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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000520-MR

KIMBERLY HOLMES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA BISIG MCCORMICK, JUDGE
ACTION NO. 12-CR-000143

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

VANMETER, JUDGE: Kimberly Holmes appeals from the Jefferson Circuit

Court's judgment of conviction and sentence which found her guilty of fourth-

degree assault. For the following reasons, we reverse and remand this case to the

trial court for further proceedings.

In 2011, Kimberly and her husband, Andrew McCarty, were living with Andrew's grandmother, Wanda McCarty, in Wanda's home. The parties agreed that Kimberly and Andrew would pay \$400 per month in rent, and would help with household chores. By November 2011, Kimberly and Andrew had stopped paying Wanda rent, and Wanda claimed they were not cleaning up after themselves. Doctors advised Wanda that she should not let others live with her because it caused her stress. Allegedly, a pattern emerged in which Wanda would ask Andrew and Kimberly to move out, then relent and allow them to stay.

Wanda testified that on November 12, 2011, she was involved in an argument with Kimberly and Andrew, which resulted in Kimberly grabbing her forearm and allegedly digging her nails into Wanda's skin while yelling at Wanda "hit me, hit me" multiple times. Wanda also testified that she felt someone strike her upper arm, but she did not see who did it. A bruise and gouge marks were left on Wanda's arm, but Wanda testified that she bruised easily due to her age. Ultimately, Kimberly and Andrew were each charged with knowingly abusing or neglecting an adult, pursuant to KRS¹ 209.990(2), and Andrew was also charged with one count of terroristic threatening in the third degree under KRS 508.080.

A joint jury trial was held from January 29 through January 31, 2013. The jury acquitted Kimberly of knowing abuse or neglect of an adult, as well as wanton abuse of an adult by a caretaker, but the jury found her guilty of assault in the fourth degree. The jury recommended a sentence of 120 days and a \$500 fine. At

¹ Kentucky Revised Statutes.

final sentencing, pursuant to KRS 534.060, the court converted the \$500 fine to 30 days to serve to run concurrently with the other sentence. This appeal follows.

Kimberly raises two issues on appeal. First, she contends the trial court erred by permitting the Commonwealth to present evidence of her alleged drug use. Second, she claims the trial court erred by refusing to allow her to present evidence of Andrew's history of domestic violence. An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion, *i.e.* "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Barnett v. Commonwealth*, 317 S.W.3d 49, 61 (Ky. 2010) (citation and quotations omitted).

Kimberly first asserts that the trial court erred by allowing inquiry into her alleged drug use to be presented at trial. Although Kimberly objected, the trial court allowed this evidence to be presented as part and parcel of why Wanda wanted Kimberly and Andrew out of the house. The Commonwealth asked Kimberly during cross-examination whether Wanda had expressed concern about Kimberly and Andrew using heroin. The Commonwealth further asked Kimberly about Wanda's claim that Kimberly had once purchased drugs in her presence. Kimberly denied both the drug use and the drug purchase and moved for a mistrial, which the trial court denied.

Kimberly claims this evidence is inadmissible prior bad acts evidence under KRE² 404(b), which states:

² Kentucky Rules of Evidence.

(b) Other crimes, wrongs, or acts. 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. It may, however, be 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.

“[T]he thrust of KRE 404(b) has always been interpreted as *exclusionary* in nature.” *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). “[T]he unaltered proposition of the rule is that ‘evidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character.’” *Id.* at 888-89 (citation omitted). The burden is on the Commonwealth to prove: 1) the other crimes evidence is relevant for some purpose other than proving the criminal disposition of the accused; 2) the evidence of the other crime is sufficiently probative of its commission so as to warrant its introduction into evidence; and 3) the probative value of the evidence is not substantially outweighed by the potential for prejudice arising from introduction of the evidence. *See id.* at 888-90. Kimberly argues that the drug-related evidence was both irrelevant to the charges against her and unfairly prejudicial.

The Commonwealth claims the evidence of Kimberly's drug use is inextricably intertwined with proof of the stress Kimberly caused Wanda, and the reason why Wanda asked Kimberly and Andrew to vacate her residence. While we understand how this evidence might be inextricably intertwined with evidence of Wanda's stressors, we fail to appreciate how the amount of stress Wanda suffered tended to prove an element of any of the charged offenses. The Kentucky Supreme Court has held that evidence of a defendant's drug use runs afoul of KRE 404(b) when the drug use was not linked to the charged crimes. *See Chavies v. Commonwealth*, 374 S.W.3d 313, 321 (Ky. 2012) (evidence of defendant's marijuana use in a trial for sexual abuse was inadmissible under KRE 404(b) where the Commonwealth presented no evidence linking the marijuana use to the charged crimes). None of the charges against Kimberly required a finding of stress, and further, sufficient evidence of Wanda and Kimberly's tumultuous relationship was available absent the potentially prejudicial drug evidence. Thus, we believe evidence of Kimberly's alleged drug use was both irrelevant and unfairly prejudicial and therefore, such evidence should have been excluded.

Next, Kimberly argues that she should have been allowed to introduce, as part of her defense, evidence of Andrew's past acts of domestic violence against her. We disagree. While we are reversing, we will address this issue since it may arise on remand. This evidence was properly excluded prior bad acts evidence under KRE 404(b). Kimberly admits in her brief that this evidence would have been offered to prove "that she was a victim, not a perpetrator of violence." She

offers no other purpose for the evidence other than proving Andrew's violent character and conformity therewith, which is clearly impermissible propensity evidence. Further, Andrew's past acts of domestic violence against Kimberly are irrelevant to the incident with Wanda. Hence, the court properly refused to admit such evidence.

For the foregoing reasons, the Jefferson Circuit Court's judgment and sentence is reversed and remanded for further proceedings consistent with this opinion.

CAPERTON, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: Notwithstanding my understanding and appreciation of the majority's analysis, I must respectfully dissent. While, generally, KRE 404(b) is exclusionary in nature, an exception to that rule applies in this case.

Kimberly took the stand and admitted grabbing Wanda. Her explanation for doing so – her *motive* – was to “calm down” a woman she described as easily stressed, subject to mood swings, and “very particular about things.” That might seem a reasonable explanation – an acceptable *defense* to the charges of abuse and assault. But Kimberly's description of her calming an overly-sensitive, irascible granny did not paint the whole picture.

The Commonwealth sought to impeach Kimberly's testimony of her motive and defense for her unwanted touching of Wanda. At a bench conference, the Commonwealth sought permission to introduce evidence that Wanda was not just an unreasonable, cranky old woman. With the court's permission, evidence of Kimberly's drug use would be offered to show that Wanda was stressed by more than "little, little things." Nothing indicates the Commonwealth intended that Kimberly's drug use was to prove her character or that her assault was in conformity with her drug use. The trial court accepted that explanation as do I.

Furthermore, the trial court properly limited the scope of cross-examination as to that evidence. Specifically, the court instructed the Commonwealth that if Kimberly admitted using drugs, the inquiry was to end. As the cross-examination proceeded, without Kimberly's admitting to drug use, the trial court further cabined the line of questioning, directing the Commonwealth to avoid a mini-trial on the issue.

The trial court did a commendable job of controlling the introduction of this evidence, thereby minimizing the prejudicial impact of the evidence. Kimberly could have minimized any prejudice even more had she requested a limiting instruction, but she chose not to do so.

We should defer to the considerable discretion trial courts enjoy when applying the Kentucky Rules of Evidence. There was no abuse of that discretion in this case.

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