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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000914-MR

GREG BRINEGAR

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 05-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

ACREE, JUDGE: Appellant, Greg Brinegar, seeks reversal of the Estill Circuit

Court's decision to admit evidence of Appellant's prior bad acts under Kentucky

Rules of Evidence (KRE) 404(b). Brinegar was convicted of second-degree arson

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 21.580.

by complicity and sentenced to ten years in prison. Brinegar contends that the Circuit Court abused its discretion when it determined as admissible evidence of Brinegar's involvement in four similar fires, other than the one for which he was indicted. KRE 404(b) allows introduction of evidence of other crimes, wrongs, or acts if such evidence is offered for some other purpose than merely proving the character of a person that tended to show action in conformity therewith. The evidence of Brinegar's involvement in the four uncharged fires showed a relevant common scheme or plan associated with the arson for which he was convicted. Therefore, we affirm.

On April 4, 2005, as a result of arson, a fire burned down the Little Doe Creek Church of the Living God in Estill County. As part of the subsequent investigation, Amie Wilson and Greg Brinegar each made formal statements indicating the other's involvement in a total of five fires. Both were charged with arson related crimes for the church fire only. Originally a co-defendant, Wilson agreed to a plea bargain that granted her probation in exchange for her testimony against Brinegar. At trial, over Brinegar's objection, Wilson testified that Brinegar repeatedly manipulated her into starting a number of fires in Estill County, including the fire that burned down the church. This court must determine if the evidence was properly admitted.

The admissibility of evidence is reviewed for abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999). The test for abuse of

discretion is whether the trial judge's decision regarding the evidence was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* at 945.

“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.” KRE 404(b). However, prior bad acts may be admitted to show a defendant's “common scheme or plan.” [*Commonwealth v. English*, 993 S.W.2d 941, 943-44 \(Ky. 1999\)](#). Ultimately, this court must make three inquiries: probativeness, relevance, and prejudice. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994) (citing Lawson, *The Kentucky Evidence Law Handbook*, 3d ed., Sec. 2.25(II) (1993)). Evidence of prior bad acts is admissible if, (1) it is offered to prove a common scheme or plan; (2) such evidence is relevant to serve a purpose other than proving a defendant's criminal disposition; and (3) the probative worth and need for the evidence outweighs potential prejudice to the accused. *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982) (citations omitted).

First, we consider whether there was a common scheme or plan. For the “common scheme or plan” exception to apply, the charged offenses must be “part and parcel of a greater endeavor” that included the prior bad acts. *English*, 993 S.W.2d at 945. If the method of the commission of the other uncharged crimes is so similar as to indicate a reasonable probability that all of the crimes were committed by the same person, evidence that the defendant committed the other uncharged crimes is admissible to show a common scheme or plan. *Billings*

v. Commonwealth, 843 S.W.2d 890, 893 (Ky. 1992). “Common facts rather than common criminality are the keystone of such an examination.” *Lear v. Commonwealth*, 884 S.W.2d 657, 659 (Ky. 1994).

In *Adcock v. Commonwealth*, 702 S.W.2d 440 (Ky. 1986), the appellant was convicted of the murder, rape, and burglary of an 80-year-old woman. The trial court allowed evidence that the appellant had previously broken into the victim’s home and had robbed and beaten her. *Id.* at 442. On appeal, the Court reasoned that such evidence was properly admitted because “the circumstances were so similar and were near enough in time as to constitute a signature of sorts of the appellant.” *Id.* at 443.

In this case, the evidence not only indicates that Brinegar committed similar crimes within the previous three weeks, but that he committed them in the same geographic vicinity, that in each case he directed a fire to be started in a particular way, sometimes reporting the fire himself, and was on site to put out each fire in question. The circumstances were very similar and near enough in time to constitute a “signature of sorts” under *Adcock*. The evidence reveals a common scheme or plan whereby this volunteer firefighter on inactive status intentionally started fires near his home so that he could put them out.

Next, we consider relevance. Evidence is relevant if it has *any* tendency to increase the likelihood of the fact for which it was offered. KRE 401 (emphasis added). Estill County Fire Chief Derek Muncie testified about four other fires being in the vicinity of and close in time to the church fire and that

Brinegar, a volunteer firefighter on inactive status with the department, was present at each of the fires, even calling in to report some of them. Wilson testified that she and Brinegar worked together in starting these fires. This evidence helped clarify the circumstances surrounding Brinegar's course of conduct over the three weeks leading up to the indicted offense, subsequently increasing the likelihood of a common scheme or plan to start fires. Evidence that each of the four other fires were started by lighting a rag soaked in paint thinner share common facts with the church fire for which Brinegar was indicted. This evidence demonstrates facts common to all of the conduct and is relevant to the specific crime for which Brinegar was charged. Consistent with *Lear, supra*, the evidence does not merely support a propensity for common criminality.

“A ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that a trial court has abused its discretion.” *Bell*, 875 S.W.2d at 890 (citing *Rake v. Commonwealth*, 450 S.W.2d 527, 528 (Ky. App. 1970)). Here, the uncharged conduct was strikingly similar to the charged crime, establishing a relevant pattern of conduct. There was a proper purpose for this evidence and its potential for prejudice did not outweigh its probative value. The trial judge, acting within his discretion, properly admitted the evidence.

The Estill Circuit Court's Judgment is affirmed.

ALL CONCUR.

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