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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-000252-ME

GREGORY JOHNSON APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 14-D-500008

BREANA FUQUA APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Gregory Johnson appeals from the entry of a Domestic Violence Order ("DVO") rendered in Jefferson Family Court restraining him from additional acts of violence or further contact with his former girlfriend, Breana Fuqua. Johnson contends that the Family Court abused its discretion when it admitted evidence of prior domestic violence petitions that had been filed against

him by petitioners other than Fuqua. We conclude that the admission of this evidence was harmless error, and AFFIRM the Order on appeal.

Johnson and Fuqua are unmarried and share custody of their minor child. On January 2, 2014, Fuqua filed a Petition in Jefferson Family Court alleging that on January 1, 2014, she traveled to a gas station in Jefferson County, Kentucky, for the purpose of picking up the child from Johnson. Fuqua alleged that after waiting for one hour, she called Johnson, who told her that he was not going to return their daughter to her. According to the Petition, Johnson stated that if she called the police, he would shoot her in the head. Fuqua allegedly did call the police, who did not intervene because Johnson was the child's biological father. Fuqua also maintained that there was a pattern of domestic disputes in the past, including Johnson's alleged threat in September, 2013, that he would kill Fuqua in front of the trial judge when they adjudicated custody.

Based on these allegations, the Jefferson Family Court rendered an Emergency Protective Order and scheduled a hearing on the DVO for January 13, 2014. The hearing was conducted on the scheduled date, during which Johnson denied making any threats to Fuqua. Fuqua testified in support of the allegations set out in her Petition. Evidence was also adduced that Fuqua exchanged a number of friendly texts with Johnson earlier in the day on January 1, 2014, including asking if he had a girlfriend and if he wanted to get together for sex. According to the testimony, she only became angry when he failed to appear at the gas station as they had previously agreed. Johnson testified that he was late to the gas station

because he had to drive a long distance from Prospect and that Fuqua was already gone when he arrived. Later in the day, Fuqua picked up their daughter at the home of Johnson's grandmother.

According to the record, Judge Fitzgerald told Johnson that "it looks like you have been in trouble at least three times before for making the types of threats to other people that you have made against Breana." Judge Fitzgerald and Johnson then discussed a prior petition filed against Johnson by Antoisha Thompson, and another petition filed against Johnson by his mother, Sharon Malone. The Court then clarified that one of Malone's petitions was filed against another woman, and Judge Fitzgerald asked Johnson if he recalled his mother filing a petition when he was 17 years old alleging terroristic threatening and disorderly conduct. Johnson told the Court that he remembered a disorderly conduct incident which occurred outside a courtroom.

The hearing concluded, and the Court determined that a preponderance of the evidence demonstrated that Johnson had engaged in domestic violence by threatening Fuqua and that he may do so again. The Court then entered the DVO and this appeal followed.

Johnson now argues that the Family Court erred in rendering the DVO. In support of this contention, Johnson maintains that the Court abused its discretion when, in violation of Kentucky Rules of Evidence (KRE) 404b, it improperly admitted evidence of the prior DVO petitions filed by third parties, and then relied on this evidence to conclude that further violence or threats of violence

may occur again as against Fuqua. Johnson, through counsel, directs our attention to KRE 404(b), which excludes evidence of unrelated crimes, wrongs or bad acts, and argues that none of the exceptions to this evidentiary rule is applicable herein. Johnson notes that one of the prior petitions had been dismissed by the Court, another taken out more than four years earlier when Johnson was 17 years old, and none pertained to Fuqua. In sum, Johnson argues that the Court's admission of and reliance upon the domestic petitions filed by third parties constituted an abuse of discretion, and he seeks an Opinion reversing and remanding the matter for reconsideration.

KRE 404(b) provides in relevant part that,

> 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[.]

As a general rule, evidence of crimes or bad acts other than that charged is not admissible. KRE 404(b); Lawson, *Kentucky Evidence Law Handbook* § 2.25 (3rd. ed.1993). However, evidence of other crimes or wrongful acts may be introduced as an exception to the rule if relevant to prove motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(1). "To be admissible under any of these exceptions, the acts must be relevant for some purpose other than to prove criminal predisposition[,]" and they

must be "sufficiently probative to warrant introduction[.]" *Chumbler v. Commonwealth,* 905 S.W.2d 488, 494 (Ky. 1995) (citing *Clark v. Commonwealth,* 833 S.W.2d 793, 795 (Ky. 1991)). Additionally, "the probative value [of the evidence] must outweigh the potential for undue prejudice to the accused." *Id.*

The Kentucky Supreme Court has stressed that KRE 404(b) is exclusionary in nature, and as such, any exceptions to the general rule that evidence of prior bad acts is inadmissible "should be closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences[.]" *O'Bryan v. Commonwealth,* 634 S.W.2d 153, 156 (Ky. 1982). To determine the admissibility of prior bad act evidence, the Kentucky Supreme Court adopted the three-prong test as set out in *Bell v. Commonwealth,* 875 S.W.2d 882, 889–91 (Ky. 1994), which considers the proposed evidence in terms of its: (1) relevance, (2) probative value, and (3) prejudicial effect. We review the trial court's application of KRE 404(b) for an abuse of discretion. *Anderson v. Commonwealth,* 231 S.W.3d 117, 119 (Ky. 2007).

In *West v. Commonwealth*, 2013 WL 3155835 (Ky. 2013), the Kentucky Supreme Court distinguished between the admissibility of prior bad acts by the respondent against the petitioner versus bad acts by the respondent against third parties.[1] In concluding that prior bad acts against the petitioner may be admissible, the Court determined that the probative value of the evidence outweighed its prejudicial value. *Id.* at p.4. It reached this conclusion by looking

[1] *West* addressed the violation of a DVO, along with related criminal charges.

to the DVO statute, KRS Chapter 403, which requires as a basis for issuing a DVO proof that an act of domestic violence "may again occur[.]" That is to say, the prior bad acts committed by the respondent against the petitioner may be relevant to demonstrate that future acts of domestic violence may again occur, and are therefore admissible in a DVO hearing (KRS 403.745).[2] Conversely, the Court in *West* concluded that evidence of prior bad acts against third parties was not admissible as it did not demonstrate that the respondent may again commit acts of domestic violence against the petitioner. *Id.* at p.6. While this is a fact-specific determination, the general principle is applicable herein. In applying KRE 404(b), *West* and its predecessor cases to the facts at bar, we conclude that evidence of Johnson's prior alleged bad acts against third parties should not have been admitted into evidence for the purpose of demonstrating that Johnson may commit further acts of domestic violence as against Fuqua.

However, we also conclude that such error was harmless.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting

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[2] *See also*, *Justice v. Justice*, 2005 WL 991338 (Ky. App. 2005), stating that:

> In this case the evidence [of prior domestic violence] was admissible to show that Kim had reason to be in fear of imminent physical injury or assault when Dennis called her at 11:30 p.m. the night their divorce became final. *See* KRS 403.720(1). It was also admissible to show a pattern of intimidation, abuse and control continuing over a period of years. In domestic violence cases such evidence is essential to the fact finder's determination of whether a DVO is warranted and, if so, what kind of protection and assistance should be provided. . . . The evidence was properly admitted.

> aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CR 61.01.

Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial. *Johnson v. Commonwealth,* 231 S.W.3d 800 (Ky. App. 2007). We conclude from the record that there is no substantial possibility that the result would have been any different - *i.e.,* that the DVO would not have been rendered - if the evidence in question had been excluded. In accordance with the statutory scheme which was promulgated to protect victims of domestic violence, Fuqua had a very low burden of proof. She merely had to demonstrate that she was "more likely than not" the victim of domestic violence and that such violence "may" occur again. *Commonwealth v. Anderson,* 934 S.W.2d 276, 278 (Ky. 1996); KRS 403.750. Domestic violence is defined as a "physical injury, serious physical injury, sexual abuse, assault, *or the infliction of fear of imminent physical injury*, serious physical injury, sexual abuse or assault between family members or members of an unmarried couple." KRS 403.720(1) (Emphasis added).

Fuqua's petition and supportive testimony, which the Court found credible, alleged that Johnson threatened to kill her on January 1, 2014, that he

repeatedly threatened her over the phone, that there were domestic disputes in the past, and that Johnson threatened to kill her in September 2013. Her testimony on January 13, 2014, met the burden that she was more likely than not the victim of domestic violence and that such violence may occur again. The admission of evidence that Johnson allegedly committed bad acts against third parties, though erroneous, was harmless.

For the foregoing reasons, we AFFIRM the Domestic Violence Order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rob Eggert
Louisville, Kentucky

NO BRIEF FOR APPELLEE