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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001996-MR

STEPHEN DRIVER

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 07-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: Stephen Driver appeals from a judgment of the Marshall Circuit Court convicting him of first-degree assault committed against his wife, Vera.

This appeal raises issues related to evidence of prior bad acts, alleged prosecutorial

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

misconduct, violation of the jury oath, and failure to instruct the jury on extreme emotional disturbance. We have examined the evidence and all of the issues presented, and we conclude that the trial court's judgment of conviction is proper.

Driver's offense occurred during an argument with his wife after discovering that she was having an affair. The assault began when Driver threw a bottle of window cleaner at Vera and she ran to the bathroom. Driver dragged his wife out of the bathroom by her hair. He then began pulling her hair out and choking her. Vera managed to free herself and run out of the house. Driver pulled her back inside and continued choking and hitting her. Vera attempted to escape in the couple's van, but Driver again pulled her inside the house and continued to assault her. Driver used a belt to both strike and choke Vera and, at one point, she saw stars and almost lost consciousness. During the course of the assault, Driver stated multiple times that he would kill Vera.

Officer Dan Melone was dispatched after neighbors called 911 and reported screams coming from the Drivers' yard. He arrived on the scene and was let into the house by two small children. Driver stated that there was no problem and that his wife was in the shower and could not speak with the officer. Eventually, Vera appeared with a towel wrapped around her head and contradicted Driver's version. She provided a written statement, accusing Driver of choking her with a belt, hitting her, and pulling out her hair. She was missing large patches of hair, which had been torn out by the roots, and on the ground beside the van were

several clumps of what appeared to be Vera's hair. Vera was taken to the emergency room for treatment.

The grand jury returned an indictment charging Driver with attempted murder. At both the preliminary hearing and at trial, Vera recanted part of her story in an effort to minimize the culpability of her husband with whom she had been cohabiting while he was released on bond. The Commonwealth introduced evidence of previous assaults against Vera, as well as Driver's assaults against his former wife, at his trial. Driver tendered a jury instruction on assault under extreme emotional disturbance; however, the trial court refused to instruct the jury accordingly. Driver was convicted of the lesser included offense of first-degree assault and sentenced to fifteen years. This appeal followed.

On appeal, Driver first argues that the trial court improperly allowed evidence of prior bad acts to be introduced. Among the evidence to which Driver objected were his previous convictions for fourth-degree assault, terroristic threatening, and wanton endangerment against Vera, as well as for first-degree assault and wanton endangerment against his former wife. The jury heard that Driver slapped Vera, threatened to kill her and waved a butcher knife at her in one incident. During another assault, he hit Vera with his hands, a stick and a clothes hanger, kicked her, threatened to cut her throat with a butcher knife, poked her in the leg, pulled her hair, forced her to eat dirt, and forced her into the trunk of the car. The Commonwealth introduced evidence that Vera knew Driver had been in prison for assaulting his former wife and that the conviction was based on a

beating he had given her with a .22 caliber rifle and a baseball bat. Finally, the jury heard that Driver broke into the home of his former wife, attacked her family and threatened to burn their trailer.

Admission of evidence of prior bad acts is governed by Kentucky

Rules of Evidence (KRE) 404(b) which reads as follows:

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

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; 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.

Prior to trial, Driver filed a motion *in limine*, seeking to have evidence of prior acts of domestic violence excluded. The trial court decided that such evidence was admissible under KRE 404(b)(1) to prove absence of mistake or accident. The trial court further admonished the jury that the prior acts could not be taken as proof of Driver's guilt of the current charge, but only as evidence that Vera's injuries were not the result of accident or mistake.

The Commonwealth sought to prove attempted murder by establishing the severity of the assault and Driver's threats to Vera. Driver countered by attempting to minimize the effect of his threats to kill Vera during the assault. He

relied in part on Vera's own testimony, in which she presented a version of events portraying him as less culpable than the statement she made to the responding officer on the actual night of the assault. Sticking with her testimony from the preliminary hearing, Vera denied that Driver had used the belt to choke her and attributed some of the bruising on her neck to an earlier fall in the yard. She told the jury she did not believe Driver would ever kill her and that she was not afraid of him at the time of the trial. In her opening statement, Driver's trial counsel told the jury that the assault began as a mutual argument that spiraled into a physical altercation. She further stated that murdering his wife was never on her client's mind.

The Kentucky Supreme Court previously determined that evidence of a defendant's prior abuse of a murder victim was admissible under KRE 404(b)(1) to show absence of mistake when he later killed her. *Moseley v. Commonwealth*, 960 S.W.2d 460, 461 (Ky. 1997).² Thus, the purpose for which the Commonwealth sought to introduce the evidence of Driver's prior acts of abuse against Vera was proper under the rule. While Driver is correct that evidence of his assaults against his former wife was not admissible to prove either intent or absence of mistake with regard to his assault on Vera, we find the admission of this evidence to be harmless error. *See Greene v. Commonwealth*, 197 S.W.3d 76, 84 (Ky. 2006)(defining harmless error as one in which "the substantial rights of the

² Although the Court upheld the admission of the evidence under KRE 404(b)(1) in *Moseley*, the case was nevertheless reversed because the evidence in question was not admissible under any of the hearsay exceptions found in KRE 803.

defendant are not affected or there appears to be no likely possibility that the result would have been different had the error not occurred”).

Driver next contends that the Commonwealth engaged in prosecutorial misconduct during closing argument. He takes issue with two sections of the prosecution’s closing argument. First, the Commonwealth referred to the prior bad acts evidence and argued that these previous acts of violence against Vera showed his intent to kill her on the night in question. Driver objected, but was overruled. On appeal, he contends that the Commonwealth’s use of the prior bad acts evidence violated the trial court’s decision that the evidence would only be used to show absence of mistake or accident. KRE 404(b).

When reviewing claims of prosecutorial misconduct, the appellate courts of Kentucky will reverse only if the misconduct is flagrant, or if it meets all of the following criteria:

- (1) Proof of defendant’s guilt is not overwhelming;
- (2) Defense counsel objected; and
- (3) The trial court failed to cure the error with a sufficient admonishment to the jury.

Matheny v. Commonwealth, 191 S.W.3d 599, 606 (Ky. 2006)(citations omitted).

Driver’s argument does not satisfy the first element of the *Matheny* test. The evidence of Driver’s guilt included Vera’s account of the attack, as well as photographs of the injuries she sustained. Even on appeal, Driver does not

argue that Vera's assault was committed by anyone other than himself. There is overwhelming proof supporting Driver's conviction for assaulting Vera.

Additionally, we disagree with Driver's contention that mention of his prior acts of violence against his wife was flagrant misconduct in the context in which it occurred. "Some leeway must be accorded each side in arguing the meaning and effect of evidence." *Kinnett v. Commonwealth*, 408 S.W.2d 417, 418 (Ky. 1966)(citation omitted). We do not believe the language used by the Commonwealth in closing argument indicates an improper motive such as urging the jury to find guilt on the present charge due to prior offenses. More directly, proof of prior bad acts is admissible to prove intent. KRE 404(b)(1).

Driver's second claim of prosecutorial misconduct is more persuasive. Near the end of closing argument, the Commonwealth described how the couple's small children answered the door when Officer Melone arrived. Although the children did not testify and their statements to the officer were not introduced, the Commonwealth speculated that they may have asked him whether he was there to help them. Driver objected to the Commonwealth being permitted to make the following argument: "And don't you think these kids have a right to never, ever, ever have to answer the door for a police officer again and say something like, 'Are you here to help us?'" (VR No. 1: 7/12/07; 9:31:43). The Commonwealth then went on to ask the jury to prevent similar occurrences in the future by convicting Driver of attempted murder or first-degree assault.

The Kentucky Supreme Court addressed the propriety of arguing for the jury to convict in order to avoid undesirable future consequences in *Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981), saying:

The main function of the jury is to determine guilt or innocence. The constitutional right to a trial by jury is limited to that determination. . . . The consideration of future consequences . . . have [sic] no place in the jury's finding of fact and may serve to distort it. For that reason we now hold that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial.

Payne at 870. Driver claims that the children's unsubstantiated statements, to which he objected, were the linchpin of the Commonwealth's argument proving his guilt. Clearly, the Commonwealth should not have offered to the jury, as a reason for conviction, that it would protect the children from the need to allow the police through the door to rescue their mother. "When prosecutorial misconduct is claimed, the relevant inquiry on appeal should always center around [sic] the overall fairness of the trial, not the culpability of the prosecutor." *Maxie v. Commonwealth*, 82 S.W.3d 860, 866 (Ky. 2002). Thus, given the strength of the evidence against Driver and the overall fairness of the trial, we hold that the Commonwealth's improper but brief comments did not affect the outcome of the trial.

Driver's third argument involves a question asked by one juror as the members of the jury were retiring to deliberate after the guilt phase of the trial. The juror in question asked about sentencing procedures. This suggested to Driver

that the juror had already determined his guilt prior to deliberating with fellow jurors. He moved for a mistrial, but his motion was denied by the trial court. He now argues that this juror violated her oath not to form or express an opinion regarding his guilt prior to submission of the case to the jury. We disagree.

While examining the issue of jury bias, the Kentucky Supreme Court previously stated that “[a] basic principle of due process is the right to an unbiased decision.” *Grooms v. Commonwealth*, 756 S.W.2d 131,134 (Ky. 1988). Driver argues that the juror in question “had already decided he was guilty, was ready to set his sentence, and apparently had no desire to consider the option that he was not guilty.” (Appellant’s brief at page 16).

The juror’s specific statement, as best it can be discerned from the recorded transcript, was: “What, what kind of, uhm, sentencing occurs?” (Appellant’s brief, p. 14). Without more, this statement is no more an indicator of the juror’s premature decision than it is of his curiosity regarding criminal trial procedure.

Moreover, Kentucky Rule(s) of Criminal Procedure (RCr) 9.70, which addresses the admonition given jurors, states that a juror must avoid forming or expressing an opinion on the trial “until the cause be finally submitted to them.” As noted by Driver, the juror made her statement as the jury members were retiring to deliberate. Thus, the case had already been submitted to the jury. Nothing indicates the juror in question refused to deliberate or be benefitted by the deliberation of other jurors. Further, the jurors decided to convict Driver of first-

degree assault, rather than the charged offense of criminal attempt to commit murder. Consequently, Driver fails to demonstrate that any jury member was unable to meaningfully consider all of the available options, including a verdict of not guilty, because of the question of this one juror.

Finally, Driver contends that the trial court erroneously refused to instruct the jury on the mitigating factor of assault under extreme emotional disturbance. KRS 508.040 allows a defendant charged with assault to mitigate his culpability if he acted under extreme emotional disturbance. In order to mitigate his culpability, Driver was required to establish that he

acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

KRS 507.020(1)(a). Had Driver been convicted of assault under extreme emotional disturbance, he would have faced the penalties for a Class D felony, rather than the Class B penalties for first-degree assault. KRS 508.040(2)(a).

Driver asserts that the evidence in the case established that, when he assaulted his wife, he was acting under extreme emotional disturbance.

In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony.

Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999). The jury heard evidence that Driver began fighting with Vera because she was having an affair. He argues that marital infidelity leads to uncontrollable emotions which could “enrage, inflame, or disturb” a spouse to the point that he loses the ability to control his actions. (Appellant’s brief at page 19). While that may be true, Driver failed to present any evidence of the state of his emotions at the time of the assault. Driver maintains that his wife’s infidelity and the fact that he was admitted to the hospital after he assaulted her provided sufficient evidence upon which to base a jury instruction for assault under extreme emotional disturbance. We find this argument unpersuasive.

Driver declined to testify, as is his right under the Fifth Amendment to the U.S. Constitution. However, he also failed to present any other evidence at his trial, such as through the testimony of any of the other witnesses including Vera, that his learning of her infidelity brought about in him an extreme emotional disturbance. “Where the situation itself provides no justification or excuse and no other evidence is presented which would give rise to a subjective determination of the situation which would furnish a justification or excuse, the court would be remiss in allowing speculation by the jury.” *Thomas v. Commonwealth*, 587 S.W.2d 264, 266 (Ky.App. 1979). The mere fact of marital infidelity, without any evidence of its effect on Driver’s emotions at the time of his attack on Vera, is insufficient justification for a mitigating instruction.

For the foregoing reasons, the judgment of the Marshall Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, DISSENTING: I dissent on grounds that there was prosecutorial misconduct and trial court error with respect to statements attributed to the parties' small children and use of such statements to make a "Send a Message" argument. I also dissent on grounds that the trial court erred in failing to give an instruction on extreme emotional disturbance as requested by Appellant.

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