

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001803-MR

DANIEL JORDAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE KATHLEEN LAPE, JUDGE
ACTION NO. 17-CR-00352

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: LAMBERT, MAZE AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Daniel Jordan appeals from his conviction for second-degree unlawful imprisonment,¹ first-degree wanton endangerment,² and assault in

¹ Kentucky Revised Statutes (KRS) 509.030.

² KRS 508.060.

the fourth degree.³ His only argument on appeal is that the trial court erred in excluding testimony about a civil lawsuit in which he and the victim in this case, Andraya Naumenko, were involved. He argues that the court should have allowed him to cross-examine Ms. Naumenko about the lawsuit and allowed him to testify about it in order to show that Ms. Naumenko had motive to lie. We believe that the court did err in excluding some of this testimony. We also believe this was not harmless error; therefore, we reverse and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

Ms. Naumenko was business partners with Kim Perry in a business called HH Motorsports. Ms. Naumenko hired Appellant to work as a mechanic for the business in May of 2016. Shortly thereafter, Ms. Naumenko and Appellant began having a relationship. Ms. Perry later sued Ms. Naumenko and Appellant over a business dispute. Ms. Naumenko and Appellant were married in September of 2016.

The events that led to Appellant being criminally charged happened on February 22, 2017. Appellant's and Ms. Naumenko's testimony differed greatly over what occurred. Ms. Naumenko testified that she and Appellant got into an argument. She testified that Appellant picked her up by the throat, threw her to the ground, and punched her several times in the face. She also stated that

³ KRS 508.030.

Appellant removed a black pistol from his pocket, pointed it at her head, and pulled the trigger; however, it misfired. She stated that he then pointed the gun above her head and it fired, leaving a bullet lodged in the wall. Ms. Naumenko then testified that Appellant dragged her into the bedroom and raped her. Appellant eventually left their house and Ms. Naumenko walked to a nearby police station and reported the incident.

Appellant testified that they did get into an argument, but that Ms. Naumenko began hitting him and that he hit her three times in self-defense. He also testified that it was Ms. Naumenko who had the gun and that she threatened suicide. He claimed that he smacked the gun out of her hand, picked it up, and that it accidentally discharged. He also claimed that he did not rape Ms. Naumenko.

Appellant was arrested and indicted on counts of first-degree rape,⁴ attempted murder,⁵ kidnapping,⁶ first-degree wanton endangerment, and fourth-degree assault. During trial, Appellant's counsel began questioning Ms. Naumenko about the civil lawsuit. The Commonwealth objected. The trial court believed the civil lawsuit was irrelevant and that testimony about it would confuse the jury by having a trial within a trial. The trial court allowed the defense to ask

⁴ KRS 510.040.

⁵ KRS 506.010 and KRS 507.020.

⁶ KRS 509.040.

generally whether a civil lawsuit existed and that it was still ongoing at the time of the incident. Defense counsel was not allowed to get into specifics. During Appellant's testimony, he indicated that during the altercation, he told Ms. Naumenko that he was going to "tell the truth about the lawsuit." The Commonwealth again objected, and the court sustained the objection. Defense counsel also tried to discuss the ongoing civil lawsuit in the closing argument, but the Commonwealth objected, and the court sustained the objection.

Appellant was eventually convicted of second-degree unlawful imprisonment, first-degree wanton endangerment, and assault in the fourth degree. He was sentenced to a total of five years in prison. This appeal followed.

ANALYSIS

Appellant argues that the trial court erred in not allowing him to present a full defense. He claims he should have been allowed to fully cross-examine Ms. Naumenko about the lawsuit and that he should have been allowed to testify about the lawsuit. Appellant claims that one of his defense theories was that he was going to "tell the truth" about the circumstances in the civil lawsuit and testify against Ms. Naumenko's interests. His argument is that this motivated her to lie about the events of February 22, 2017, so that he would be in jail and unable to testify.

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Kentucky Rules of Evidence (KRE) 401. Generally speaking, “[a]ll relevant evidence is admissible. . . . Evidence which is not relevant is not admissible.” KRE 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” KRE 403.

“[T]rial judges retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). On the other hand, “[t]he Due Process Clause affords a criminal defendant the fundamental right to a fair opportunity to present a defense. The exclusion of evidence violates that constitutional right when it significantly undermine[s] fundamental elements of the defendant’s defense.” *Harris v. Commonwealth*, 134 S.W.3d 603, 608 (Ky. 2004) (citations and internal quotation marks omitted). In addition,

it is well settled that a witness may be cross-examined on any facts which tend to show bias, interest, or motive

which might affect the credibility of the testimony of the witness. This is so for the reason that the jury is entitled to hear all the relevant facts calculated to influence a witness so as to enable the jury to properly estimate the weight to be given the testimony of the witness.

Keller v. Commonwealth, 572 S.W.2d 157, 159 (Ky. 1978).

In the case at hand, we must balance the trial court's ability to determine what evidence is relevant and admissible with Appellant's ability to confront the witnesses against him and to put on a full defense. The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "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). We believe that the trial court abused its discretion in this case.

In *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988), the United States Supreme Court stated that

subject to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness. We emphasized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Id., 488 U.S. at 231, 109 S.Ct. at 483 (citations and internal quotation marks omitted). Furthermore, “[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. This right, often termed the ‘right to present a defense,’ is firmly ingrained in Kentucky jurisprudence[.]” *Beaty v. Commonwealth*, 125 S.W.3d 196, 206 (Ky. 2003), *abrogated on other grounds by Gray v. Commonwealth*, 480 S.W.3d 253, 267 (Ky. 2016) (citations and internal quotation marks omitted).

We believe that the trial court was reasonable in trying to limit the amount of testimony regarding the civil lawsuit in order to not confuse the jury and essentially try the civil lawsuit in the criminal case. However, we believe the trial court went too far. Testimony regarding the lawsuit and Appellant’s allegation that he informed Ms. Naumenko that he planned on testifying against her interests is relevant to show bias on the part of Ms. Naumenko. Part of Appellant’s defense was that Ms. Naumenko was lying about the altercation in order to prevent him from testifying in the civil case. At a minimum, Appellant should have been able to elicit testimony from Ms. Naumenko and himself regarding the fact that Ms. Perry filed a civil lawsuit against Ms. Naumenko and Appellant, that the lawsuit was ongoing at the time of the altercation, that a hearing was to be held soon after the date of the altercation, and that Appellant informed Ms. Naumenko that he planned on testifying against her. Appellant’s counsel should have also been

allowed to argue during closing argument that this lawsuit was a motive for Ms. Naumenko to lie about Appellant.

CONCLUSION

The trial court went too far in excluding testimony regarding the civil lawsuit. The court abused its discretion because the ruling to drastically limit the testimony infringed upon Appellant's ability to cross-examine his accuser, argue that Ms. Naumenko was fabricating her testimony, and limited his ability to put on a full defense. The trial court properly tried to limit the testimony regarding the civil suit, but it was unreasonable and unfair in the almost total exclusion of any evidence regarding the civil lawsuit. Based on the foregoing, we reverse and remand for a new trial.

ALL CONCUR.

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