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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002091-MR

JAMES STROHMAIER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 11-CR-002591

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: James Strohmaier appeals from the Jefferson Circuit Court's judgment of conviction and sentence, arguing that a mistrial should have been granted. For the following reasons, we affirm.

On June 8, 2011, Strohmaier and his wife (the victim) got into an altercation which resulted in his arrest for alleged domestic abuse. During trial, Strohmaier

moved for a mistrial based on three instances of the victim's testimony involving alleged prior bad acts, which Strohmaier argued was inadmissible evidence under KRE[1] 404(b). Strohmaier also moved for a mistrial based on the Commonwealth's inquiry into his post-arrest silence. The trial court denied his motions and at the conclusion of the four-day trial entered a judgment of conviction against him for assault in the fourth degree and terroristic threatening in the third degree. In accordance with the jury's recommendation, the trial court sentenced Strohmaier to twelve months and a $500 fine for the assault conviction, ninety days and a $250 fine for the terroristic threatening conviction, to run concurrently for a total sentence of twelve-months' imprisonment and a $500 fine. The record shows Strohmaier received shock probation. Strohmaier now appeals.

Our standard for reviewing a trial court's denial of a mistrial is as follows:

> A mistrial is an "extreme remedy" of last resort and is appropriate only when there appears in the record a manifest necessity. The central inquiry is whether either party's right to a fair trial has been infringed upon. On appellate review, we review the trial court's decision for an abuse of discretion.

York v. Commonwealth, 353 S.W.3d 603, 607 (Ky. 2011) (internal citations omitted).

Strohmaier claims the first instance of alleged prior bad act evidence occurred when the victim described his womanizing, excessive drinking, and other guilty pleasures as the source of the argument that led to the domestic violence. Strohmaier argues this testimony violated the terms of the court's pre-trial order

[1] Kentucky Rules of Evidence.

prohibiting references to prior instances of domestic violence, marijuana use by Strohmaier, his prior DUI conviction that occurred over 15 years ago, and Strohmaier's falsification of a job application related to the DUI conviction. Strohmaier also argues the victim's testimony is inadmissible under KRE 404(b).

Under KRE 404(b), evidence of prior bad acts is generally inadmissible unless offered for some reason other than to purely harm another's character; such as to show motive, intent, or a lack of mistake. KRE 404(b)(1). In order for evidence of any nature to be admissible, it must be relevant and its prejudicial effect must not outweigh its probative value. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 302 (Ky. 2008) (citing KRE 403).

In *Barnett v. Commonwealth*, 317 S.W.3d 49 (Ky. 2010), the victim's brother testified that he did not really know the defendant but knew he had been "in court some and in trouble some." *Id.* at 59. Upon the defendant's objection, the court denied a motion for a mistrial and instead admonished the jury to disregard the statement. *Id.* The court concluded that the statement was isolated and ambiguous, did not refer to any specific act by the defendant, and no reason was shown as to why the jury would be unable to follow the admonition. *Id.* Accordingly, the court determined the admonition cured any error. *Id.*

In *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006), the Commonwealth played taped statements by the defendant and lowered the volume during references to his criminal history, but the jury still inadvertently heard references to his criminal past (jail and probation). *Id.* at 691. Upon the defendant's objection,

the court denied the motion for a mistrial and admonished the jury instead, a decision which the Supreme Court of Kentucky declined to disturb. *Id.*

In the case at bar, the Commonwealth instructed the victim before trial not to mention the topics included in the court's pre-trial order: prior instances of domestic violence, marijuana use by Strohmaier, his prior DUI conviction that occurred over 15 years ago, and Strohmaier's falsification of a job application related to the DUI conviction. We have reviewed the record and do not find that the victim's isolated comment violated the pre-trial order. Her remark was more of an "off the cuff" comment, made during the course of a four-day trial, which was interrupted by Strohmaier's objection. We do not believe any prejudicial effect on Strohmaier was substantial enough to warrant the extreme remedy of a mistrial.[2]

Next, Strohmaier argues that a mistrial should have been granted when the victim testified that "it" happened quite often, which Strohmaier interprets as referring to prior acts of domestic violence. However, a review of the record reveals the statement was too vague to be inadmissible as a prior bad act under KRE 404(b) and the testimony had no prejudicial effect on Strohmaier.

In *Peyton v. Commonwealth*, 253 S.W.3d 504 (Ky. 2008), the court held that a deputy's testimony that he "had dealt with [defendant] on many different occasions," was not inadmissible under KRE 404(b) because the statement was "vague and did not allude to any particular bad act [defendant] committed." *Id*. at

[2] We note that a curative admonition may have been appropriate had Strohmaier requested one. A trial court is not required to *sua sponte* give a curative admonition. *Caudill v. Commonwealth*, 120 S.W.3d 635, 658 (Ky. 2003).

517. Additionally, in *Commonwealth v. Mitchell*, 165 S.W.3d 129 (Ky. 2005), the court held that a detective's testimony that his informant had identified targets based on prior transactions was not descriptive enough to fall under KRE 404(b)'s prior bad acts. *Id.* at 134.

Here, the trial court held a bench conference to address Strohmaier's objection, during which both the Commonwealth and the trial court agreed that the victim's testimony was ambiguous. Thereafter, the trial court allowed the victim to clarify her statement and the victim clarified "it" referred to her tendency to apologize when she and Strohmaier argued. After the victim clarified her statement, any conceivable prejudicial effect on Strohmaier was cured and no basis for a mistrial remained.

Next, Strohmaier argues that a mistrial should have been granted when the victim was allowed to testify about another argument they had a few weeks prior to the argument at issue. Put into context, Strohmaier's counsel questioned the victim about the self-inflicted scratches on her arm. The victim testified that Strohmaier's behavior - threatening choking gestures and verbal threats that he would either kill her or make her want to kill herself – led her to scratch herself, during both the incident in question and during a previous argument they had. The Commonwealth asserts the victim's mentioning of the prior argument was admissible under the doctrine of curative admissibility since Strohmaier "opened the door" by questioning the victim about the self-inflicted scratches on her arms. "Opening the door" generally occurs when one party offers inadmissible evidence,

causing the other party to offer additional inadmissible evidence to counterbalance or negate the prejudicial impact of the initial inadmissible evidence. *Norris v. Commonwealth*, 89 S.W.3d 411, 414 (Ky. 2002) (citing 1 Wigmore, *Evidence in Trials at Common Law*, 731 (Tillers' rev. 1983)).

We do not believe the doctrine of curative admissibility applies in this instance since Strohmaier's initial question about whether the victim scratched herself was not inadmissible. Therefore, the question did not require additional inadmissible evidence for clarification. Instead, the proper analysis is whether the victim's mentioning of their prior argument while explaining her self-inflicted scratches was admissible under KRE 404(b).

As stated above, evidence that is purely intended to paint the other party's character in a negative light and show conformity therewith is inadmissible under KRE 404(b). But if an exception exists under KRE 404(b)(1) or (2), then the evidence may be admitted. KRE 404(b)(1) allows for the admission of evidence offered as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" KRE 404(b)(2) allows for the admission of evidence "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."

In *Noel v. Commonwealth*, 76 S.W.3d 923 (Ky. 2002), the court held that a victim's testimony that she had been sexually abused by the defendant "more than one time" fell within the purview of the KRE 404(b)(1) exception when offered to

prove intent, plan, or absence of mistake or accident. *Id.* at 931. The court noted, "evidence of similar acts perpetrated against the same victim are almost always admissible for those reasons." *Id*.

Here, the victim's testimony was offered to show a similar pattern of behavior and to establish intent, motive, plan, or an absence of mistake or accident. Therefore, her testimony was admissible under the KRE 404(b)(1) exception, was relevant to the charges against Strohmaier, and its probative value outweighed any prejudicial effect. Accordingly, the trial court did not abuse its discretion by denying Strohmaier's motion for a mistrial on this basis.

Lastly, Strohmaier contends he should have been granted a mistrial based on the Commonwealth's inquiry into his post-arrest silence. Strohmaier testified on direct examination that after being arrested and taken into custody, he was not read his *Miranda* rights, was never asked his version of the events and police did not take a statement from him. On cross-examination, the Commonwealth clarified that Strohmaier had never provided the police with his version of the story. Defense counsel objected and argued during the bench conference that the Commonwealth was improperly commenting on Strohmaier's Fifth Amendment right to remain silent. The Commonwealth responded that Strohmaier had waived his right to object to any discussion about his silence since defense counsel raised the topic first. Strohmaier moved for a mistrial, which the trial court denied.

The Fifth Amendment privilege against self-incrimination "'protects an accused only from being compelled to testify against himself, or otherwise provide

the State with evidence of a testimonial or communicative nature.'" *Byrd v. Commonwealth*, 2007-SC-000706-MR, 2008 WL 5051612 (Ky. Nov. 26, 2008) (quoting *Schmerber v. California,* 384 U.S. 757, 761, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). "A defendant's silence may be used against him for some impeachment purposes." *Byrd*, at *3 (citing *Jenkins v. Anderson,* 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) (allowing impeachment use of pre-arrest, pre-*Miranda* warnings silence where defendant testified); *Fletcher v. Weir,* 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) (allowing impeachment use of post-arrest, pre-*Miranda* warnings silence where defendant testified). *But see Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (disallowing impeachment use of post-*Miranda* warnings silence where defendant testified)).

The present case is analogous to *Fletcher v. Weir*, in which the United States Supreme Court held that "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." 455 U.S. at 607, 102 S.Ct. at 1312. Here, Strohmaier was never read his *Miranda* rights or asked to give a statement post-arrest. Defense counsel questioned Strohmaier about his silence on direct examination and the prosecutor was permitted to follow up on this line of questioning for impeachment purposes during cross examination. Thus, no mistrial was warranted.

For the foregoing reasons, the Jefferson Circuit Court's judgment of conviction and sentence is affirmed.

ALL CONCUR.

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