

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000977-MR

MARK CROSSLAND

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 06-CR-00467

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Mark Crossland was convicted of one count of violating a domestic violence order and one count of intimidating a participant in the legal process. He alleges that the following errors occurred during his trial: (1) he was substantially prejudiced when the trial court permitted the introduction of evidence of prior crimes and bad acts in violation of KRE 404, KRE 401, and KRE 403; (2) he was substantially prejudiced when the Commonwealth “vouched” for a

¹ Senior Judge Ann O’Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

witness's credibility; and (3) that the trial judge erroneously failed to recuse himself from presiding over the trial. We conclude that Crossland's allegations are without merit and affirm.

Crossland was married to Iris Kelly. After their separation, Kelly's home burned after which a domestic violence order was entered preventing Crossland from contacting or harassing Kelly. Following an investigation by Detective Frank Gresham, a Kentucky State Police arson/explosives investigator, Crossland was charged with arson, burglary, firearm charges, and animal cruelty relating to the fire at Kelly's home. After Crossland allegedly threatened Kelly to influence her testimony regarding the fire at her home or to prevent her from testifying, he was indicted for the offenses that are the subject of this appeal.

The instant case was scheduled for trial on May 9, 2007. However, Crossland moved for a continuance arguing that although he was convicted of the firearm charges on October 24, 2006, the arson and burglary charges remained pending and he would be prejudiced if the trial in the present case was concluded prior to the trial on those charges. The trial court granted the motion and scheduled the trial to commence on April 16, 2008.

Prior to the trial date, Crossland filed a motion for the trial judge to recuse himself from presiding over the trial asserting that the trial judge had presided over two prior criminal trials involving Crossland and had made statements indicating that he could not be impartial. Crossland incorporated a

complaint he filed with the Judicial Conduct Commission against the trial judge.

The trial judge held a hearing on the matter and denied the motion to recuse.

Subsequently, Crossland filed a motion requesting that the trial court suppress Gresham's testimony as irrelevant under KRE 401 because his testimony related to the arson, burglary and firearms charges for which he had already been convicted and not the violation of a DVO and intimidation charges. Further, he argued that KRE 403 prohibited admission of Gresham's testimony because it was highly prejudicial and inflammatory because it would lead the jury to consider collateral issues and could be used to infer Crossland's criminal propensity.

At a hearing on the motion to suppress, the Commonwealth argued that Gresham's testimony was relevant to demonstrate the legal process in which Kelly was the primary witness. The trial court ruled that the Commonwealth could present Gresham's testimony for the limited purpose of demonstrating that Kelly was a witness in the case charging Crossland with arson and burglary of her home. It specifically restricted the Commonwealth from introducing evidence regarding the outcome of Crossland's trial on the charges.

At trial, Gresham testified that on December 1, 2005, he investigated an arson fire at Kelly's home and that Crossland was charged with arson, burglary, animal cruelty, and firearm charges as a result of the 2005 fire. He identified Kelly as an important witness in the case against Crossland.

Kelly testified that on August 18, 2006, she was working in a factory in Calvert City when she received a call at 2:27 p.m. The number shown was

either “unknown or unavailable.” She testified that she was “one hundred percent positive” Crossland was the caller and that he yelled “you thought you had me, didn’t you ...? Well, I’ve got something for you.” Feeling threatened by Crossland’s words, Kelly contacted her divorce attorney, the McCracken County Sheriff and Gresham.

The trial testimony also included former Bailiff Russ Bohanon who testified that on August 18, 2006, he escorted Crossland to the McCracken County Courthouse to be arraigned on the charges related to the 2005 fire and that Crossland became agitated and boisterous. After he was arraigned, Bohanon escorted Crossland to the jail and he testified that during the trip, Crossland was cursing which seemed to be directed at one person.

McCracken County Jailer Bill Adams testified that in 2006, inmates were permitted to make phone calls either by purchasing a phone card or by making a collect call. Adams traced the call made at 1:36 p.m. on August 18, 2006, as being made from Pod 4, where Crossland was housed.

Crossland challenges the admission of evidence relating to the charges resulting from the 2005 fire under KRE 404, KRE 401, and KRE 403. KRE 404(b) prohibits the admission of prior criminal conduct or bad acts to prove that the defendant acted in the same way on a particular occasion. However, the rule also provides exceptions. Prior bad acts are 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.

KRE 404(b).

In *Norton v. Commonwealth*, 890 S.W.2d 632, 638 (Ky.App. 1994), this Court cited with approval *United States v. Masters*, 622 F.2d 83 (4th Cir. 1980), where the theory that the prior bad acts can be “interwoven” into the present crime was explained:

“[W]here evidence is admissible to provide this ‘full presentation’ of the offense ‘[t]here is no reason to fragmentize the event under inquiry’ by suppressing parts of the ‘res gestae’.” As further pointed out by Lawson, the case law from which the language utilized in KRS 404(b)(2) is extracted suggests “that the rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective.” *See also, Stanford v. Commonwealth*, Ky., 793 S.W.2d 112 (1990), citing both Lawson and *Smith v. Commonwealth*, Ky., 366 S.W.2d 902 (1962), in which it was stated:

[T]he rule [is] that all evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also approve or tend to prove the commission of other crimes by him or to establish collateral facts.

We conclude that because the evidence regarding Crossland’s prior charges were essential to the Commonwealth’s case, it was properly admitted.

KRS 524.040 sets forth the elements of the offense of intimidating a participant in the legal process and provides in part:

(1) A person is guilty of intimidating a participant in the legal process when, by use of physical force or a threat directed to a person he believes to be a participant in the legal process, he or she:

(a) Influences, or attempts to influence, the testimony, vote, decision, or opinion of that person;

(b) Induces, or attempts to induce, that person to avoid legal process summoning him or her to testify;...

A participant in the legal process includes a witness. KRS 524.010(3).

Because evidence of the charges resulting from the 2005 fire were necessary to establish the elements of the current offense and were so inextricably intertwined with evidence essential to the case, they were relevant and admissible under KRE 404(b).

Crossland argues that even if evidence of the charges arising from the 2005 fire was admissible under KRE 404(b), the Commonwealth exceeded the bounds of the rule and, as a consequence, introduced irrelevant and prejudicial evidence in violation of KRE 401 and KRE 403.

KRE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

We have discussed the relevancy of the charges resulting from the 2005 fire and reaffirm that the charges were relevant to the charge of intimidating a participant in a legal proceeding.

KRE 403 limits the introduction of relevant evidence when “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.” An appellate court cannot reverse a trial court's ruling under KRE 403 unless there has been an abuse of discretion. *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994).

Crossland argues that Gresham’s testimony was unduly prejudicial and the information given the jury regarding the death of Kelly’s dog in the fire was likewise unduly prejudicial. However, it is not a defendant’s prerogative to dictate the evidence submitted to the jury by the Commonwealth simply because it is harmful to his defense. The Commonwealth is permitted to prove every element of its offense and the defendant “may not stipulate away the parts of the case that he does not want the jury to see.” *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). “In order for a jury to be able to size up a case fairly and wisely it must be allowed to gain a reasonable perspective, and that can best be done by permitting it to see an unadulterated picture. *Id.* (internal quotations and citations omitted). We have reviewed the record and conclude there was no error.

Crossland also contends that the prosecution vouched for the credibility of Kelly in the opening statement. However, he admits the issue was not preserved for review, thus, it is subject to review only under the palpable error rule. RCr 10.26. An appellate court may consider an unpreserved, palpable error which affected the defendant's “substantial rights” and resulted in “manifest

injustice.” *Id.* In determining whether an error is palpable, “an appellate court must consider whether on the whole case there is a substantial possibility that the result could have been any different.” *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983).

Crossland argues that in its opening statement, the Commonwealth impermissibly “vouched” for Kelly’s credibility when it stated that Kelly “had all her ducks in a row.” A prosecutor is not permitted to express his personal opinion as to the character of a witness. *Moore v. Commonwealth*, 634 S.W.2d 426, 438 (Ky. 1982). However, even if convinced that the prosecutor’s use of the phrase “ducks in a row” vouched for Kelly’s credibility, we only address the merits of the alleged error if it rises to the level of palpable error. Given the totality of the evidence, there was no substantial possibility that the result of the trial would have been different absent the prosecutor’s remarks. Therefore, we conclude there was no palpable error. RCr 10.26.

Crossland’s final argument is that the trial court erroneously denied his motion to recuse under KRS 26A.015(2)(e) on the basis that the trial judge’s “impartiality might reasonably be questioned.” A motion for recusal should be made immediately upon discovery of the facts upon which the disqualification rests. *Kohler v. Commonwealth*, 492 S.W.2d 198 (Ky. 1973); *Bailey v. Bailey*, 474 S.W.2d 389, 391 (Ky. 1971). “Otherwise, it will be waived.” *Bussell v. Commonwealth*, 882 S.W.2d 111, 113 (Ky. 1994).

Crossland alleged in his motion that because the trial judge presided over his two most recent criminal trials and made statements indicating that he could not be fair, the trial judge was required to recuse from presiding over his trial. Additionally, Crossland attached a complaint filed against the trial judge with the Judicial Conduct Commission wherein he alleged that during a July 26, 2006, competency hearing and his February 2, 2007, sentencing hearing, the trial judge made disparaging remarks directed at Crossland.

Despite his belief that the trial judge had demonstrated partiality in 2006 and early 2007, Crossland did not seek recusal in February 2008. Nothing new was presented on February 28, 2008, that was not already known to Crossland over one year earlier. Under the circumstances, his motion was untimely. *Id.*

Moreover, the Kentucky Supreme Court has described the burden of proof required for recusal of a trial judge as an onerous one. “There must be a showing of facts of a character calculated seriously to impair the judge's impartiality and sway his judgment. The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal.” *Stopher v. Commonwealth*, 57 S.W.3d 787, 794-795 (Ky. 2001)(internal citations and quotations omitted).

Crossland alleged that the trial court made statements indicating the judge's partiality which the trial judge disputed, yet, Crossland failed to present any evidence to support his allegations. Consequently, he failed to meet the onerous burden imposed and the motion was properly denied.

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

ALL CONCUR.

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