

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-1231-MR

GEORGE WAYNE COLE

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE DAVID WILLIAMS, JUDGE
ACTION NO. 16-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, DIXON, AND MAZE, JUDGES.

COMBS, JUDGE: George Wayne Cole was convicted of one count of sexual abuse, first-degree, and was sentenced to one year of imprisonment. He appeals as a matter of right. After our review, we affirm.

On June 16, 2016, a Clinton County grand jury indicted Cole on two misdemeanor counts of second-degree unlawful imprisonment and one count of first-degree sexual abuse involving a victim under 12 years of age, a Class C

felony. According to the indictment, the offenses occurred between January 1, 2015 and December 1, 2015.

On January 5, 2017, the Commonwealth filed notice of its intent to use evidence of other crimes, wrongs, or acts pursuant to KRE¹ 404(b) seeking to admit evidence that Cole had sexually abused his niece, J.E., when she was approximately ten and twelve years of age in 2004 and 2006, respectively.

On June 14, 2017, the trial court conducted a hearing on the Commonwealth's motion. J.E. (the earlier victim) and C.T. (the victim in the case now before us) both testified. On May 30, 2018, the trial court entered findings of fact, conclusions of law, and an order sustaining the motion for admission of KRE 404(b) evidence as follows:

FINDINGS OF FACT

1. It is alleged that Cole sexually abused his niece, J.E., when she was approximately (10) years old and again when she was twelve (12) years old. In the spring of 2004, a minor child, J.E. was staying over night in the home of Cole visiting his daughters. J.E. was Cole's niece by marriage, lived next door to him and routinely spent time with him and his daughters. J.E. was awakened during the night by Cole placing his hand in her pajamas and rubbing her vagina. Also, in 2004, J.E. alleges that while spending the night with Cole's daughters she was forced to sleep in the bed with Cole and his daughters and awoke to Cole rubbing his foot up her leg towards her vagina. J.E. reported that she couldn't leave because Cole had the door barricaded with

¹ Kentucky Rules of Evidence.

a chair. On or about March 31, 2006, very similar facts allegedly occurred. The Defendant instructed J.E. to sleep on the floor next to him on the couch. During the night she was awakened by the Defendant rubbing her left breast. The next morning Cole gave her \$15.00 and told her not to tell anyone.

2. Testimony by the alleged victim, C.T., in the case *sub judice*, disclosed that she lives next door to Cole and viewed him as a father figure. C.T. was friends with Cole's daughter and he transported both girls to and from ball practice routinely. On one occasion, C.T. alleges that she was in Cole's house alone with him and he offered her \$100.00 to touch her vagina. She further testified that when she attempted to leave Cole blocked her exit and chased her around a table until she escaped. On a separate occasion, C.T. alleges that Cole had her lay [*sic*] down on a massage mat and he positioned the mat where it was touching her vagina. C.T. claims that Cole then held her down and controlled the massage mat until she finally fled.²

In its conclusions of law, the trial court explained that KRE 404(b) has been interpreted as exclusionary in nature due to the inherent danger of the prejudicial impact of evidence of other crimes. Therefore, evidence of other crimes or bad acts will only be admissible if an exception to the general rule of exclusion applies and if the probative value of the evidence outweighs its probative effect, citing *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994). The Commonwealth bears the burden of demonstrating such an exception and of

² C.T. testified at the evidentiary hearing that she was about 11 years of age at the time.

establishing that the probative qualities of the evidence outweigh its inherently prejudicial effect.

The trial court further explained that there must be a factual commonality between the 404(b) evidence 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, the acts were accompanied by the same mens rea, or both.” The trial court concluded that there was a sufficient factual similarity in the case before us and carefully catalogued those coincidences:

In this matter at hand, Cole acted as a father figure to both the alleged victim and the present alleged victim. Cole was J.E.’s uncle and spent considerable time with her. Cole is C.T.’s next door neighbor and provided her transportation to and from sports practices for an entire year. Both victims lived in close proximity to Cole’s residence and were close friends with Cole’s daughters. It is also alleged that Cole offered both victims money in return for either their silence or their participation in sexual acts. The allegations made by both victims included only inappropriate touching and physical contact. Intercourse has never been alleged. It is also important to note that there were allegations of attempted confinement made by both victims. Furthermore, the complaining witnesses were of similar age when the alleged sexual abuse occurred. Although the alleged incidents occurred almost ten (10) years ago, “[t]emporal remoteness goes to the weight, not the admissibility, of evidence of prior bad acts and is of less concern when the evidence of the pattern of conduct falls with a clearly defined, distinctive pattern” [*Clark v. Commonwealth*,

223 S.W.3d 90, 100 (Ky. 2007)] which this Court finds in this matter.

The trial court granted the Commonwealth's motion for admission of the KRE 404(b) evidence. Cole filed a motion to alter, amend, or vacate. Cole argued that the exceptions to KRE 404(b) do not apply because in 2008, the evidence alleging sexual abuse of a minor stemming from J.E.'s allegations had been presented to the Casey County grand jury, which returned a no true bill.

On July 30, 2018, the trial court entered an order granting Cole's motion to supplement its prior order after having inadvertently omitted its analysis of probative value versus prejudicial effect. In relevant part, the court explained as follows:

[I]f taken as true by the jury, the evidence of prior sexual misconduct could lead a jury to believe 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, the acts were accompanied by the same mens rea, or both. This is the precise goal of such exceptions under KRE 404(b) and such evidence cannot be excluded solely because it is merely adverse to the opposing party. Lastly, this Court finds that the probative value of the proffered evidence heavily outweighs its potential prejudicial effect. As previously discussed, KRE 403 provides no protection against evidence that is merely prejudicial in the sense that it is detrimental to a party's case. This Court does not believe that the proffered evidence would have any tendency to suggest a decision on an improper basis, such as an emotional one. The only concern this Court has is in regards to the fact that a

no true bill was returned when the prior allegations were brought before the Casey County Grand Jury. This Court, nor any of the parties to this action, are aware of any case law that addresses the effect of a no true bill on allegations of prior misconduct. Operating under the lack of precedence, this Court finds that it is best practice to allow the jury whether to credit the evidence.

(Footnotes omitted).

Cole petitioned this Court for a writ of prohibition seeking reversal of the trial court's orders granting the Commonwealth's motion for admission of KRE 404(b) evidence. That petition was denied by order of this Court entered on October 25, 2018, holding that Cole "failed to demonstrate that he is without an adequate remedy by appeal"

The case was tried on May 21-22, 2019. At the conclusion of the Commonwealth's case-in-chief, the trial court granted Cole's motion to dismiss the two misdemeanor counts of unlawful imprisonment based on the pertinent statute of limitations. The trial court denied Cole's motion to dismiss the first-degree sexual abuse charge at the end of all of the evidence. However, the trial court instructed the jury only on first-degree sexual abuse with the victim being under 16 years of age rather than 12 years of age due to conflicting evidence about the date of the massage incident.

The jury found Cole guilty of first-degree sexual abuse and recommended a sentence of one year. On July 11, 2019, the case came before the

court for final sentencing. By an order entered on July 11, 2019, Cole was sentenced to one year to serve.

Cole filed this appeal. As the Commonwealth notes, Cole's Arguments numbered I.-V. and VI.B. all discuss different aspects of the same issue – the admissibility of KRE 404(b) evidence about similar acts of a sexual nature.

We shall address them together.

KRE 404(b) provides, in relevant part, as follows:

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[.]

Generally, evidence of crimes other than that charged is not admissible. KRE 404(b). Evidence of other crimes or wrongful acts may be introduced as an exception to the rule, however, if relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(1). . . .

. . .

To determine the admissibility of prior bad act evidence, we have adopted the three-prong test described in *Bell v. Commonwealth*, 875 S.W.2d 882, 889-891 (Ky. 1994), which evaluates the proposed evidence in terms of: (1) relevance, (2) probativeness, and (3) its prejudicial effect.

We review the trial court's application of KRE 404(b) for an abuse of discretion.

Conley v. Commonwealth, 599 S.W.3d 756, 772 (Ky. 2019) (citations and footnotes omitted). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Cole contends that the trial court erred in admitting evidence regarding J.E.’s allegations of sexual abuse where the Casey County grand jury returned a no true bill. We do not agree. The cases upon which Cole relies are highly distinguishable. The trial court was not aware of any case law addressing the effect of a no true bill on allegations of prior misconduct, and we are not aware of any published decision. However, the unpublished case of *Jones v. Commonwealth*, No. 2002-SC-001011-DG, 2005 WL 635051, (Ky. Mar. 17, 2005),³ is analogous.

Jones involved an appeal from the denial of an RCr⁴ 11.42 motion. The defendant in *Jones* had been convicted on two robbery counts arising from the robbery of two ATM customers on different dates as well as a second-degree PFO

³ Kentucky Rule of Civil Procedure (CR) 76.28(4)(c) permits use of an unpublished opinion where “there is no published opinion that would adequately address the issue before the court.”

⁴ Kentucky Rules of Criminal Procedure.

count. The fact that a true bill had not been issued on the second robbery count was not discovered – even though that caption was typed in the indictment. After the error was revealed, the trial court amended its judgment to reflect only one conviction for the first robbery. On direct appeal, this Court affirmed the single robbery conviction, but it remanded for a new sentencing phase trial with a new jury which only heard evidence relating to the first robbery and the second-degree PFO. Jones did not appeal this Court’s decision on the direct appeal, but he filed an RCr 11.42 motion. Our Supreme Court granted Jones’s motion for discretionary review to consider whether he was sufficiently prejudiced by trial counsel’s failure to object to his prosecution on the unindicted count so as to render the guilty verdict unreliable. The Court explained as follows:

[W]e note that evidence of the uncharged [second] robbery would have been admissible in a trial for the [first] robbery given Appellant’s incredulous statement that both [ATM customers] voluntarily gave him the money when he asked for it. KRE 404(b) has been interpreted to allow evidence of uncharged crimes when they are similar enough to the charged offense to show a modus operandi [*sic*]. When the charged crime and the uncharged crime are so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person, under the same circumstances, the evidence of the uncharged crime is admissible. See *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994); *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992); *Adcock v. Commonwealth*, 702 S.W.2d 440, 443 (Ky. 1986). In this case, both [robberies] were virtually identical. Subject to the discretion of the trial court, the jury would have heard the

evidence of the [second] robbery despite the no true bill.

Jones, 2005 WL 635051, at *2.

Cole submits that the court's findings regarding the commonality of facts are insufficient for the court to find a pattern-of-conduct exclusion under KRE 404(b). "[W]hether prior sexual misconduct by a defendant is admissible [is] a difficult, fact-specific inquiry[.]" *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). In *Clark*, our Supreme Court explained that it is commonality of the facts constituting the crimes that demonstrates a *modus operandi*, not commonality of the crimes themselves. Although the facts need not be identical in all respects, the proponent of the evidence must demonstrate:

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.

Id. *Clark* explains that conduct which merely satisfies the statutory elements of an offense is not sufficient to satisfy the *modus operandi* exception. "Contact between the abuser and the intimate body parts of the abused appears only to meet the requisite sexual contact necessary to commit first-degree sexual abuse." *Id.* at 98.

In the case before us, the trial court found a distinctive factual pattern beyond mere allegations of inappropriate touching and physical contact. The court

found: that Cole acted as a father figure to both victims, that both victims lived in proximity to Cole's residence, that both were close friends with Cole's daughters, that both alleged that Cole had offered them money, and that both victims alleged attempted confinement. In addition, the trial court determined that the complaining witnesses were of similar age when the alleged sexual abuse occurred. Even where age is a statutory element of the offense, similarity in age "is entitled to at least some weight toward meeting the Commonwealth's burden under the modus operandi [*sic*] exception." *Id.* We cannot say that the trial court abused its discretion in determining that there was a sufficient factual similarity. *See Fox v. Commonwealth*, No. 2014-CA-000674-MR, 2016 WL 837291, at *4 (Ky. App. Mar. 4, 2016) (The fact that the "victims were so similarly aged, physically developed, and, for lack of a better term, 'convenient' . . . is ultimately persuasive to this Court. These . . . characteristics . . . demonstrate not only a similarity or commonality of fact, but a distinct pattern among victims . . .").

After determining relevancy, the trial court must determine if the evidence of the uncharged crime is sufficiently probative of its commission by the accused to warrant its introduction into evidence. It is sufficiently probative if the trial judge believes the jury could reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts.

Finally, after determining relevancy and probativeness, the trial court must weigh the prejudicial nature of the "other bad acts" evidence versus its probative value. Only if the potential for undue prejudice

substantially outweighs the probative value of the evidence must it be excluded. . . . The trial courts have great discretion in weighing prejudice versus probativeness, but do not have discretion to fail to weigh these factors.

Leach v. Commonwealth, 571 S.W.3d 550, 554 (Ky. 2019) (internal quotation marks and citation omitted).

In the case before us, the trial court properly weighed these factors. It believed that evidence of prior sexual misconduct “could lead a jury to believe 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.” Thus, the evidence was sufficiently probative. Further, the trial court did “not believe that the proffered evidence would have any tendency to suggest decision on an improper basis, such as an emotional one.” In *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999), our Supreme Court held that the “[t]he balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge.” We find no abuse of discretion.

Cole argues that the trial court limited his ability to confront his accusers. At the evidentiary hearing, the trial court advised Cole’s counsel to “move on,” that it was not going to allow him to question J.E. about what she did or did not do. The Commonwealth responds that the trial court properly restricted

the testimony relevant to the issue of bad acts rather than allowing it to serve as a broad discovery device, also noting that the right to confront witnesses is not applicable to pretrial hearings. We agree. *Oakes v. Commonwealth*, 320 S.W.3d 50, 55 (Ky. 2010) (“[T]he U.S. Supreme Court has never held that the right to confront witnesses applies to pre-trial hearings. In fact, to the contrary, it has repeatedly described the right as a trial right.”).

Cole also argues that the probative value of the 404(b) evidence was outweighed by its prejudicial effect because the jury could only assume that its admission was evidence of a prior charged crime. We disagree. Trooper Warriner testified at trial and explained that the Casey County grand jury returned a no true bill.

Cole argues that he did not receive a fair trial and that the Commonwealth failed to meet its burden of proof to satisfy the elements of sexual assault in the first degree because it failed to show forcible compulsion. However, as noted above, the trial court instructed the jury under KRS⁵ 510.110(1)(c)1., which provides that:

(1) A person is guilty of sexual abuse in the first degree when:

...

(c) Being twenty-one (21) years old or more, he or she:

⁵ Kentucky Revised Statutes.

1. Subjects another person who is less than sixteen (16) years old to sexual contact[.]

Forcible compulsion is not an element of the offense that the jury considered.

Cole contends that there was no sexual contact, that C.T. never testified that Cole placed the massager between her legs, or that there was any contact that gratified the sexual desire of either party. Thus, Cole argues that the trial court erred in failing to grant his motion for directed verdict because the prosecution did not prove elements of the charge. We disagree.

KRS 510.010(7) defines “Sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]” C.T. testified at trial that Cole laid the massager device on the floor. She laid on her back. Cole told her to get on her stomach and she did. Cole then told her to raise up and he jerked the massage device so it touched her “privates.” Cole asked her if it felt good, and she said no. C.T. testified that she wanted to get up, but Cole pinned her down with one hand on her back. C.T. gestured that Cole’s other hand was on her shoulder.

“On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). We find no error.

At pages 22-23 of his brief, Cole argues that the trial court erred when it failed to grant his motion for a directed verdict, specifically contending: (1) that the prosecution could never pinpoint a specific date when the sexual abuse occurred and (2) that the prosecution wrongly referred to Cole's showing pornography on his iPad to C.T. where the charge of distributing obscene material to minors, first offense, had been dismissed prior to trial. Cole provides no authority to support these arguments. "It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005).

Cole also contends that there was cumulative error. Having found no error, there can be no cumulative error. *Sholler v. Commonwealth*, 969 S.W.2d 706, 712 (Ky. 1998).

We affirm the judgment of conviction of the Clinton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jerry J. Cox
Mount Vernon, Kentucky

Heidi Weatherly
Mt. Vernon, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky