IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: FEBRUARY 20, 2003
NOT TO BE PUBLISHED

FINAL
DATE 5-22-03 ELIA Grau D.C.

Supreme Court of Kentucky

2001-SC-0672-TG

ROBERT DENZIL NEWSOME — APPELLANT

V.

ON TRANSFER FROM THE COURT OF APPEALS
1999-CA-1641-MR
MARTIN CIRCUIT COURT NO. 95-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Robert Denzil Newsome, was convicted in the Martin Circuit Court of first-degree rape and first-degree sexual abuse. He was sentenced to a total of twenty years imprisonment. Appellant filed a notice of appeal in the Court of Appeals and the case was subsequently transferred to this Court on jurisdictional grounds.[1] The sole issue presented is whether the trial court erred in admitting the evidence of Appellant's prior violent acts against persons other than the victim.

During the early morning hours of March 13, 1995, Appellant entered the bedroom of S.N., his seventeen-year-old daughter. S.N. testified that he laid down on her bed and began rubbing her breasts. She then jumped up from the bed and hid in the bathroom until she believed Appellant had left the bedroom. S.N. stated that a few hours later, Appellant entered her room again wearing no clothes. Appellant ordered

[1] Ky. Const. § 110(2)(b).

S.N. to remove her pants and then raped her. S.N. testified that at some point during the rape, Appellant placed his hands near her throat as if he might strangle her and that she believed he was going to kill her. Following the rape, Appellant retrieved some toilet paper and gave it to S.N. so she could clean herself. After doing so, she placed the tissue in her bedroom trash can. Appellant thereafter left S.N.'s room.

While waiting for the school bus later that morning, S.N. informed one of her brothers that Appellant had raped her and that she was not coming home. Once at school, S.N. informed a friend of the rape. The friend reported the rape to the school's secretary, who immediately called the police. The police subsequently collected samples from both S.N. and Appellant for use with the rape test kits. The kits were sent to the Kentucky State Police Central Forensic Laboratory, and the results indicated that Appellant's DNA matched a sample taken from the tissue found in S.N.'s trash can.

On November 22, 1995, the Martin County Grand Jury indicted Appellant for First-Degree Rape, Incest,[2] and First-Degree Sexual Abuse. On April 1, 1999, the Commonwealth filed a Notice of Intent "to introduce evidence of domestic violence acts by the Defendant herein which acts were observed by the victim and serve, in part, as a basis for her fear and intimidation by the Defendant." At trial, the trial court held an in camera hearing to ascertain the nature and relevance of the evidence. Only S.N. testified during the hearing. S.N. stated that although Appellant had never hit either her or her two brothers, she remembered witnessing or hearing about Appellant's physical abuse of her mother and stepbrother. However, neither S.N.'s mother nor stepbrother was living in the house at the time of the rape. In fact, S.N. testified that she had not

[2] By Order entered April 29, 1999, Count II (Incest) of Appellant's indictment was dismissed pursuant to the Commonwealth's motion.

seen Appellant behave violently in the home "within the past year or two prior to the time of the occurrence."

In ruling that the evidence was admissible to show S.N.'s state of mind, the trial court stated:

> [A] person who believes themselves to be the victim of a crime should be allowed to tell the circumstances that actually exists in their [sic] mind concerning the crime and the question of why maybe she didn't scream or the question of why she didn't do this or that. She can explain that and that is probative in this particular instance since the charge itself is forcible rape. It's probative of why she did not take any other action.

S.N. subsequently testified before the jury about her fear of Appellant. She stated that Appellant had never hit her or threatened her, but that she had witnessed Appellant slap and punch her mother on several occasions. She testified that her mother moved out of the residence because of the abuse. S.N. also testified that Appellant beat her stepbrother. On cross-examination, S.N. conceded that it had been at least one year since she had seen Appellant hit her mother and several years since she had seen him hit her stepbrother. Following S.N.'s testimony, the trial court admonished the jury that "[her] testimony regarding Appellant's prior abuse of his ex-wife and son was to be considered only to the extent that it was relevant to S.N.'s state of mind on the night of the charged incident."

The jury found Appellant guilty of both first-degree rape and first-degree sexual abuse. On May 27, 1999, Appellant was sentenced to a total of twenty (20) years imprisonment. This appeal followed.

Kentucky Rules of Evidence 404 provides, in part:

> (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 could not be accomplished without serious adverse effect on the offering party.

The evidence regarding Appellant's prior abusive behavior was properly admitted under KRE 404(b) because it was relevant to prove "forcible compulsion," an element of the crime charged. KRS 510.010(2) defines "forcible compulsion" as "physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person . . . ." This definition opens the door to an array of evidence to prove a charge of rape where there is no direct threat or actual physical force. It recognizes that threat may be implied and that fear need not arise only from direct threat or physical force.

The conclusion that other crimes can be admitted to show a victim's fearful state of mind as proof of forcible compulsion is supported by Yarnell v. Commonwealth.[3] In Yarnell, this Court allowed testimony of prior abuse by the defendant against the victims to prove forcible compulsion. The victims were allowed to testify concerning prior abuse to determine their state of mind and whether they feared the accused.

In the present case, the victim had witnessed previous abuse by Appellant against her mother and stepbrother. This evidence was admitted to show her state of mind, her fear of Appellant, and to prove forcible compulsion. As this crime unfolded, it

[3] Ky., 833 S.W.2d 834 (1992).

would have been implicit to the victim that her failure to submit would probably result in physical force to accomplish the crime or in punishment for her refusal. S.H. even testified that she "feared" Appellant. Undoubtedly, the circumstances contained sufficient implied physical force to create a reasonable fear in the victim's mind. Thus, it was relevant to the crimes charged that Appellant inflicted physical harm upon the victim's family members. Exclusion of the evidence would have had a "serious adverse effect"[4] on the Commonwealth.

The dissent seems to acknowledge the accuracy of the foregoing analysis. It recognizes that the evidence was relevant but treats it as unnecessary. It is not this Court's province to determine what evidence is needed by a party to support its claim or defense. Our responsibility is to determine whether the trial court abused its discretion in the admission or exclusion of evidence and not to second-guess a party's strategy with respect to the evidence it presents. Yarnell, *supra,* clearly stated that "[a]ctual force is not needed to prove forcible compulsion."[5] While there was some evidence that Appellant may have behaved in a threatening manner toward the victim, it was not so overwhelming as to dispense with other evidence that caused the victim to fear him.

For the foregoing reasons, the judgment of the Martin Circuit Court is affirmed.

Lambert, C.J., and Johnstone, Keller, and Wintersheimer, JJ., concur. Graves, J., dissents by separate opinion in which Cooper, J., and Stumbo, J., join.

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[4] KRE 404(b)(2).
[5] 833 S.W.2d at 836.

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REVIEW FROM COURT OF APPEALS
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MARTIN CIRCUIT COURT NO. 95-CR-00037

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE GRAVES

Respectfully, I dissent.

The sole issue presented is whether the trial court erred in admitting the evidence of Appellant's prior violent acts against persons other than the victim. I conclude that such was, in fact, error warranting reversal of Appellant's convictions.

Evidence of a defendant's commission of criminal acts, other than that for which he is being tried, is not admissible in the courts of this Commonwealth unless the other acts are relevant for some purpose other than to prove the criminal disposition of the accused. KRE 404(b); Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), overruled, in part, on other grounds in Garrett v. Commonwealth, Ky., 48 S.W.3d 6

(2001); see also Billings v. Commonwealth, Ky., 843 S.W.2d 890 (1992). "It 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 itself." Jones v. Commonwealth, 303 Ky. 606, 198 S.W.2d 969, 970 (1947). "For this reason, trial courts must apply the rule cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." Bell v. Commonwealth, Ky., 875 S.W.2d 882, 889 (1994).

This Court has generally ruled that evidence of prior sexual acts of a similar nature against the same victim is competent. See Keeton v. Commonwealth, Ky., 459 S.W.2d 612 (1970). And evidence of prior physical and emotional abuse against the same victims in a rape trial has been held admissible to prove forcible compulsion. See Yarnell v. Commonwealth, Ky., 833 S.W.2d 834 (1992). However, this Court has generally restricted evidence of prior sexual acts against persons other than the victim of the charged offense, unless they are similar to the act charged and not too remote in time. See Anastasi v. Commonwealth, Ky., 754 S.W.2d 860 (1998); Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985); Lantrip v. Commonwealth, Ky., 713 S.W.2d 816 (1981); Warner v. Commonwealth, Ky., 621 S.W.2d 22 (1981). This case goes one step farther, in that it concerns the admissibility of evidence of prior physical abuse against persons other than a victim of sexual abuse or rape.

The burden is on the Commonwealth to establish a "proper basis before admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its inflammatory effect." Daniel v.

Commonwealth, Ky., 905 S.W.2d 76 (1995) (quoting Drumm, supra, at 381). Our case law has established that there are three inquiries which provide a useful framework for determining the admissibility of other crimes evidence: (1) Is the evidence relevant for some purpose other than to prove criminal disposition of the accused; (2) is proof of the other crime sufficiently probative of its commission to warrant introduction of the evidence against the accused; and (3) does the probative value of the evidence outweigh its potential for prejudice to the accused. Drumm, supra, at 381 (quoting Lawson, The Kentucky Evidence Law Handbook, §2.20 at 42-43 (2d ed. 1984); see also Daniel, supra at 78. Using these three inquiries, I conclude that the evidence of Appellant's prior acts of physical abuse against other family members should have been excluded.

The first inquiry is whether the evidence was relevant for some purpose other than to prove criminal disposition. The Commonwealth asserts that evidence of Appellant's physical abuse against other members of the family was relevant to the issue of forcible compulsion, because it showed how his abuse of others caused S.N. to fear him and why she apparently did not resist during the rape. In agreeing with the Commonwealth, the majority relies upon our decision in Yarnell, supra, in which we held that evidence concerning the victims' fear of the accused was admissible to support a finding of forcible compulsion. However, I find such reliance on Yarnell legally and factually misplaced.

Pursuant to KRS 510.040(1), "A person is guilty of rape in the first degree when: (a) He engages in sexual intercourse with another person by forcible compulsion[.]" KRS 510.010(2) defines forcible compulsion as:

> [P]hysical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]

The definition of forcible compulsion was amended by the legislature in 1996 to broaden the scope of circumstances under which forcible compulsion can occur and to clarify that physical resistence by the victim is not required. Cooper, Kentucky Instructions to Juries, §4.04, p. 194 (Anderson 1999); see also Miller v. Commonwealth, Ky., 77 S.W.3d 566 (2002).

Thus, unlike the Yarnell case, S.N.'s testimony that she feared Appellant because of his prior abuse against others was not required to sustain a finding of forcible compulsion. Contrary to the trial court's reasoning, there was absolutely no need to prove why S.N. "did not take any action." As KRS 510.010(2) provides, a showing of physical resistence on the part of the victim is not necessary to meet the definition of forcible compulsion. Furthermore, Appellant's act of placing his hands around S.N.'s neck, as if to choke her, constituted an implied, if not expressed, threat of physical force. Such is further supported by S.N.'s testimony that "she believed Appellant was going to kill her." Contrary to the majority's assertion, evidence of Appellant's prior physical abuse of others was simply not necessary to prove that S.N. was compelled by force or threat to submit to sexual intercourse with Appellant.

Moreover, the facts of this case are significantly different than those presented in Yarnell, supra, wherein the evidence indicated that:

> the two children were subject to constant emotional, verbal and physical duress. They lived in continued fear of what Yarnell might do to them or their mother. They testified that they went along with deviate sexual behavior only because

> of this fear. Under the evidence as a whole, it was not clearly unreasonable for the jury to find that Yarnell engaged in sexual intercourse with the children by means of forcible compulsion.

Yarnell, supra, at 857.

Here, S.N. testified that the prior abuse was perpetrated only against her mother and step-brother, and that she was never threatened or physically abused by Appellant. Further, the prior acts in question were not similar in kind to the act of rape, thus separating this controversy from the line of cases that allow prior sexual acts to be admitted in a subsequent prosecution for a sexual offense. And importantly, Appellant's prior uncharged conduct occurred one to two years prior to the rape for which he was convicted of in this case, making the prior acts too remote in time to be relevant to this prosecution.

The second inquiry is whether evidence of the uncharged crimes is sufficiently probative of their commission by Appellant to warrant their introduction. See Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). I believe that it is not. The evidence of Appellant's prior physical abuse of his wife and step-son consisted solely of S.N.'s uncorroborated testimony. The alleged victims of the abuse were not brought forward to validate the allegations. Nor were S.N.'s other brothers questioned as to whether they ever witnessed the abuse. The scarcity of evidence illustrates the inherent difficulty with this inquiry. "What is clear though, is that the inquiry into probativeness need not be a guessing game. . . . This is an issue to be determined by a trial court *before* evidence of uncharged crimes is admitted." Bell, supra, at 890. There is nothing in the record to indicate that this inquiry was considered by the trial court. Thus, S.N.'s testimony, standing alone, was not sufficiently probative

of Appellant's prior acts of physical abuse. Cf Parker v. Commonwealth, Ky., 952 S.W.2d 209 (1997), cert. denied, 522 U.S. 1122 (1998).

Finally, as for the prejudice inquiry, even the trial court acknowledged that the evidence in question was extremely prejudicial to Appellant. This type of evidence is inherently prejudicial in that it is difficult to expect a jury to separate such damaging information and avoid viewing it as evidence of a defendant's criminal disposition. For this reason, I cannot agree that the trial court's admonition limiting the jury's use of the evidence was effective. Since there was no proper purpose this evidence could have served, the conclusion that its potential for prejudice outweighed its probative value is inescapable. Walker v. Commonwealth, Ky., 476 S.W.2d 630 (1972).

Cooper, and Stumbo, J.J. join in this dissenting opinion.