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RENDERED: NOVEMBER 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-0252-MR

CEDRIC DUWAYNE THOMPSON

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. LISABETH HUGHES ABRAMSON, JUDGE
01-CR-001310

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant was charged with multiple counts of rape, burglary, kidnapping, and robbery, and one count each of attempted rape and assault. At trial, the jury found him guilty on all counts, and the trial court sentenced him to seventy years. Appellant now appeals to this Court as a matter of right,[1] claiming four errors: (1) that the attempted rape and assault counts should have been severed from the other counts; (2) that the trial court improperly permitted an in-court identification of Appellant; (3) that the kidnapping exemption statute should have prevented his conviction for kidnapping

[1] Ky. Const. § 110(2)(b).

because he was on trial for robbery and rape; and (4) that the trial court erred in permitting the Commonwealth to introduce evidence of Appellant's tattoo during the penalty phase of the trial. After a review of the record, we find no error and affirm the trial court.

II. FACTUAL BACKGROUND

A. Victim CM

Appellant's first victim, CM, arrived home from work at approximately 2:30 A.M. on April 4, 2001. Shortly thereafter she left her apartment to take her garbage to the dumpster. As she carried her garbage down the breezeway that led from her apartment to the parking lot, she saw a black man walking on the sidewalk outside. She made eye contact with him for about ten seconds. As she returned to her apartment a few minutes later, the man she had seen approached her with a gun and said, "You already know what this is about." Thinking that he intended to rob her, CM offered the man the keys to her truck and backed away from him. He moved forward and put the gun against her head. He then grabbed the back of her neck with his other hand and began pushing her toward the parking lot. She struggled and broke loose from his grip, but as she ran toward her apartment, he grabbed her and put the gun to her head again. The man began pushing her down the breezeway toward the parking lot again. As he pushed her, she struggled and fell down, but he lifted her up and continued to push her toward the parking lot.

When they reached the end of the breezeway, the man had become agitated and he pushed CM against the wall. She fell to the ground again and tried to curl up into a ball, but the man grabbed her and lifted her from the ground. He began to undress CM, pulling her shirt up and her pants down, and then he pulled his own pants

down, exposing his genitals. CM dropped to the ground a third time and began screaming. The man began hitting her repeatedly in the head with the butt of the gun and telling her to shut up. After about half a minute of this, he gave up and ran away.

CM ran to her truck and drove to a nearby gas station, where she asked the clerk to call the police and an ambulance. She received some treatment for the injuries to the back of her head when the ambulance arrived, but she decided not to go directly to the hospital. Instead, she showed the police where she had been attacked and gave them a description of the attacker—a black man wearing a red, hooded Starter jacket and white nylon jogging pants. A police officer then took her to the hospital for further treatment.

About a week after the attack, CM went to the police station to help prepare a sketch of the man who attacked her. She worked on the sketch with a detective for about three hours. She later saw the sketch posted in a convenience store in another part of town. Some time after completing the sketch, another police detective approached CM to look at a photo line-up, or "photo pack," of six photographs. CM could not positively identify any of the six photographs, saying that she needed to see the people in person to make a positive identification.

At a pretrial hearing and at trial, CM testified that she thought one of the photographs in the photo pack she had seen was of her attacker, and that when she had asked to see the people in the photo pack in person, she had one of the photographs in mind. But the police never asked CM to participate in a live line-up. She also testified that she became sure that Appellant was her attacker when she saw a photo of him that was displayed on television as part of a news story after he was

arrested for other crimes (specifically, the crimes against the other victims in this case). During the pretrial hearing and the trial CM identified Appellant as her attacker.

B. Victims MD1 and MD2[2]

MD1 was attacked in her apartment on May 1, 2001. Late in the evening, she heard a knock on her door. When she answered the door, a black man was standing in the hallway. The man asked about someone named Mandy, who MD1 did not know, and then he asked to use MD1's phone. When MD1 turned to get the phone, the man forced his way into her apartment. The man had a gun and asked for $500.00. MD1 said she only had $50.00, and the man said that was not enough. He took MD1 to her bedroom, forced her to undress, and raped her multiple times, and then made her shower and get dressed. He took several items from her apartment, and then forced her to drive him to an ATM, where she withdrew $500.00. He took the money, and then they went to a shopping center, where he made her get out of the car and walk away.

MD1 went to a gas station to contact the police and was taken to a hospital where she was treated for injuries. She gave the police a description of her attacker and later helped develop a sketch of the man. When presented with a photo pack line-up, she positively identified Appellant as her attacker.

At about 11:00 A.M on May 11, 2001, MD2 was standing outsider her apartment, talking to a coworker on the phone. A man walked by on the sidewalk and asked for directions. MD2 spoke with the man for a moment, but was unable to give him the directions he wanted. The man walked away and MD2 continued her phone conversation and then went into her apartment.

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[2] The second and third victims share the same initials, so the designations "MD1" and "MD2" are used to distinguish between the two.

At about 11:00 P.M. on the same day, MD2 took her garbage out to her patio, and a man approached her with a gun. The man was wearing a mask that partially covered his face, but she still recognized him as the man who had asked for directions earlier in the day. The man forced MD2 to go back into her apartment, where he raped her, and then made her shower and wash the clothes she had been wearing. He took some money from MD2's purse, two rings, and a diamond bracelet. He then made MD2 take him to her car and drive to two ATMs, where he forced her to take out $450 for him.

The man then forced MD2 to drive back to her apartment. He made her get out of the car, and she ran to her apartment and called the police. When the police arrived, she showed them where the man had forced her to drive, and then they took her to the hospital. The next week, a police detective visited MD2 and asked her to look at some photographs. She identified Appellant from the photographs as the man who had attacked her.

When the police arrested Appellant, a search of his residence revealed items that had been stolen from MD1 and MD2's apartments and clothing that matched the descriptions given by victims. Appellant's DNA matched samples that had been collected from MD1 and MD2 when they were treated at the hospital.

III. PROCEDURAL BACKGROUND

Appellant appeared at approximately ten pre-trial hearings where CM was also present. The record does not show what occurred at these hearings. The day before trial Appellant moved the trial court to sever the counts relating to the attack on CM from those involving MD1 and MD2 and to prohibit CM from making an in-court identification. The trial court held a short hearing, then denied both motions.

Appellant was found guilty on all counts—two counts of Rape in the First Degree, two counts of Burglary in the First Degree, two counts of Kidnapping, two counts of Robbery in the First Degree, one count of Attempted Rape in the First Degree, and one count of Assault in the Second Degree. The jury recommended that the sentences on all the charges run consecutively for a total of 133 years. Taking into consideration both the jury recommendation and the requirements of KRS 532.110(1)(c), the trial court sentenced Appellant to seventy years. Appellant now appeals to this Court as a matter of right.[3]

IV. ANALYSIS

Appellant makes four claims of error: (1) that the counts involving CM (attempted rape and assault in the second degree) should have been severed from those involving MD2 and MD1; (2) that the trial court improperly permitted CM to identify him in court; (3) that KRS 509.050 should have prevented his conviction for kidnapping because he was on trial for robbery and rape; and (4) that the trial court should not have allowed the Commonwealth to introduce evidence of Appellant's tattoo during the penalty phase of the trial. We address each claim in turn.

A. Severance of Trials

Appellant contends that he was entitled to severance of the counts related to his alleged attack on CM from the counts related to the other two attacks. It is a well-established precedent that the trial judge has broad discretionary powers in matters of joinder[4] and that the trial court's decision not to sever the counts "will not be overturned

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[3] Ky. Const. § 110(2)(b).

[4] E.g., Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993); Brown v. Commonwealth, Ky., 458 S.W.2d 444, 447 (1970).

absent a showing of prejudice and clear abuse of discretion."[5] The trial court is charged with granting separate trials only "[i]f it appears that a defendant . . . is or will be prejudiced by joinder of offenses."[6] We have described "the real issue [as] whether [a defendant] was unduly prejudiced, i.e., whether the prejudice to him was unnecessary and unreasonable."[7]

The facts in this case are similar to Romans v. Commonwealth.[8] In Romans, the appellant was charged with raping two women, Lois McClellan and Doris Burnett. He claimed that McClellan had consented to sex in exchange for money. He did not deny that Burnett had been raped, but he denied that he committed the crime. The trial court refused to grant the appellant separate trials on the two counts of rape. We held that "[i]t is not always and inevitably prejudicial, in the legal or relative sense of the word, that two separate and unrelated charges of forcible rape against the same defendant be tried together."[9] And though we ultimately reversed in Romans on other grounds, we went on to note that when the case was to be retried, "the two charges ought not to be tried together."[10]

Appellant draws our attention to the language noting that "[i]f the jury was convinced that the appellant did in fact rape Miss Burnett, it would for that reason be less inclined to doubt that he did the same thing in the McClellan case."[11] But Appellant

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[5] Rearick, 858 S.W.2d at 187.

[6] RCr 9.16.

[7] Price v. Commonwealth, Ky., 31 S.W.3d 885, 888 (2000).

[8] Ky., 547 S.W.2d 128 (1977).

[9] Id. at 131.

[10] Id.

[11] Id.

ignores the language immediately preceding this quotation that recognizes that there was evidence to support the consent defense with regard to McClellan: "In the McClellan case appellant admitted the act of intercourse but claimed it was by consent. That the prosecuting witness had been previously involved in prostitution lent some degree of credence to his defense. It was a matter of his word against hers." Appellant also ignores that decisions in this type of case are factually sensitive.[12] As we have noted elsewhere, the facts in Romans consisted of "unusual circumstances."[13] The mere fact that a defendant claims to have different defenses to similar or identical charges, especially where the other defenses are based solely on the defendant's testimony without corroboration, does not inherently preclude joinder of those charges in a single trial. That joinder of charges will hamper Appellant from presenting a certain defense is not enough to require severance: "This argument in the absence of other compelling factors ordinarily is not sufficient to warrant a severance."[14]

Thus, we are left to look elsewhere to see if the joinder was prejudicial. We have held that "[i]n determining whether a joinder of offenses . . . is prejudicial, a significant factor to be considered is whether the evidence of one of the offenses would be admissible in a separate trial for the other offense. If the evidence is admissible, the joinder of offenses, in most instances, will not be prejudicial."[15] We have also noted that "joinder is proper where the crimes are closely related in character, circumstance and time."[16] In other words, joinder is probably not prejudicial if evidence of one of the

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[12] Id. ("Where to draw the line depends on the facts of the individual case.").

[13] Owens v. Commonwealth, Ky., 572 S.W.2d 415, 416 (1977).

[14] Id.

[15] Spencer v. Commonwealth, Ky., 554 S.W.2d 355, 357 (1977).

[16] Commonwealth v. Collins, Ky., 933 S.W.2d 811, 816 (1996).

crimes would be admissible in the separate trial of the other offense. Admissibility of this type of evidence is governed by KRE 404(b), which allows the admission of evidence of other crimes if it shows motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

We employed this rule even before the adoption of the Rules of Evidence,[17] when we also noted that "[e]vidence of other crimes of sexual misconduct is also admissible for the purpose of showing motive, a common pattern, scheme or plan."[18] But we have narrowed the rule with regard to sexual offenses:

> [M]ultiple acts involving sexual crimes are not necessarily similar, . . . collateral bad acts evidence offered to prove corpus delicti should satisfy the same criteria as such evidence offered to indicate modus operandi. That is, evidence of other acts of sexual deviance offered to prove the existence of a common scheme or plan must be so similar to the crime on trial as to constitute a so-called signature crime.[19]

In making its ruling, the trial court relied on what it called a "significant connectedness . . . among the[] charges," specifically noting that all three attacks in this case occurred within a small geographic area and within a short period of time (within forty days). At trial, the testimony revealed even more connections among the three attacks: all occurred late at night, the attacker used a gun in all three, and all three victims were young women living in apartments. And there was a further connection between the attack on CM and the attack on MD2: the attacker waited until the women

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[17] See, e.g., Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 552 (1985) ("Evidence of other crime is admissible when the crime has a special relationship to the offense charged. Such evidence would show motive, identity, absence of mistake or accident, intent, or knowledge, or common scheme or plan.").

[18] Id.

[19] Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993).

took out their garbage to approach them. Appellant claims that the attack on CM was different because it involved an attempted rape in an open outdoor parking lot, whereas the other attacks took place in the victims' homes, and because MD1's attacker attempted to gain entry through trickery (asking to use the phone) and MD2's attacker wore a mask. While these differences militate against the possibility that a signature crime was involved, they are not sufficient to show that the trial court's ruling, given the large number of similarities among the crimes, was an abuse of discretion.

B. Identification

Appellant also claims that the trial court erred by allowing CM to identify him in court. He argues that CM's in-court identification was unduly suggestive because she had failed to identify him from the photo pack, thus making the in-court identification the functional equivalent of a one-on-one confrontation. We would simply note that the failure of a witness to identify a suspect from a photographic line-up does not prevent that witness from later identifying a suspect in court.[20] It is not necessarily error even when a witness picks one person from a photo line-up but then identifies another person at trial—i.e., makes an initial misidentification.[21] Instead, the jury must determine what weight to give to the in-court identification,[22] which, in turn, gives the defense plenty of room to cross-examine the witness as to his or her misidentification, or failure to make an identification, when presented with the photo line-up. That the trial

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[20] See United States v. Dobson, 512 F.2d 615, 616 (6th Cir. 1975) ("[W]here an eyewitness was unable to pick out a defendant's picture from an array of photographs, this did not prevent the same witness from making a positive in-court identification."); United States v. Briggs, 700 F.2d 408, 413 (7th Cir. 1983) ("[A] witness's prior inability to identify a defendant goes to the credibility of the in-court identification and not to its admissibility, and thus raises a proper question of fact for the jury to determine.").

[21] Dobson, 512 F.2d at 616.

[22] Id.

court allowed CM's in-court identification of Appellant as her attacker, after she failed to identify him from the photo pack, was not error.

Appellant also makes the somewhat confused argument that in failing to have CM view a live line-up of suspects, but then allowing her to attend pretrial hearings in the case, the police, or perhaps the Commonwealth, engaged in impermissible state action and also made the in-court identification unduly suggestive. This is, in a sense, an attempt to invoke Neil v. Biggers,[23] which "established a two-prong due process test"[24] for evaluating identifications by witnesses. We have described this test as follows:

> When examining a pre-trial confrontation, this court must first determine whether the confrontation procedures employed by the police were "suggestive." If we conclude that they were suggestive, we must then assess the possibility that the witness would make an irreparable misidentification, based upon the totality [of] the circumstances and in light of the five factors enumerated in Biggers.[25]

We also noted that "[i]mplicit in the first prong of the Biggers test is a finding that the government had some hand in arranging the confrontation."[26]

To begin with, we must point out that the Biggers analysis only applies to pretrial confrontations. As such, any suggestion by Appellant that the in-court identification during the trial was unduly suggestive under the Biggers test is not well taken. What Biggers does allow is for a later in-court identification to be prohibited if a pretrial confrontation was unduly suggestive. The trial court recognized this distinction

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[23] 409 U.S 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

[24] Wilson v. Commonwealth, Ky., 695 S.W.2d 854, 857 (1985).

[25] Id.

[26] Id.

expressly when it ruled that to the extent there were any pretrial confrontations, they were not unduly suggestive, thus rendering an application of the Biggers factors unnecessary.

So what we are then left to review is whether any of the pre-trial confrontations were unduly suggestive. And this is where Appellant's argument becomes confusing. We are unable to determine exactly which pre-trial confrontation that Appellant takes issue with because he discusses three separate categories of unduly suggestive confrontation. As such we will analyze each category of "contact" between Appellant and CM, whether live or not, that followed the photo pack.

Appellant's first point of contention in this regard is with the police's failure to have CM view a live line-up after she requested one. First of all, this is not an unduly suggestive confrontation because there was no contact with Appellant, i.e., there was no confrontation. But Appellant appears to discuss this matter in an attempt to show "state action" that would render later confrontations "unduly suggestive." Basically, Appellant argues that the police engaged in state action by failing to have CM view a live line-up. This, he contends, then tainted her later observations of Appellant in court because she had not been given an out-of-court opportunity to identify him. This failure to act by the police, however, is not "state action." In fact, we find it difficult to conceive of a failure to act as "action" unless the failure to act constitutes a breach of duty. But the police had no duty to have CM do a live line-up. A failure by the police to have a victim view a live line-up of suspects is similar to the situation where a person misidentifies, or fails to identify, a suspect when presented a photo array: it does not prevent a later in-court identification and goes only to the weight of the in-court identification, which is a matter for the jury to decide.

Appellant also claims that CM's in-court identification was tainted by her appearance at several pretrial conferences and hearings, including the hearing the day before trial when the motions to sever and to prohibit CM's in-court identification were heard. Appellant argues that Commonwealth engaged in state action by allowing CM to speak with the other victims during these proceedings and by failing to prevent CM from seeing Appellant during these pretrial proceedings. Appellant also claims that CM's later in-court identification was based on knowledge gained from these pretrial proceedings, not her own recollection of the attack.

We addressed the issue of confrontations during pretrial proceedings in Wilson v. Commonwealth:

> During the course of a prosecution, there will invariably be chance confrontations between an accused and witnesses for the Commonwealth. We fail to perceive a real danger to the defendant in such situations where the Commonwealth has not arranged the confrontation and there is no attempt by its agents to indicate to the witness(es) that "that's the man." In our view, such a confrontation is less suggestive than an in-court identification, where a witness need merely look to the defense table. We therefore hold that, in order to establish that a pre-trial confrontation was unduly suggestive, the defendant must first show that the government's agents arranged the confrontation or took some action during the confrontation which singled out the defendant. [27]

Appellant has not shown that the Commonwealth arranged any confrontation between him and CM during these pretrial proceedings, nor has he shown that the Commonwealth took any action at these pretrial appearances that singled him out. In fact, the only testimony that Appellant elicited on this count was that CM had come to approximately ten pretrial proceedings. Appellant has failed to prove that these

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[27] Id.

confrontations were anything more than the "chance confrontations" contemplated by Wilson. No evidence suggested that the Commonwealth arranged the confrontations.

The sole possible exception might have occurred at the final pretrial hearing the day before trial. At that time, CM took the witness stand, gave testimony, and pointed out Appellant as her attacker—a situation that was more suggestive than a chance encounter in a hallway of the courthouse. But this confrontation occurred in the context of a just-in-case Biggers hearing that was ordered by the trial court and requested by the defense, not the Commonwealth. And more importantly, CM testified that she had already become convinced that Appellant was her attacker when she saw his picture during a television news broadcast—before the pretrial proceedings. It suffices to say that such a broadcast was not state action. Thus, to paraphrase Wilson, "[b]ecause [Appellant] has failed to show either of these actions on the Commonwealth's part, we find that the trial court properly refused to suppress the in-court identification."[28]

C. Kidnapping

Appellant actually alleges two separate errors with regard to the two counts of kidnapping: (1) that the trial court failed to order the Commonwealth to give him proper notice of the nature of these charges and (2) that the kidnapping offenses should have been dismissed under the kidnapping exemption in KRS 509.050.

1. Failure to Provide Notice of Underlying Felony

Appellant claims that the trial court erred by failing to require the Commonwealth to provide him with adequate warning of the nature of the kidnapping charge. As to both kidnapping counts, the indictment reads that Appellant "committed the offense of Kidnap[p]ing when he unlawfully restrained [the victim], against her will with the

[28] Id.

intention of accomplishing or advancing the commission of a felony." The jury instructions listed robbery as the felony underlying the kidnapping charge. But Appellant claims that the Commonwealth did not give him notice before trial of what felony the kidnapping counts referred to.

In its Response to Court's Order of Discovery and Bill of Particulars, the Commonwealth noted that "the attached [discovery] materials specify the time, date, place, and alleged conduct by the defendant which is the basis of the charges contained herein." Appellant, however, filed no motion with respect to this response, and raised no objection at trial. If he was unsatisfied with the sufficiency of the Commonwealth's response, he was required to raise this issue either before or during trial. But he failed to do so. We have consistently refused to consider issues not presented to the trial judge,[29] and we will not rule on a matter raised for the first time on appeal. This issue was not preserved, thus Appellant's claim of error does not warrant further consideration.

2. Kidnapping Exemption Statute

Appellant further alleges error with respect to the trial court's jury instruction on the charge of kidnapping. Appellant claims that the allegations made by the Commonwealth place the events within the purview of the kidnapping exemption statute, which reads in relevant part:

> A person may not be convicted of . . . kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds

[29] Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 872 (1998) ("Appellate courts review only claims of error which have been presented to trial courts.").

> that which is ordinarily incident to the commission of the offense which is the objective of his criminal purpose.[30]

Appellant argues that the restrictions on the victims' liberty were no more than those that occur normally during, and incident to, robbery and/or rape, and as such, fall within the kidnapping exemption.

The applicability of the exemption statute is determined under a three-part test:

> First, the criminal purpose must be the commission of an offense defined outside Chapter 509; second, the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense; and finally, the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense.[31]

The first prong of the test is clearly satisfied because the underlying offense—robbery—is defined outside Chapter 509, namely, in KRS Chapter 515.

As to the second prong, we have ruled that "the restraint will have to be close in distance and brief in time in order for the exemption to apply."[32] We have also noted that "[i]f the victim is restrained and transported any substantial distance to or from the place at which the crime is committed or to be committed, the offender will be guilty of an unlawful imprisonment offense as well. Under that criterion the exemption statute is not applicable."[33] We have specifically construed this language in Timmons as excluding application of the kidnapping exemption when a victim is transported in a car to the site of a robbery.[34] The restraints in this case occurred when Appellant, having already raped MD1 and MD2, forced each of them to drive him to and from an ATM,

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[30] KRS 509.050.

[31] Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 180 (2001).

[32] Timmons v. Commonwealth, Ky., 555 S.W.2d 234, 241 (1977).

[33] Id.

[34] Brown v. Commonwealth, Ky., 892 S.W.2d 289, 291 (1995).

where he forced them at gunpoint to get money for him. The trial court correctly denied the applicability of the kidnapping exemption to the case.

D. Tattoo Evidence

Appellant also argues that the trial court erred in allowing the introduction of a photograph of a tattoo during the sentencing phase. The photograph was of a tattoo across Appellant's back that read "HAMMADICK." Appellant claims that the Commonwealth failed to lay a foundation to establish that the tattoo was indicative of future dangerousness or character (presumably an argument that the tattoo was irrelevant) and that the introduction of the photograph of the tattoo was unduly prejudicial.

Though the specific issue of the relevance of evidence of a tattoo during sentencing appears to be without precedent in Kentucky law, the rule of relevance—"having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"[35]—provides sufficient guidance. And we review the trial court's decision in this regard under the abuse of discretion standard.[36]

The Commonwealth failed to offer any testimony as to the meaning of the tattoo, and the Appellant himself offered no explanation. The tattoo is a made-up word. With no background, context, or obvious, inherent meaning, the tattoo is simply a tattoo. Thus, we can discern little connection between Appellant's tattoo and any "fact that is of consequence to the determination" of the sentence to be imposed. But the trial court ruled that because Appellant had committed crimes against women, the tattoo was

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[35] KRE 401.

[36] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996).

highly relevant as to punishment and the possibility of Appellant's recidivism. Though we might disagree with the trial court's finding that the tattoo was relevant, Appellant has failed to show that the trial court's relevance finding rose to the level of an abuse of discretion.

We are left then to determine whether admission of the tattoo was unduly prejudicial. The lack of testimony or other evidence as to the meaning of the tattoo, however, also makes it difficult for us to discern any prejudice. Because there is no evidence of what the tattoo means, we find little, if any, prejudice in the introduction of the photograph at trial. At the very least, Appellant has not shown that the photograph was sufficiently prejudicial to require reversal, and any error committed by the trial court in this regard was harmless.

V. CONCLUSION

The trial court did not abuse its discretion in refusing to sever the attempted rape and assault counts from the other counts, or in finding that the tattoo evidence was relevant; CM was properly allowed to identify Appellant in court; and the trial court correctly ruled that the kidnapping exemption did not apply. For these reasons, we affirm the trial court.

Lambert, C.J.; Graves, Johnstone, Keller, Stumbo and Wintersheimer, JJ., concur. Cooper, J., concurs in result only.

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