this time was for Mr. Justice to leave the home, and Justice was to be subjected to random drug testing.

7. Estelle Mullins, a next-door neighbor of Justice in 2004, testified concerning Joshua's frequent unsupervised visits to her and her mother's residence during the period he was two and three. Estelle also testified that Justice's children, including Joshua, generally were poorly supervised and that she saw them playing in the road frequently. She principally testified concerning an incident when DezzaRae was left unattended in a vehicle on a hot day and a visiting relative informed Justice of the situation; when Justice was informed, she became confrontational and stated that everybody should mind their own business.

8. Shawna Allen testified to an incident that happened on February 20, 2005. This occasion involved an incident during which Aaron (age 16) was seriously shot by his step-father (Joshua's father), Clinton Justice. Justice was present. Shawna testified that Justice asked her to take Aaron to the hospital because she needed to get home to the other children. Justice told Aaron to say that he had not seen her (Justice) and that Shawna had picked him up alongside the road. Justice did not come to the hospital during the three hours while Aaron was there.

9. Justice provides a reference to additional testimony by Shawna Branham with a citation to June 13, 2007, at 10:30:00 a.m. However, on June 13, 2007, a break was taken at 10:12 and proceedings recommenced at 10:43. Branham was not a witness either before or after the break. As the citation is in error, we are unable to review Justice's attempted reference to additional testimony by Branham.

10. Debbie Stanley, a former social worker, testified regarding an incident that occurred in August 1989. On that occasion Justice's mother, Hattie White, called in a referral to the Department for Social Services, and Stanley worked the referral. The referral involved an incident during which Justice had eight-month old Aaron in a vehicle while she was drinking, and later left Aaron with a baby sitter with no food, milk, or diapers. Justice left Aaron with the sitter so she could go "partying." When Justice finally showed up late on Sunday evening to pick Aaron up, "she appeared dirty, beaten-up, and drunk." Stanley substantiated neglect based upon the foregoing.

11. Justice's final reference is to testimony by "Paramedic Whitehead." His citation is to June 18, 2007, at 9:28:00 – 9:32:00. The first witness on June 18, 2007, was Steven Heath, a private detective. He took the stand at 9:29 a.m. As the citation is in error, we are unable to review Justice's attempted reference to testimony by Whitehead.

"Although appellant has a right only to a fair trial, not a perfect one, he is entitled to be tried for the crimes charged in the indictment and no others."

Commonwealth v. Tamme, 83 S.W.3d 465, 471 (Ky. 2002) (Keller, J., concurring)

(citation omitted). This right is carefully protected by KRS 404. KRE 404 provides, in relevant part, as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
>
> . . . .
>
> (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; 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.

Our principal focus concerns subsection (b) of the Rule. KRE 404(b) has always been interpreted as exclusionary in nature.

> It is a well-known fundamental rule that evidence that a defendant on trial has committed other offenses is never admissible unless it comes within certain exceptions, which are well-defined in the rule itself. For this reason, trial courts must apply the rule 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, 875 S.W.2d 882, 889 (Ky. 1994) (internal citation and quotation marks omitted).

In *Bell*, the Supreme Court set out a three-part test for determining the admissibility of KRE 404(b) evidence. That test requires the trial court to examine the relevance of the evidence, its probative value, and the prejudice that it may create against the defendant. *Id.* at 889-91. We structure our review in accordance with this three-part test.

1) Relevance

"With respect to the first inquiry, courts have emphasized the importance of requiring that the 'other crimes' evidence be offered to prove material facts that are in actual dispute." Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.25[3][b], at 127 (4th ed. LexisNexis 2003).

The second-degree manslaughter instruction Justice was convicted under stated as follows:

> You will find the Defendant guilty of Second-Degree Manslaughter under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about July 10, 2005, and before the finding of the Indictment herein, Joshua Justice drowned in a swimming pool.
>
> B. That from on or about April 1, 2004, to on or about July 10, 2005, the Defendant engaged in a course of conduct that subjected Joshua Justice to situation that

resulted in a substantial and unjustifiable risk of death or serious physical injury;

C. That the Defendant's course of conduct led to Joshua Justice's death on or about July 10, 2005;

AND

D. That in engaging in that course of conduct, the Defendant was acting wantonly as that term is defined under Instruction No. 5.

Thus, the crucial facts the jury was called upon to decide were 1) whether from on or about April 1, 2004, to on or about July 10, 2005, Justice engaged in a course of conduct that subjected Joshua to situations that resulted in a substantial and unjustifiable risk of death or serious physical injury; 2) whether that course of conduct led to Joshua's death; and 3) whether by engaging in that course of conduct Justice was acting wantonly.

Of the instances set forth above, only those described in the testimony of Estelle Mullins and Shawana Allen relate to the time period charged in the indictment. Accordingly, we believe the evidence was properly admitted.[4] All of the remaining acts, however, occurred well before the July 10, 2005, drowning. Moreover, those events generally occurred during the time period of 1989 through 1997 – a time frame ranging from eight to sixteen years prior to the tragedy. In comparing those incidents to the factual determinations assigned to the jury for resolution, we are not persuaded that the incidents were constructive in proving any material fact that was in actual dispute.

[4] We accordingly do not refer to those incidents in the discussion that follows.

Assuming that the prior bad acts occurred as described in the testimony, they do not directly address, and thus shed little light upon, whether from April, 1 2004, to July 10, 2005, Justice engaged in a course of conduct that subjected Joshua to situations that resulted in a substantial and unjustifiable risk of death or serious physical injury; whether that course of conduct led to Joshua's drowning; or whether by engaging in that course of conduct Justice was acting wantonly. In summary, the prior bad acts were not useful in proving any material fact that was in actual dispute – the touchstone for admissibility of prior bad acts. Rather, the evidence tended only to demonstrate Justice's traits of character for neglecting her children, being an irresponsible parent generally, and frequently engaging in substance abuse. Moreover, the evidence demonstrated little more than that she acted in conformity with these negative character traits during the time period leading up to the drowning. Such evidence is inadmissible under both KRS 404(a) and KRE 404(b), and does not fall within any of the exceptions contained in those subsections.

In defense of the admission of the evidence, the Commonwealth argues that:

> [t]he appellant's prior bad acts were not admitted in this case to show her bad character, but rather, were introduced to show her intent, knowledge, and absence of mistake in consciously disregarding the substantial and unjustifiable risk of not supervising her four (4) year old son for over five (5) hours, and, as such, were properly admitted at trial pursuant to KRS 404(b). In this case, all of the other bad acts evidence went to show the Appellant had previously disregarded serious risks to her

> children, and that this risks [sic] had been brought to her attention through interventions by social services and other actors. Without the context of these prior occurrences, it would have been impossible for the jury to determine whether the Appellant's failure to supervise Joshua that day was a one-time fluke where she accidentally disregarded substantial and unjustifiable risks to him, or whether her conduct was wanton and she consciously disregarded those risks. To that extent, the other bad acts introduced in this case went to the Appellant's intent, knowledge, and absence of mistake, showing that she consciously disregarded substantial and unjustifiable risks to Joshua's safety by choosing to ignore him for over five (5) hours, when she had knowledge of those risks through these previous events. As a result, these other bad acts were properly admitted in this case pursuant to KRE 404(b).

Rephrased, the Commonwealth argues that the evidence was relevant to show that Justice had the propensity to neglect her children (i.e., the July 10, 2005, incident was not a "one-time fluke.") However, that is precisely the type of evidence KRE 404 is designed to exclude from trial. Justice was entitled to be tried for her conduct as it related to Joshua's drowning. The presentation of evidence that she, for example, left Aaron alone in November 1991 – 14 years earlier – violates that right. We further note that "wantonness" is evaluated based upon a "reasonable person" standard, *see* KRS 501.020(3), and thus the prior acts are irrelevant in the determination of whether she acted wantonly in relation to the drowning. That she may have had prior experience with neglecting her children and thus may, subjectively, be more appreciative of the risks and dangers associated with such conduct is not relevant, nor does the prior neglect implicate any of the KRE 404(b)(1) exceptions.

Moreover, interspersed throughout the testimony cited above is repeated testimony relating to Justice's long history of substance abuse and removals of the children from the home. The Commonwealth does not, in its argument, attempt to justify the admission of this evidence, and we are aware of no authority which would permit the introduction of, as here, pervasive evidence that a defendant has an extensive background of alcohol and drug abuse when that is not a fact in issue in the case. Accordingly, we believe the substance abuse and child-removal evidence was inadmissible under KRE 404.

2) Probative Value

As evident from the discussion above, the prior bad acts evidence has little probative value concerning the events of April 2004 through July 2005. The issue assigned to the jury for determination was whether Justice acted wantonly in creating circumstances which led to Joshua's drowning within the April 2004 through July 2005 timeframe, and whether this conduct led to his death. The prior bad acts evidence outside of this time frame has little probative value in resolving this.

3) Prejudice

This prong of *Bell* applies KRE 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

The testimony was very prejudicial. A parade of witnesses testified and established that since 1989, Justice had been a poor and neglectful mother, had repeatedly engaged in drug and alcohol abuse, and had had her children repeatedly removed from the home. She was thoroughly portrayed as a person of bad moral character, a drunk, a drug user, and an irresponsible mother. Without question the evidence inflamed the jury against her. As demonstrated by our previous discussion, any probative value associated with the prior bad acts evidence is substantially outweighed by its prejudicial effect.

Preservation

The Commonwealth argues that the issue is not properly preserved because Justice failed to properly object to the prior bad acts as the incidents were raised at trial. However, trial counsel repeatedly objected to the introduction of the prior acts, and without nitpicking each of the instances set forth above, the record demonstrates that trial counsel generally and vigorously sought to preclude the introduction of prior acts by contemporaneous objection. Moreover, "[a] motion in limine resolved by order of record is sufficient to preserve error for appellate review." KRE 103(d); *Lanham v. Commonwealth*, 171 S.W.3d 14, 21(Ky. 2005). Here, Justice opposed the Commonwealth's KRE 404(c) motion. We believe the argument was properly preserved.

Conclusion

The standard of review in determining whether the trial court properly admitted prior bad acts evidence is whether there has been an abuse of that

discretion. *Commonwealth. v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. The trial court abused its discretion by admitting the evidence of the above instances of prior bad acts falling outside of the period April 2004 though July 2005. Upon retrial, testimony concerning these instances should not be introduced against Justice.

PRIOR RESTRAINING ORDER

As previously noted, Joshua's great-aunt, Betty Johnson, lived two doors down from the Justice family. Because of previous disagreements between Johnson and Justice, in May 2004, a court order directing Johnson not to have contact with Justice and her children had been placed into effect; the order, however, was no longer in effect in July 2005, though Johnson believed it was. It was because of her belief that the order was still in effect that Johnson did not answer Joshua's knocks on the morning of July 10, or otherwise seek to assist him that morning.

During her trial testimony, Johnson testified concerning the no-contact order and gave background testimony concerning why the order was placed in effect. Justice contends that the trial court abused its discretion by permitting Johnson to testify concerning the order. More specifically, Justice argues as follows:

> [T]o allow Johnson to continue to portray the Appellant as a vexatious litigant against her (when it was in fact the Pike District Court who placed Johnson under "no

> contact orders" with the Appellant and the Appellant's immediate family) firmly affixed the Appellant in a harmful prejudicial position in the eyes of the jury, especially when that portion of Johnson's testimony was entirely irrelevant, and nonprobative as to wanton conduct, all of which made it highly inflammatory. KRS 403.
>
> The Appellant simply cannot be held to have acted wantonly, because as unfortunate circumstances did ultimately dictate a previous/expired "no contact order" was coincidentally issued upon the last person who could have saved the victim. When balancing the unfair prejudicial effect versus the possible relevancy of Johnson's testimony, it is clear the scales greatly favor the Appellant on this issue.

A trial court has wide discretion regarding evidentiary matters. It is well-settled that rulings on the admissibility of evidence are within the discretion of the trial court and should not be reversed on appeal absent a clear abuse of discretion. *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994).

We are not persuaded that the trial court abused its discretion in permitting Johnson to testify concerning the no-contact order and the background leading up to its issuance. Some explanation was necessary to clarify why Johnson did not answer Joshua's knocks or otherwise come to the assistance of her four-year-old nephew playing unsupervised in her yard the morning of July 10th, but, rather, merely watched the unsupervised child through her window. Because this would normally be considered irresponsible conduct by an adult, permitting Johnson to explain why she did not act to come to the aid of the child was not an abuse of discretion.

CONCLUSION

For the foregoing reasons the judgment of the Pike Circuit Court is reversed and the case is remanded for additional proceedings consistent with this opinion.

KELLER, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, CONCURRING: This tragic case highlights the difficulty inherent in applying rules of evidence regarding character – especially as to whether a history of prior bad acts is merely prejudicial or whether it is, in fact, illustrative of a pattern of conduct and thereby relevant and admissible.

This case is a very close call. It involves an area of the law where appellate review enjoys the benefit of hindsight denied to a trial court that is compelled to grapple with this thorny problem during the tension and emotion of such a trial. I am persuaded that the majority opinion has diligently reviewed every item of evidence in its thorough analysis. While there was error, it surely was not clearly obvious or blatant. Reasonable minds continue to differ on such outcomes.

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