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OPINION OF MAY 27, 2011, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002109-MR

ERIC RAE BELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 08-CR-002323

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING IN PART,
AFFIRMING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

[1] Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580. Senior Judge Isaac completed this opinion prior to the expiration of her term of service as senior judge. Release of the opinion was delayed by administrative handling.

ISAAC, SENIOR JUDGE: Eric Rae Bell appeals the Jefferson Circuit Court's judgment convicting him of first-degree sodomy, tampering with physical evidence, and fourth-degree assault.

I. FACTUAL AND PROCEDURAL BACKGROUND

Bell was indicted on charges of first-degree rape, first-degree sodomy, fourth-degree assault, tampering with physical evidence, and being a second-degree Persistent Felony Offender. Following a jury trial, he was convicted on charges of first-degree sodomy, fourth-degree assault, and tampering with physical evidence and sentenced to a total term of fifteen years of imprisonment.

Bell contends that the circuit court erred when it (a) denied his motions for a directed verdict on the rape and sodomy charges; (b) excluded statements the complainant[2] made to medical personnel concerning her history of drug use and addiction; and (c) excluded evidence that could have been used to impeach the complainant's credibility. He also argues that the circuit court improperly instructed the jury after it reported that it was deadlocked and improperly assessed a fine against him.

II. ANALYSIS

A. DIRECTED VERDICT

Bell first claims that the circuit court erred in denying his motions for a directed verdict concerning the charges of rape and sodomy.[3] He asserts that "the

[2] We will simply refer to the female complainant as "the complainant," rather than using her name, due to the sexual nature of the sodomy conviction.

[3] Bell does not allege that a directed verdict should have been entered regarding the charges of fourth-degree assault and tampering with physical evidence.

only testimony that the sex between Bell and [the complainant] was not consensual came from [the complainant]."[4] He further alleges that it was unreasonable for the jury to have convicted him of sodomy and that "[b]y not granting the motion to direct a verdict on the rape count, the [circuit] court increased the chances of a compromise[d] verdict despite the absence of credible evidence, which is exactly what occurred."

Although Bell claims that there was an increased chance of a compromised verdict, he does not explain how the verdict was compromised and he does not cite any legal authority on this point. We refuse to consider this part of his claim because it does not comply with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v), which requires briefs to contain arguments that include citations of authority that are applicable to each legal issue in the case. *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

To the extent Bell challenges the circuit court's denial of his motion for a directed verdict pertaining to the rape charge, the claim is moot because the jury acquitted him of that charge.

Bell also challenges the circuit court's denial of his motion for a directed verdict regarding the sodomy charge.

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly

[4] We note that there were only two people in the house at the time the events in question occurred. While Bell complains that the only testimony that the sex was not consensual came from the complainant, it logically follows that the only testimony alleging that the sex was consensual came from Bell. Therefore, whether it was consensual or not was a credibility determination for the jury to make.

> unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.
>
> . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-88 (Ky. 1991) (internal quotation marks and citation omitted).

The complainant, who has multiple sclerosis, testified that she accepted Bell's offer to drive her to babysit her grandchildren because she sometimes has trouble walking. She stated that after she got in the car with Bell, he punched her, drove her to a different house, and pushed her inside. He then allegedly told her to take her clothes off and made her perform oral sex on him three to four times. The complainant testified that Bell attempted to have intercourse with her. He was able to penetrate her, but he was unable to remain inside her. She stated that he then became frustrated and began to beat her. She told him she wanted to go to the bathroom, but he would not allow her to do so. She then defecated on the floor due to her multiple sclerosis. She attested that Bell continued beating her until she was able to hit him on the head with an ash tray, at which time Bell left and went upstairs. The complainant testified that, although she was nude, she then crawled out to the street and hid behind a vehicle.

Detective Docky Ousley of the Louisville Metro Police Department testified that he found the complainant on a curb behind a vehicle. She was nude, with the exception of having a coat over her shoulders. He testified that the

complainant was bleeding from the mouth; she had a swollen face; her eyes were practically closed from the swelling; she was in and out of consciousness; and he feared for her life. Because the testimony of the complainant and Detective Ousley constituted sufficient evidence for a jury to reasonably convict Bell of sodomy, the circuit court did not err in denying Bell's motion for a directed verdict.

B. HISTORY OF DRUG USE

Bell next alleges that the circuit court erred in excluding statements the complainant made to medical personnel concerning her history of drug use and addiction. He contends that if he had been permitted to introduce this evidence, the jury would have been more likely to believe his version of the events, *i.e.*, that due to the complainant's twenty-year drug addiction, she consensually traded sex in exchange for receiving crack cocaine from Bell.

We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. at 581.

Bell quotes *United States v. Scheffer*, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998), for the general proposition that excluding evidence violates a defendant's due process rights when it "significantly undermine[s] fundamental elements of the defendant's defense."

A recent opinion of the Supreme Court of Vermont addressed a set of facts similar to those in Bell's case and concluded that evidence of a victim's prior drug use was admissible under certain circumstances. *See Vermont v. Memoli*, 18 A.3d 567 (Vt. 2011). The defendant Memoli and his companion testified that the complainant traded sex for drugs, whereas the complainant alleged that she was raped. There was evidence that the complainant had smoked marijuana and crack cocaine on the evening in question. Memoli's defense counsel sought to introduce evidence of the complainant's use of drugs both before and after the date of the offense as her motive for engaging in sexual acts, arguing that it was crucial to Memoli's defense that the complainant consented to the sexual relations because she was a crack addict. The trial court only permitted Memoli to introduce evidence of the complainant's drug use on the night of the incident, holding that any other evidence of the complainant's drug use was irrelevant to the issue of consent.

The Vermont Supreme Court held that Vermont's rape shield statute, which "precludes admission of [e]vidence of prior sexual conduct of the complaining witness," was not applicable in Memoli's case because he "did not seek to introduce evidence of complainant's prior sexual conduct." *Id.* at ¶¶ 19-20 (internal quotation marks omitted). The Court noted:

> Defendant requested to admit evidence of complainant's crack cocaine use, both before and after the incident to demonstrate complainant's affection for the drug. Only then could he argue his defense – that her desire for cocaine was strong enough to motivate her to consent to sexual interactions with him in exchange for the drug.

Id. at ¶ 20.

Similarly, the evidence Bell sought to introduce did not concern the complainant's prior sexual conduct and, therefore, KRE[5] 412, Kentucky's "Rape Shield Law," was inapplicable to this evidence.

The Vermont Court further ruled that evidence of the complainant's drug use thirty days before and after the incident was relevant to whether she had consented to the sexual relations with Memoli in exchange for crack cocaine. The Court explained that Memoli

> did not seek to introduce complainant's drug use to prove that she had a specific character trait of being an addict or a reputation as a drug user to undercut her credibility. . . . Defendant's proffer was narrower: that evidence of complainant's drug use was relevant to demonstrate that she had motive to consent to sexual acts with defendant. This purpose is consistent with the rule.

Id. at ¶ 27 (citing Vermont Rule of Evidence 404(b)).

Similarly, in Bell's case, the evidence of prior drug use was relevant for the purpose of determining whether the complainant consented to the sexual relations with Bell in exchange for drugs. *See* KRE 401. Pursuant to KRE 404(a)(2), "in a prosecution for criminal sexual conduct," evidence proffered by an accused concerning "a pertinent trait of character of the victim" is inadmissible. However, in Bell's case, the evidence of prior drug use was not being offered to establish a character trait of the complainant; rather, defense counsel sought to introduce it to prove that the complainant had a motive to consent to the exchange

[5] Kentucky Rule of Evidence.

of sex for drugs. The evidence was permissible for such a purpose under KRE 404(b).

Furthermore, KRE 403, which requires the trial court to balance the probative and prejudicial value of otherwise relevant evidence, did not bar admission of the evidence of prior drug use because any prejudicial effect did not outweigh the strong probative value pertaining to the issue of whether the complainant had a motive to consent to trading sex for drugs. Therefore, we conclude that the evidence of the complainant's history of drug use was admissible.

As previously mentioned, Bell specifically seeks to introduce the complainant's medical record, which revealed that she had reported a personal history of using cocaine. Bell claims that these statements are admissible pursuant to KRE 803(4), which provides an exception to the hearsay rule for

> Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

The complainant's statement that she had a history of using cocaine pertained to her medical history, and considering that she tested positive for cocaine at the hospital the night she made that statement, the statement was reasonably pertinent to her treatment or diagnosis. Therefore, the complainant's statement in her medical record regarding her history of drug use is admissible, and the circuit court erred when it denied defense counsel's request to admit it. Because Bell was not

afforded a full opportunity to present his defense theory to the jury due to this error, he is entitled to a new trial on the charge of first-degree sodomy. As to Bell's conviction on the charges of assault and tampering with physical evidence, the trial court's erroneous evidentiary ruling had no bearing on any issue or element of those charges. The conviction for assault in the fourth degree and tampering with physical evidence is therefore affirmed.

C. IMPEACHMENT EVIDENCE

Bell asserts that the circuit court erred in excluding evidence that the complainant had been charged with filing a false police report in 2007. Bell's defense counsel presented the avowal testimony of Officer Andreas Shabaan of the Louisville Metro Police Department. Officer Shabaan testified that the complainant told him and another officer that someone on a bicycle attacked her, took her purse, took the money out of her purse, threw down her purse, and rode away. Officer Shabaan initially believed the complainant. Upon further questioning, however, it became evident to him that she was not being truthful. Specifically, she repeatedly changed her description of the suspect and his bike and she could not explain the fact that the officers found money as well as a crack pipe in her purse. Officer Shabaan testified the complainant stated that she needed to file a police report so she could get her $200 back from the welfare office. The complainant was ultimately charged with filing a false police report although Officer Shabaan was uncertain if she was convicted of the charge because he was subsequently deployed to Iraq.

Bell contends that he should have been permitted to introduce this evidence under KRE 608 in order to impeach the complainant's general truthfulness and as a specific instance of conduct which undermined her credibility. Kentucky Rule of Evidence 608 provides as follows:

> (a) ***Opinion and reputation evidence of character.*** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) ***Specific instances of conduct.*** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

Bell's claim that the officer should have been permitted to testify about his opinion of the complainant's untruthfulness lacks merit. Officer Shabaan did not testify that he knew the complainant prior to the date he charged her with filing a false police report. Therefore, he had no basis for having knowledge of the complainant's character for untruthfulness. *See Stewart v. Commonwealth*, 197 S.W.3d 568, 571 (Ky. App. 2006) (reasoning that a woman's mother was qualified

to testify concerning her daughter's truthfulness because the mother had knowledge of her daughter's character). Officer Shabaan's only allegation was that he believed the complainant had lied to him about having been robbed.

Furthermore, even if the charge alone was sufficient to qualify Officer Shabaan to testify regarding the complainant's untruthfulness, whether his opinion should have been admitted as evidence still must be subjected to the KRE 403 balancing test. *See Dennis v. Commonwealth*, 306 S.W.3d 466, 472 (Ky. 2010). Because Officer Shabaan could not state whether the complainant was actually convicted of the crime, his testimony concerning the charge and the events leading to the charge would have been substantially more prejudicial than probative.

Bell also contends that Officer Shabaan's testimony should have been admissible as testimony concerning a specific instance of conduct. Pursuant to KRE 405(c), "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." However, in *Dennis*, the Kentucky Supreme Court noted that "[w]ith respect to the victim's character, . . . KRE 405 in pertinent part limits the admissible evidence to testimony as to general reputation in the community or by testimony in the form of opinion. That rule does not allow for evidence of a victim's specific instances of conduct." *Dennis*, 306 S.W.3d at 471 n.2 (internal quotation marks omitted). Thus, pursuant to *Dennis*, evidence of the complainant's specific instance of conduct was inadmissible.

Even if we were to assume for the sake of argument that this type of evidence was admissible pursuant to KRE 405, its admissibility would be limited by KRE 608(b), which provides that a witness's specific instance of conduct may not be proved by extrinsic evidence. Officer Shabaan's testimony constituted extrinsic evidence and, therefore, it was not admissible under KRE 608(b).

Furthermore, the evidence was also inadmissible under KRE 404(b) which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Although KRE 404(b) permits the use of a prior crime for impeachment purposes, "[t]he impeaching crime must be a felony conviction, and not a pending charge." *Moore v. Commonwealth*, 634 S.W.2d 426, 436 (Ky. 1982); *see also* KRE 609. In the present case, Bell failed to show that the complainant was actually convicted of, rather than simply charged with, filing a false police report. In any event, the crime of falsely reporting an incident is a misdemeanor. *See* KRS 519.040. Therefore, the circuit court did not abuse its discretion when it ruled that Officer Shabaan's testimony concerning the complainant's prior charge for filing a false police report was inadmissible.

D. COURT'S INSTRUCTION TO JURY

Bell next asks us to review under the palpable error standard his contention that the trial court improperly instructed the jury after it reported that it was deadlocked. "A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently

raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr[6] 10.26.

> [T]he requirement of "manifest injustice" as used in RCr 10.26 . . . mean[s] that the error must have prejudiced the substantial rights of the defendant, . . . *i.e.*, a substantial possibility exists that the result of the trial would have been different. . . .

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted).

Approximately three hours after beginning deliberations, the jury sent the following note to the circuit court:

JUDGE,
AS OF 5:00 p[.]m[.], THE JURY HAS COME TO A UNANIMOUS DECISION ON ONLY 2 OF THE 4 CHARGES. WE ARE SIGNIFICANTLY SPLIT ON THE REMAINING 2 INSTRUCTIONS. CAN YOU PROVIDE US WITH SOME GUIDANCE AS TO OUR OPTIONS[?]

THANK YOU
THE JURY

After conferring with the attorneys for both sides, the court sent the following note to the jury without any objections.

> You are instructed to continue to deliberate based upon the jury instructions and the evidence.
>
> You are entitled to have dinner provided. It will take approximately one hour for dinner to be delivered. Please let the deputy know if you would like to order dinner.

Bell contends that the jury's letter to the court indicated that the jury was deadlocked, and that the court's response was therefore improper for failing to

[6] Kentucky Rule of Criminal Procedure.

comply with the requirements of Kentucky Rules of Criminal Procedure (RCr) 9.57(1) which provides as follows:

> If a jury reports to a court that it is unable to reach a verdict and the court determines further deliberations may be useful, the court shall not give any instruction regarding the desirability of reaching a verdict other than one which contains only the following elements:
>
> (a) in order to return a verdict, each juror must agree to that verdict;
>
> (b) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (c) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;
>
> (d) in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change his or her opinion if convinced it is erroneous; and
>
> (e) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

In determining whether a court's comment to a jury violates RCr 9.57, "the focus on appeal is whether the comment itself was coercive." *Mills v. Commonwealth*, 996 S.W.2d 473, 493 (Ky. 1999), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

In *Commonwealth v. Mitchell*, 943 S.W.2d 625 (Ky. 1997), after "three hours of deliberations, the jury returned to the courtroom and delivered the following note to the trial judge: 'The jury has reached a decision on one of the

counts but seems firmly divided on the other two counts. What should we do?'" *Mitchell*, 943 S.W.2d at 626. The trial court in *Mitchell* responded to the jury's note with instructions that included all of the requirements set forth in RCr 9.57, with the exception of the requirement that the verdict must be unanimous. The jury deliberated approximately two hours longer before returning its verdict. The Kentucky Supreme Court held that "[a]lthough the instruction did not readvise the jury that its verdict must be unanimous, that omission was harmless since the jury had already been so advised in the court's initial written instructions, which were still in the possession of the jury." *Mitchell*, 943 S.W.2d at 627.

In Bell's case, the court's omission from its note to the jury of the elements set forth in RCr 9.57 was similarly harmless because the court instructed the jury to continue deliberating "based upon the jury instructions and the evidence." The elements required by RCr 9.57 were included in the initial jury instructions, which the jury still had in its possession. The instructions provided as follows:

> In the jury room it is your duty to discuss the case in order to reach a verdict. Each of you must decide the case for yourself, but should do so only after considering the views of each juror. You should not hesitate to change an opinion if you are convinced it is wrong. However, you should not be influenced to decide any question in a particular way simply because a majority of the jurors, or any of them, favor such a decision.
>
> * * *
>
> The verdict of the Jury must be unanimous finding the defendant guilty or not guilty, and must be signed by one of you as Foreperson.

Therefore, the trial court's response referring the jury to the instructions did not constitute palpable error.

E. ASSESSMENT OF FINE

Finally, Bell asks for palpable error review of the trial court's assessment at his sentencing hearing of a $1,000 fine for the fourth-degree assault conviction. Later in that same hearing, the court was asked to declare Bell indigent for purposes of his appeal, and the court did so by granting Bell's motion to proceed *in forma pauperis* on appeal.

Pursuant to KRS 534.040(4), fines required by that statute for the commission of misdemeanors "shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." Because Bell was declared indigent by the court during the same hearing in which he was fined, the fine was improper. *See* KRS 534.040(4).

Accordingly, the Jefferson Circuit Court judgment is reversed in part and the case is remanded for a new trial solely on the charge of first-degree sodomy. The portion of the judgment which imposes the $1,000 fine is vacated. The judgment is affirmed in all other respects.

COMBS, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MOORE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I am not persuaded that the trial judge erred in this case in refusing to admit evidence of the complainant's sexual conduct in relation to previous drug use. As a matter of fact and the record, the jury was made fully aware of her past conduct when Bell testified that he and the complainant had exchanged sex for drugs in the past. I believe that that testimony was enough for the jury to assess the true nature of the complainant's motive in this immediate case without inviting it to delve into a sordid inquiry as to her distant past.

I would refrain from adopting a rule from a foreign jurisdiction that essentially would render evidence of drug use into a rebuttable presumption of sexual promiscuity or an automatic inference that sexual favors must be a *quid pro quo* for drugs. And the Vermont case relied upon by the majority creates that very evidentiary outcome – an outcome which, in effect, may further victimize and stigmatize the victim of an alleged sexual assault.

I am persuaded that the trial court ruled correctly on this issue in finding that complainant's drug use was indeed inadmissible character evidence under the particular circumstances of this case that would have been more prejudicial than probative had it been admitted. Therefore, I would not remand for a new trial on this issue.

I concur with the majority opinion on all other issues.

MOORE, JUDGE, DISSENTING: I concur with the analysis of Senior Judge Isaac's opinion, but dissent as to allowing the convictions to stand on

the tampering with evidence and assault charges. I agree with Senior Judge Isaac's opinion holding that Bell did not have the opportunity to present his full defense theory to the jury and, thus, he is entitled to a new trial on the sodomy charge. However, because the underlying allegations that lead to these charges are so entwined, I believe the United States Constitution requires granting a new trial on all of the charges, to allow Bell to present his full defense theory to the jury on all of the charges, rather than just on the sodomy charge. "[T]he exclusion of evidence violates a defendant's constitutional rights when 'it significantly undermine[s] fundamental elements of the defendant's defense.'" *Fields v. Commonwealth*, 274 S.W.3d 375, 401 (Ky. 2008), *overruled on other grounds by Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010) (quoting *United States v. Scheffer*, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998)). Granting a new trial on all of the charges would provide the jury an opportunity to view all of the evidence in light of his full defense, in which Bell alleges that the events in question involved a consensual sexual encounter that went badly when the complainant did not receive what she had thought she had bargained for, *i.e.,* drugs; she became violent, assaulting him; Bell defended himself; and he then cleaned up the house after the complainant left so that his wife would not find the complainant's clothes and excrement. Therefore, I dissent because a new trial should be granted on all of the charges to afford Bell the opportunity to present his full defense to the jury on every charge.

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