

RENDERED: JANUARY 25, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001857-MR

MICHAEL ANTHONY ANDERSON

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE THOMAS P. JONES, JUDGE  
ACTION NO. 10-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; KELLER AND MOORE, JUDGES.

KELLER, JUDGE: Michael Anthony Anderson (Anderson) appeals from his conviction of one count of sexual abuse in the first degree. On appeal, Anderson argues that the trial court: (1) erroneously admitted evidence of prior bad acts; (2) erroneously denied his motions for a mistrial after a witness testified about his criminal history, his history of substance abuse, and his abandonment of the victim

and her brother while the children were in his care; and (3) erroneously denied his motion for a new trial. Anderson also argues that the cumulative effect of these errors mandates reversal of his conviction. The Commonwealth argues that the issues raised by Anderson were not preserved, were waived, or were not errors. Having reviewed the record and the arguments of the parties, we affirm.

## FACTS

The following background facts are not in dispute. Anderson and the victim's mother, H.A., had known each other and occasionally dated since they were in high school. In 2007, Anderson and H.A. began living together with H.A.'s two children from a previous marriage, J.S. - the victim - and J.S.'s older brother. During the marriage, H.A. worked two jobs, providing the financial support for the family. Anderson did not work outside the home and acted as primary caregiver to H.A.'s children. In addition to acting as a "stay-at-home step-father," Anderson attended school, studying therapeutic massage.

On April 21, 2010, J.S. told her school counselor that Anderson had been sexually abusing her. The counselor then contacted Child Protective Services, who contacted H.A. H.A. confronted Anderson that afternoon with J.S.'s allegations and, although Anderson denied the allegations, H.A. asked him to leave the home, which he did.

On August 16, 2010, a grand jury indicted Anderson for sexual abuse in the first degree with a victim under the age of twelve. According to the indictment, the abuse took place between February 1 and February 14, 2010.

Pursuant to a motion by Anderson, the indictment was ultimately amended to reflect that the victim was older than twelve at the time of the alleged abuse. It appears from the record that the parties attempted to reach a plea agreement but were unable to do so. Therefore, this matter proceeded to trial.

On June 10, 2011, two days before the scheduled start of the trial, the Commonwealth filed a motion to introduce evidence pursuant to Kentucky Rule of Evidence (KRE) 404(b). In its motion, the Commonwealth indicated it anticipated H.A. would testify that Anderson called her in late January or early February and reported that he had massaged J.S. as practice for class. According to the motion, Anderson also told H.A. that J.S. had been naked when this massage took place.

The Commonwealth also indicated H.A. would testify that she looked at Anderson's search history on the family computer. That history revealed that someone, presumably Anderson, had accessed a web site regarding "how to have sex with a virgin." Finally, the Commonwealth indicated it anticipated J.S. would testify that Anderson began abusing her in February 2009 and continued to abuse her until she reported the abuse to her school counselor.

Counsel for Anderson objected "for the record" to the timeliness of the Commonwealth's motion. However, he admitted that he and the Commonwealth's attorney had previously discussed the matters contained in the motion, and he was not surprised by the motion's contents.

Counsel for Anderson then objected to the evidence on the grounds that it was not relevant and, if relevant, was unduly prejudicial. The

Commonwealth argued the evidence was appropriate to show motive, opportunity, intent, preparation, plan, knowledge, and/or absence of mistake or accident. After some discussion, the parties agreed the trial should not be delayed, and that they were prepared to go forward with trial on June 13, 2011, as scheduled. It appears from the record that the court did not rule on Anderson's objection at that time; however, we note that H.A. did not testify regarding the contents of the computer. We discuss the other evidence in more detail as we address the issues raised by Anderson on appeal.

Following the trial, which lasted one day, the jury returned a guilty verdict and recommended a sentence of imprisonment of four years. After reviewing the pre-sentencing report and the sexual offender evaluation report, the court imposed a sentence consistent with the jury's recommendation. Anderson then filed a motion for a new trial. The court denied that motion, and this appeal followed.

## ANALYSIS

As noted above, Anderson argues that the trial court erroneously admitted evidence of prior bad acts; erroneously denied his motions for a mistrial; and erroneously denied his motion for a new trial. We address each issue in turn.

### A. Admission of KRE 404(b) Evidence

The standard of review regarding admission of evidence is whether there has been an abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by

sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Anderson makes two arguments with regard to the admission of evidence pursuant to KRE 404(b). The first is that he did not receive timely notice of the Commonwealth's intent to introduce that evidence, and the second is that the evidence was not properly admissible under any exception to KRE 404(b). We separately address each argument below.

### 1. Timeliness of Notice

KRE 404(c) provides that the Commonwealth is required to "give reasonable pretrial notice to the defendant of its intention to offer" KRE 404(b) evidence. The Commonwealth, apparently through an oversight, did not file its motion to introduce KRE 404(b) evidence until three days before the trial. Although he admits that he knew of the existence of the evidence for several months before the trial, Anderson argues that the Commonwealth's failure to give more timely notice unduly limited his ability to appropriately challenge its admissibility through a written motion *in limine*. The Commonwealth argues that Anderson waived any objection to the motion.

As he admits, Anderson had adequate knowledge of the existence of the KRE 404(b) evidence. Furthermore, although he may not have had adequate time to file a written motion *in limine* regarding the admissibility of that evidence, he did make an adequate argument regarding admissibility at the June 10, 2011, pre-trial hearing. Because Anderson knew of the existence of the evidence long

before trial and was able to make a reasoned argument against its admission, the Commonwealth's failure to more timely file its notice was not prejudicial.

## 2. Admissibility of Evidence

Anderson also objects to the trial court's admission of testimony by both J.S. and H.A. We address J.S.'s testimony first.

### a. J.S.'s Testimony

J.S. testified that Anderson engaged in two "methods" of abuse. The first involved Anderson dragging her to his and H.A.'s bedroom, removing or having her remove her shirt, and sucking on her "boobs" while he attempted to fondle her through her pants. J.S. testified that she screamed for help while Anderson was abusing her and that this type of abuse occurred several times during the year before she reported being abused to her school counselor.

The second method involved Anderson practicing his massage techniques on J.S. while she was unclothed. According to J.S., Anderson massaged her twice and, while massaging her, he digitally penetrated her vagina. According to Anderson, one of the massage incidents formed the basis for the indictment and only evidence regarding the massage incidents should have been admitted into evidence. Anderson argues that evidence regarding the other incidents of abuse should have been excluded because they involved activities and allegations of force not alleged in the massage incidents. We disagree that this evidence should have been excluded.

Pursuant to KRE 404(b), 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)(1). However, such evidence may be admissible if offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* This list of exceptions is not exhaustive but illustrative, and prior bad acts may be admitted to show un-enumerated exceptions such as common scheme or plan or *modus operandi*. See *Commonwealth v. English*, 993 S.W.2d 941, 943-45 (Ky. 1999); *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998). Furthermore, such evidence may also be admitted if it is "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)(2).

We agree with Anderson that the exceptions to the proscription against admitting KRE 404(b) evidence must be strictly construed because of the significantly higher degree of potential prejudice associated with this type of evidence. See *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). Furthermore, we agree with Anderson that there are some significant differences between the two methods of abuse. However, as noted by the Supreme Court of Kentucky in *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002), "[e]vidence of similar acts perpetrated against the same victim is almost always admissible" when offered "to prove intent, plan, or absence of mistake or accident."

In this case, J.S.'s testimony about the abuse that occurred in Anderson's and H.A.'s bedroom is evidence of Anderson's intent to abuse her when massaging her. Furthermore, it is evidence that any inappropriate touching by Anderson during the massage was not a mistake or accident. Therefore, the evidence was admissible.

We note Anderson's reliance on *Woodlee v. Commonwealth*, 306 S.W.3d 461 (Ky. 2010) to support his argument that the abuse that occurred in the bedroom was too dissimilar from the massage abuse to fall within any of the KRE 404(b)(1) exceptions. However, *Woodlee* is distinguishable. *Woodlee* was charged with sexually abusing his six-month-old child. At trial, another child of *Woodlee*'s testified regarding his sexual abuse of her, which began when she was four or five years old. The acts described by the older child were different from those involving the six-month-old child.

The Supreme Court noted that the Commonwealth had offered the testimony of the older child to establish *modus operandi* because the six-month-old victim was too young to testify. However, the Court held that the older child's testimony should have been excluded because the evidence involved different victims of different ages and different acts. Therefore, it was too dissimilar to show *modus operandi*.

Here, we do not have different victims. Furthermore, the evidence was not offered to prove *modus operandi* because J.S., unlike the six-month-old



child, could identify her abuser. Therefore, the similarity required by the Supreme Court in *Woodlee* was not necessary to render J.S.'s testimony admissible.

#### b. H.A.'s Testimony

Anderson argues that the court erroneously denied his motions for a mistrial based on H.A.'s testimony about his prior criminal conviction, his intoxication, and his abandonment of J.S. and her brother when H.A. was out of town on business. We begin our analysis of these arguments by noting that the trial court is in the best position to evaluate when a mistrial is required. *Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001). Therefore, we review the court's decisions regarding whether to grant a mistrial for an abuse of discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). With this standard of review in mind, we separately address each of Anderson's arguments regarding H.A.'s testimony below.

##### i. Anderson's Prior Criminal Conviction

On direct examination, the Commonwealth asked H.A. about the history of her relationship with Anderson. In response, H.A. indicated that, before they got back together in 2007, she had corresponded with Anderson while he was incarcerated. Anderson did not immediately object to this testimony.

Later, the Commonwealth asked H.A. whether Anderson had worked during the marriage. H.A. testified he had not, noting that Anderson had difficulty

finding a job because of his "past record." At that point, Anderson's counsel objected and moved for a mistrial. In support of his motion, Anderson's counsel argued that H.A.'s "past record" testimony and her testimony that Anderson had been incarcerated was inadmissible evidence of a prior crime. The trial judge denied Anderson's motion; however he offered to admonish the jury. Anderson stated that he believed an admonition would do more harm than good, and H.A. resumed her testimony.

On appeal, Anderson argues this testimony was inadmissible KRE 404(b) evidence, and the Commonwealth had not provided the required pre-trial KRE 404(c) notice. The Commonwealth argues that the statements by H.A. were not solicited but spontaneous and that Anderson failed to properly preserve the issue when he did not request an admonition.

We agree with Anderson that H.A.'s testimony regarding his incarceration and "past record" is not admissible under any of the exceptions in KRE 404(b). However, a mistrial is not necessarily the solution when evidence of past crimes comes before the jury by way of a non-responsive answer. In those instances, "this court must look at all of the evidence and determine whether the defendant has been unduly prejudiced by that isolated statement." *Phillips v. Commonwealth*, 679 S.W.2d 235, 237-38 (Ky. 1984). Furthermore, we must keep in mind that most prejudicial events can be cured by an admonition and the trial court should only grant a motion for a mistrial when no other remedy will provide

relief to the moving party. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 740 (Ky. 1996).

Having reviewed the record, we discern no abuse of discretion in the trial court's denial of Anderson's motion for a new trial based on these two statements by H.A. for four reasons. First, H.A.'s statements were not directly elicited by the Commonwealth. Second, Anderson did not object to H.A.'s statement that he had been incarcerated until several minutes later. Third, as noted by the trial court, the jury was as likely to interpret H.A.'s "past record" testimony to be a reference to Anderson's work history as to his criminal history. Fourth, although Anderson disagreed, an admonition could have cured any undue prejudice Anderson may have suffered. Therefore, as previously stated, the trial court did not abuse its discretion.

ii. Anderson's Substance Abuse/Intoxication and His  
Abandonment of J.S. and Her Brother

H.A. testified that she went out of town on business for two and a half days in early March 2010. While she was out of town, H.A. learned that Anderson had left the house and the children unattended overnight during her trip. When H.A. returned, Anderson picked her up at the airport, and "told [her] the same story he always [told her]." H.A. then testified that she asked Anderson to leave approximately one week later because she "did not want that crap<sup>1</sup> in the house." According to H.A., Anderson's mother dropped off Anderson, who was intoxicated, at H.A.'s house two weeks later and told H.A. that Anderson was her

<sup>1</sup> It is unclear from H.A.'s testimony whether she was referring to alcohol or illegal drugs.

"responsibility." Anderson stayed in the house for a period of time while they attempted to get him into "rehab."

At that point in H.A.'s testimony, Anderson's counsel objected, arguing that evidence of Anderson's intoxication/efforts to enter rehab was impermissible KRE 404(b) evidence. The court overruled the objection, noting that the evidence was not character evidence and was not being offered to show that Anderson's actions were in conformity therewith. We note that Anderson's counsel did not ask the court to declare a mistrial or to issue an admonition at that time.

H.A. continued to testify and, during cross-examination, Anderson revisited the intoxication issue, pointing out that H.A. trusted Anderson to watch the children and/or drive with the children despite his intoxication issues. Following H.A.'s testimony, the court declared a recess. During the recess the court revisited Anderson's objection to H.A.'s testimony. The Commonwealth argued that the evidence was part of the history of the relationship between Anderson and H.A. Anderson reiterated his argument that the testimony was impermissible KRE 404(b) evidence for which the Commonwealth had not provided appropriate notice. The judge stated that, after further consideration, he would sustain the objection regarding Anderson's intoxication and asked if counsel wanted him to admonish the jury. Counsel then moved for a mistrial, a motion the court, implicitly, if not explicitly, overruled. As an admonition, counsel stated that he wanted to determine whether Anderson would testify before asking the court to

give one. Anderson ultimately testified, and counsel did not re-visit the court's offer to admonish the jury.

On appeal, Anderson argues that this testimony by H.A. was also impermissible evidence of prior bad acts, and that he did not receive the requisite notice from the Commonwealth that it intended to offer the evidence. The Commonwealth argues that H.A.'s testimony was admissible because it is "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."

First, we note that the Commonwealth's argument is not helpful. KRE 404(b)(2) does provide that inextricably intertwined evidence is admissible. However, KRE 404(c) provides that the Commonwealth must give notice that it intends to introduce KRE 404(b)(2) evidence. The Commonwealth herein gave no such notice regarding evidence of Anderson's intoxication and his abandonment of the children. Therefore, whether the evidence was inextricably intertwined or not is irrelevant.

However, as with H.A.'s other testimony, we discern no error in the trial court's actions regarding the intoxication/rehab testimony. While the court did ultimately find that the evidence of Anderson's intoxication was inappropriately admitted, that improper admission was not so prejudicial as to mandate a mistrial and could have been cured with an admonition. Furthermore, any error in the court's admission of H.A.'s testimony regarding Anderson's abandonment of the

children also was not so prejudicial as to mandate a mistrial in lieu of an admonition.

#### B. Denial of Motion for New Trial

Anderson timely filed a motion for a new trial. In support of his motion, Anderson stated that he had discovered "new evidence." That evidence consisted of an affidavit from Anderson's son (A.A.) indicating that he had been present during Anderson's massage of J.S., that J.S. was clothed, and that it was clear Anderson was "practicing for school." Anderson stated that he did not become aware of this evidence until the jury was deliberating regarding what penalty to recommend.

During the hearing on the motion, Anderson's counsel admitted he had contemplated calling A.A. as a witness. Therefore, A.A. was "out in the hall" during the trial. Counsel stated that he did not discuss the massage with A.A. because counsel did not know that there would be testimony about the massage until just before the trial. Furthermore, counsel stated that he was surprised by J.S.'s testimony that Anderson had digitally penetrated her during the massage, because she had not revealed that fact to anyone prior to her testimony at trial. The Commonwealth objected to the motion, noting that Anderson's son was available to testify and that Anderson could have discovered this evidence before the case was submitted to the jury. The court, in a handwritten docket sheet notation, denied Anderson's motion.

As set forth in Kentucky Rule of Criminal Procedure (RCr 10.02):

Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice. If trial was by the court without a jury, the court may vacate the judgment, take additional testimony and direct the entry of a new judgment.

We review a trial court's denial of a motion for a new trial for abuse of discretion.

*Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003).

"One of the prerequisites for granting a new trial on newly discovered evidence is diligence on the part of [the] accused and his counsel to discover the evidence relied upon." *Hunter v. Commonwealth*, 259 S.W.2d 74, 75 (Ky. 1953). Counsel for Anderson stated that he knew several months before trial the contents of the Commonwealth's notice that it would use KRE 404(b) evidence. In that notice, the Commonwealth indicated that it would put on evidence of a phone call between H.A. and Anderson, wherein Anderson stated that he had given J.S. a massage while J.S. was unclothed. The notice also stated that J.S. would testify that Anderson had been sexually abusing her for one year before the charged incident. The Commonwealth specifically notified Anderson that it would be introducing that evidence three days before trial. Therefore, as noted above, Anderson's claim that he was unfairly surprised by this evidence is not persuasive.

Furthermore, Anderson's counsel admitted that A.A. was present, although not in the courtroom, throughout the trial. When J.S. testified that Anderson had digitally penetrated her while massaging her, nothing prevented counsel or Anderson from determining if A.A. had observed any such behavior. Thus, it

appears that Anderson and/or his counsel could have determined, through the exercise of due diligence, what A.A. knew and what he could testify to. Because this evidence could have been discovered, we discern no error in the trial court's denial of Anderson's motion for a new trial.

### C. Cumulative Error

Finally, Anderson argues that the cumulative effect of the alleged errors resulted in his receiving an unfair trial. Based on our review of the record, any errors, whether we consider them individually or cumulatively, do not rise to the level necessary to merit reversal.

### CONCLUSION

We discern no error in the trial court's evidentiary rulings nor in its denials of Anderson's motions for a mistrial or his motion for a new trial. Therefore, we affirm.

ALL CONCUR.

#### BRIEFS FOR APPELLANT:

S. Ryan Newcomb  
Frankfort, Kentucky

#### BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky