

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky

2002-SC-0253-MR

FINAL

THOMAS NEAL JACKSON

DATE 9-11-03 SNA Grew, H, DC  
APPELLANT

V. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
2000-CR-0126

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Thomas Neal Jackson, was convicted of murder by a Laurel Circuit Court jury and sentenced to thirty-three years in prison. His appeal comes before this Court as a matter of right. Ky. Const. § 110(2)(b). Appellant contends the trial court erred in allowing testimony regarding events that occurred three days prior to the murder in violation of KRE 404(b). We disagree and affirm the conviction.

Early on June 11, 2000, Carolyn Smith was found dead in Appellant's home. Medical personnel noted that Smith had bruises on her face and neck, as well as a white discharge from her mouth. Appellant told police that Smith, his live-in girlfriend, might have overdosed on drugs and later stated that he did not know how she died. The cause of death was later determined to be multiple blunt force injuries to her head, neck, and abdomen. On August 18, 2000, Appellant was indicted for murder and was ultimately convicted.

Appellant argues on appeal that the trial court erred in allowing the testimony of Mary Bentley and Linda House. Bentley testified, in pertinent part, that on June 7, 2000, Smith left Appellant's residence to stay at her apartment for a short time. Bentley went on to describe a serious confrontation between Appellant and Smith on June 8, which ended with Appellant grabbing Smith by the hair, striking her, and throwing her down onto Bentley's bed. Bentley also testified that the last time she saw Smith there were bruises on Smith's chest as well as a knot on her head. Linda House testified that as she was leaving her apartment on June 8, she noticed two men and a woman having an argument outside Mary Bentley's apartment. House witnessed the smaller man grab Smith and shove her against a brick wall. Although House could not identify Appellant in open court, the testimony of other witnesses confirmed that Appellant was in fact the smaller man. Appellant contends that the admittance of this testimony violated KRE 404(b).

KRE 404(b) states "[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." However, this type of evidence may be admissible if it is shown there is a basis for inclusion that is independent of character and criminal predisposition. In other words, the evidence must be used "for some other purpose" than to blacken the defendant's character. KRE 404(b). The trial judge has discretion to admit evidence of prior bad acts after completing a three-pronged inquiry. Bell v. Commonwealth, Ky., 875 S.W.2d 882 (1994). First, the trial judge must determine that the evidence is relevant "for some purpose other than to prove the criminal predisposition" of the defendant. Id. at 889. Secondly, the trial judge must determine that the evidence of prior bad acts is sufficiently probative of the defendant's commission of the prior acts. Id. at 890.

Finally, the potential for undue prejudice to the defendant cannot outweigh the probative value of the evidence. Id. at 890.

The trial court admitted the testimony of Bentley and House over Appellant's pretrial objection because it indicated "a continual course of conduct." The Commonwealth argued that this "continual course of conduct" culminated in murder. Appellant argues that a "continual course of conduct" is not among the list of KRE 404(b) exceptions and that the testimony should not have been admitted. However, the other purposes listed under the rule are meant to be illustrative rather than exhaustive. Colwell v. Commonwealth, Ky., 37 S.W.3d 721 (2000).

At trial, Appellant relied solely on a "mere presence" defense. That is, he completely denied involvement in the physical abuse and the killing of Smith. Appellant testified on his own behalf that he awoke to the sounds of dogs barking and merely came upon the body of Smith on the floor of his trailer with no knowledge of how she received her fatal injuries. Still denying the physical abuse, Appellant now argues on appeal that the testimony regarding the violent episodes between him and Smith is inadmissible because it was not used for a legitimate "other purpose" under KRE 404(b) and was only used to portray him as having a predisposition to violence. We disagree.

Kentucky has long held that evidence of prior threats or physical abuse by the defendant against the victim is admissible in a homicide trial for the purpose of demonstrating malice or the intent to kill. See, e.g., Jarvis v. Commonwealth, Ky., 960 S.W.2d 466 (1998); Parker v. Commonwealth, Ky., 952 S.W.2d 209 (1997), cert. denied, 522 U.S. 112, 118 S. Ct. 1066, 140 L. Ed. 2d 126 (1998); Hicks v. Commonwealth, Ky., 269 S.W.2d 181 (1954); Sanders v. Commonwealth, Ky., 50

S.W.2d 37 (1932); Nichols v. Commonwealth, 74 Ky. 575 (1875). Although this common-law rule was developed before the rules of evidence, the admissibility of evidence of prior threats or abuse by a defendant against the victim in a homicide case has survived the adoption of the KRE. Jarvis, 960 S.W.2d at 471.

Appellant urges us to distinguish Parker on the basis of the age and behavior of the victim. In Parker, this Court held that there was no error in allowing evidence of prior abuse in the trial for the murder of a 22 month-old child. The defendant in Parker completely denied any knowledge as to how the child received such extensive injuries. The evidence of prior abuse was held to be admissible to show the defendant's animus towards the child and the absence of accident or mistake. We discern no legitimate reason to distinguish this case from Parker because murder is murder, whether the victim is a helpless infant or an independent adult.

Given Appellant's denial of any involvement with the abuse and killing of Smith, as well as the primarily circumstantial evidence, the prior bad acts of Appellant were offered for the purpose of demonstrating Appellant's malice towards Smith and his intent to kill. The trial court did not abuse its discretion in admitting the evidence of prior abuse under KRE 404(b). Bell, 875 S.W.2d at 890 (citing Rake v. Commonwealth, Ky., 450 S.W.2d 527 (1970)).

For the foregoing reasons, we are convinced there was no error in allowing the testimony of Bentley and House regarding the Appellant's prior abuse of Smith. Accordingly, the judgment of the Laurel Circuit Court is affirmed.

All concur.

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