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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002012-MR
AND
NO. 2014-CA-002013-MR

ROBERT SHELBY CAUDILL — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NOS. 12-CR-00159 AND 12-CR-00180

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Robert Shelby Caudill appeals the Letcher Circuit Court's judgments convicting him of two counts of first-degree sexual abuse. After a careful review of the record, we reverse and remand for further proceedings because the circuit court abused its discretion in denying Caudill's motion to sever.

I. FACTUAL AND PROCEDURAL BACKGROUND

Caudill was indicted in Letcher Circuit Court case number 12-CR-00159 on one count of first-degree sexual abuse and one count of the use of a minor in a sexual performance. The victim in that case was H. C., a female minor child less than twelve years old. The following month, Caudill was indicted in a separate case in Letcher Circuit Court case number 12-CR-00180. In that case, he was indicted on one count of first-degree sexual abuse of a minor less than fourteen years old, one count of first-degree criminal solicitation to unlawful transaction with a minor under sixteen years old, and one count of first-degree indecent exposure, first offense. The victim in that case was B. C., a female minor child.[1]

The Commonwealth moved to consolidate the two cases for trial pursuant to RCr[2] 9.12, on the basis that the two cases "could have been joined in a single indictment or complaint." The court granted the motion.

A jury trial was held, and Caudill was convicted in case number 12-CR-00159 on one count of first-degree sexual abuse. Caudill was acquitted in that case on the charge of the use of a minor in a sexual performance. He was sentenced to a maximum term of five years of imprisonment, and his sentence was

[1] H. C. and B. C. are not related to each other and, according to H. C.'s trial testimony, they had not met until the night before trial began.

[2] Kentucky Rules of Criminal Procedure.

ordered to be served consecutively to his sentence in Letcher Circuit Court case number 12-CR-00180.

In case number 12-CR-00180, the charge of indecent exposure was dismissed before trial. The jury acquitted Caudill of the charge of first-degree criminal solicitation to unlawful transaction with a minor, and it convicted him on the charge of first-degree sexual abuse. Caudill was sentenced to a maximum term of two years of imprisonment, and his sentence was ordered to be served consecutively with his sentence in Letcher Circuit Court case number 12-CR-00159.

Caudill now appeals, contending that: (a) he suffered undue prejudice when the circuit court denied his motion to sever the charges into separate trials; and (b) the circuit court erred to Caudill's substantial prejudice when it failed to strike a particular juror for cause.

II. ANALYSIS

A. MOTION TO SEVER

Caudill first alleges that he suffered undue prejudice when the circuit court denied his motion to sever the charges into separate trials. "Whether charges should be tried separately or jointly lies within the sound discretion of the court." *Pennington v. Commonwealth*, 479 S.W.2d 618, 619-20 (Ky. 1972). Pursuant to RCr 6.18,

> [t]wo (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same

> indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

Further, RCr 9.12 provides:

> The court may order two (2) or more indictments, information, complaints or uniform citations to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment, information, complaint or uniform citation. The procedure shall be the same as if the prosecution were under a single indictment, information, complaint or uniform citation.
>
> However, RCr 8.31 (formerly RCr 9.16) states:
>
> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. . . .

The Kentucky Supreme Court has stated the following regarding joinder:

> The interaction of RCr 9.12 and RCr 6.18 allows the charges brought in separate indictments to be joined for trial only when the offenses are "of the same or similar character" or are "based on the same acts or transactions connected together or constituting parts of a common scheme or plan." When the conditions set forth in RCr 6.18 and RCr 9.12 are present, the trial judge has broad discretion to allow the joinder of offenses charged in

> separate indictments. We review such decisions for abuse of discretion. Nevertheless, to be reversible, an erroneous joinder of offenses must be accompanied by "a showing of prejudice" to the defendant. This showing of prejudice cannot be based on mere speculation, but must be supported by the record.
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> ****
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> Offenses are not "of the same or similar character" under RCr 6.18 simply because they involve conduct criminalized under the same chapter or section of the penal code.
>
> ****
>
> While temporal and geographic proximity will often be relevant considerations when the question is whether the "acts or transactions [are] connected together or constitut[e] parts of a common scheme or plan," those factors often have little to do with whether the offenses are "of the same or similar character."
>
> Upon consideration of the question on a previous occasion, we held that a "significant factor in identifying prejudice from joining offenses for a single trial is the extent to which evidence of one offense would be inadmissible in the trial of the other offense." *Rearick* [*v. Commonwealth*, 858 S.W.2d 185 (Ky. 1993)] holds, for example, that for sexual offenses to qualify for joinder as offenses "of the same or similar character," the crimes must be so strikingly similar as to meet the requirements for admission under KRE[3] 404(b) as set out in *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992), and *Gray v. Commonwealth*, 843 S.W.2d 895 (Ky. 1992).

Hammond v. Commonwealth, 366 S.W.3d 425, 428-29 (Ky. 2012) (internal citations and footnotes omitted).

[3] Kentucky Rules of Evidence.

In *Billings*, the Kentucky Supreme Court held that "for purposes of assessing the admissibility of evidence of collateral crimes" in the context of trials for sexual crimes, in which the "issue is the *corpus delicti*—whether the event occurred at all," it is appropriate "to treat the evidence as if offered to prove identity by similarity, and to require that the details of the charged and uncharged acts be sufficiently similar as to demonstrate a *modus operandi*." *Billings*, 843 S.W.2d at 892, 893.

Pursuant to KRE 404(b),

> [e]vidence 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.

The Supreme Court has

> construed KRE 404(b) as being exclusionary in nature since [i]t is a well-known fundamental rule that evidence that a defendant on trial had committed other offenses is never admissible unless it comes within certain exceptions, which are well-defined in the rule [KRE 404(b)] itself. For that reason, any exceptions to the general rule that evidence of prior bad acts is inadmissible should be closely watched and strictly enforced because of the dangerous quality and prejudicial consequences of this kind of evidence.

Clark v. Commonwealth, 223 S.W.3d 90, 96 (Ky. 2007) (internal quotation marks and footnotes omitted).

However, the list of exceptions enumerated in KRE 404(b)(1) "is illustrative, not exhaustive." *Id*. (footnote omitted). One such non-enumerated exception that has been recognized to the prohibition on introducing prior bad acts evidence is *modus operandi*. *Id*.

> The *modus operandi* exception requires the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*. If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible.

Id. (internal quotation marks and footnote omitted). It is important to note that "it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a *modus operandi*." *Id*. at 97 (internal quotation marks and footnote omitted).

> So, as a prerequisite to the admissibility of prior bad acts evidence, we now require the proponent of the evidence to demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual. Thus, [a]lthough it is not required that the facts be identical in all respects, evidence of other acts of sexual deviance . . . must be so similar to the crime on trial as to constitute a so-called signature crime.

Id. (Internal quotation marks and footnotes omitted). Yet, "conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the *modus operandi* exception. Instead, the *modus operandi* exception is met only if the conduct that meets the statutory elements evidences such a distinctive pattern as to rise to the level of a signature crime." *Id*. at 98.

In the present case, B. C. testified that she was twelve years old in 2003, when the incidents in question occurred.[4] She went with Caudill, who was her stepfather, to an electronics store that he owned for the purpose of getting a new cellular telephone. B. C. attested that while at the store, Caudill showed her pornography on a store computer. The pornography depicted two men and a woman engaging in sexual intercourse. Caudill told B. C. that he was going to teach her how to perform oral sex because she could make money performing oral sex.

B. C. testified that after they returned home and everyone had fallen asleep,[5] Caudill called B. C. into the bedroom he shared with B. C.'s mother,[6] and Caudill told B. C. that he could show her how to perform oral sex. B. C. alleged that Caudill told her that she could make $100.00 per person on whom she performed oral sex. She testified that he offered her $100.00 to perform oral sex on him, that Caudill then exposed his genitalia to her, and B. C. left the room.

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[4] B. C. was twenty-two years old at the time she testified in this case.

[5] B. C.'s mother, as well as B. C.'s younger brother and sister, also resided in the house.

[6] B. C. testified that her mother was asleep in the living room at that time.

B. C. attested that the next day, Caudill put B. C.'s hand on his penis and rubbed her hand up and down. She alleged that he told her he was going to show her what a penis felt like. B. C. testified that Caudill had an erection when he said and did this to her. When her mother returned home, B. C. told her mother what had happened and her mother removed B. C. from the home and sent her to live with B. C.'s grandmother.[7]

Caudill's other accuser, H. C., also testified at trial. At the time she testified, H. C. was in the eighth grade. She was born on February 6, 2001. H. C. stated that when she was in the fourth through sixth grades, she lived with her mother and Caudill. She alleged that during that time, Caudill touched her breasts under her shirt and also touched her near her vaginal area. H. C. attested that Caudill cursed at her, called her a "slut," and used words that referred to her "private areas."

In the house, there was a computer room. In that room, H. C. played video games with Caudill on an Xbox. H. C. testified that one game had a level where there were strippers and, in referring to the strippers, Caudill said to H. C., "that's you," to which she replied "no it [is] not." When they played video games, Caudill made H. C. either sit right next to him or on his lap. H. C. attested that when she sat on his lap, Caudill put his hand down her shirt and touched her

[7] At some point, Caudill and B. C.'s mother were divorced, and Caudill remarried. His new wife had a daughter, H. C., who became Caudill's stepdaughter and accuser in the other case before us in this appeal.

breasts and he put his hand down her pants and touched her vaginal area, sometimes on top of her underwear and at other times, inside her underwear.[8]

H. C. testified that Caudill sometimes tickled her all over her body and close to her private areas. She alleged that he once showed her some toy handcuffs that he had and he suggested that he might handcuff her to the furniture and tickle her, although there were no allegations that he actually followed through with this threat.

H. C. attested that Caudill also showed her photographs of nude men and women on the computer. Although the people in the photographs were not engaging in sexual intercourse, they were posed in a sexual manner.

H. C. further testified that Caudill told her that he would pay her $1.00 for every time that she did a handstand and her shirt fell while doing so in a way that would reveal her breasts. H. C. stated during trial that she did some handstands and Caudill paid her $5.00 or $6.00 and told her to hide it so that her mother did not find it. She hid it in her room, but H. C. testified that she was uncomfortable about having done the handstands because she knew it was wrong and she felt guilty about it. She returned the money to Caudill and told him she did not want to do anymore handstands for him.

[8] Around January 2012, H. C. allegedly told her mother about the improper touching by Caudill. H. C. attested that her mother asked her if maybe it had been an accident or if H. C. had imagined it, and H. C. testified that she told her it had actually happened. H. C. asserted that her mother did not believe her, so H. C. was not removed from the home at that time and she continued to be around Caudill. It appears that H. C.'s mother did not contact the police about H. C.'s allegations until after the mother was given a letter by H. C.'s best friend, which H. C. had written to that friend in August 2012, telling the friend about the things that Caudill had done to H. C.

Thus, the similarities between B. C.'s allegations and H. C.'s allegations were as follows: (1) Caudill showed both of them pornography on a computer; (2) Caudill offered to pay each of them for inappropriate acts for his own sexual pleasure; and (3) Caudill engaged in illicit sexual touching with each of them. However, the inappropriate acts Caudill allegedly offered to pay each of them for were different – he offered to pay B. C. to perform oral sex on him, and he offered to pay H. C. if she did a handstand in which her shirt fell in a way to reveal her breasts. Additionally, the illicit sexual fondling that Caudill allegedly engaged in with the girls differed.

Due to these differences, there was insufficient "factual commonality" between the acts involving B. C. and the acts involving H. C., as explained in *Clark*. In other words, the charged conduct concerning each girl was not "simultaneously similar and so peculiar or distinct" that it could be called a "signature crime." *See Clark*, 223 S.W.3d at 97. Further, because "the *modus operandi* exception is met only if the conduct that meets the statutory elements evidences such a distinctive pattern as to rise to the level of a signature crime," *id*. at 98, the allegations in these cases against Caudill do not satisfy the *modus operandi* requirements. Therefore, contrary to the Commonwealth's argument, the charges against Caudill concerning B. C. and H. C. were not similar enough to justify the consolidation of the indictments.

Moreover, there was an "eight-year time differential between the charges concerning B. C. and the charges concerning H. C." The Commonwealth

argues, however, that this does not preclude consolidation of the two indictments into the same trial. Although the Commonwealth could possibly have been correct if the charges involving each of the girls were similar enough to constitute a "signature crime," as discussed above, we have found that the charges were not similar and did not constitute a signature crime. Thus, the alternative was for the Commonwealth to show that the charges in this case demonstrate that Caudill had a "common scheme or plan." In order to determine if the acts against each girl were connected together or comprised a "common plan or scheme," relevant things to consider include "temporal and geographic proximity." *Hammond*, 366 S.W.3d at 428-29. Examples of "common scheme or plan" crimes are:

> the receipt of a stolen license plate as part of a plan to rob a filling station and afterward disguise the getaway car, or multiple murders and assaults as parts of an ongoing criminal syndicate. In these cases, the required nexus does not arise simply from the proximity of the alleged crimes in time and space, although proximity is certainly relevant, but rather from a "logical" relationship between them, some indication that they arose one from the other or otherwise in the course of a single act or transaction, or that they both arose as parts of a common scheme or plan.

Peacher v. Commonwealth, 391 S.W.3d 821, 837 (Ky. 2013) (internal citations omitted).

The allegations against Caudill concerning B. C. and H. C. did not arise one from the other, nor were they the course of a single act or transaction. Additionally, as the Commonwealth acknowledged in its brief, the events

concerning B. C. occurred eight years before those involving H. C. Therefore, Caudill's alleged actions in each case were not part of a common scheme or plan.

Finally, the Commonwealth does not allege that the evidence at issue satisfied any of the exceptions specified in KRE 404(b). Because the evidence supporting the crimes against B. C. would not have been admissible in the trial concerning the crimes against H. C. and vice versa, yet such evidence was admitted in this case by trying the indictments together, Caudill was prejudiced as a result. Consequently, the circuit court abused its discretion in denying Caudill's motion to sever the indictments, and we reverse his convictions and remand for further proceedings to allow Caudill to be retried on each indictment in separate trials.

B. JUROR

Caudill also asserts that the circuit court erred to his substantial prejudice when it failed to strike a juror for cause despite the fact that the juror had previously been H. C.'s teacher. However, because we are reversing and remanding for new trials based upon the circuit court's erroneous denial of Caudill's motion to sever, this claim concerning the juror is moot.

Accordingly, the judgment of the Letcher Circuit Court is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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