

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0657-MR

DATE 6-9-05 EJA Grant, D.C.

JONATHAN GOODAN

APPELLANT

V.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
03-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

2003-SC-0658-MR

JASON GOODAN

APPELLANT

V.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
03-CR-00026

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellants, Jason Goodan and Jonathan Goodan, were each convicted of two counts of Second-Degree Arson and one count of Second-Degree Burglary. Both were sentenced to fifty years in prison, though Jason Goodan, who was found to be a Second-Degree Persistent Felony Offender (PFO), received an enhanced sentence of seventy years. Appellants argue that the trial court erred in denying a requested jury instruction on the unreliability of eyewitness testimony and in admitting KRE 404(b)

evidence. The trial court's decision not to grant the requested jury instruction was proper under Evans v. Commonwealth,¹ and no KRE 404(b) evidence was proffered at trial. Accordingly, we affirm Appellants' convictions.

II. BACKGROUND

On the evening of January 17, 2003, a house owned by Marty Stevens and a motor vehicle owned by Michael Stevens were damaged by separate fires. Upon investigation, officials determined that the fires were the result of arson. Upon reentering, the residents of the house discovered that various items of personal property were missing. A few weeks later, on February 21, 2003, Jason Goodan, Jonathan Goodan, and Michelle D. Conn were indicted on two counts of Second-Degree Arson and one count of Second-Degree Burglary. Jason Goodan was also charged with being a Second-Degree PFO. Michelle Conn entered a plea of guilty, and Jason and Jonathan Goodan pled not guilty.

At trial, the prosecution called Kelsey Day, one of Michael Stevens's neighbors, to testify about what she observed on the night of the fire. Upon hearing a loud crashing noise, Day looked outside, where she saw Michelle Conn and two men in her driveway. Although Day recognized Conn, she could not identify the two men. According to Day, Conn repeatedly yelled at her, urging her to assist in the "cleanup" effort of debris that had fallen out of Conn's truck. Day refused to help Conn, and Conn and the men left shortly thereafter. About 5-10 minutes after Conn left, Day heard the sirens of fire trucks. Richard Brian Stevens, who was at Day's house on the evening of the fire, said that he too saw Conn in Day's driveway, adding, however, that one of the men with Conn was Jonathan Goodan.

¹ Evans v. Commonwealth, 702 S.W.2d 424 (Ky. 1986).

Michael Stevens and his live-in girlfriend, Tina Tackett, testified for the Commonwealth. Tackett said that Conn had been harassing her over money ostensibly owed to Conn by Michael Stevens.

Michelle Conn, who accepted a plea bargain with the Commonwealth, was also called to testify. According to Conn, Jason and Jonathan Goodan were with her in her truck on the night of the fire. She said that she and the Goodans went to the Stevens residence to collect a drug debt. Once there, Jason Goodan kicked the door in, and some items were taken from the house. Although Conn was present when the fire occurred, she maintained that she did not witness either brother setting fire to the house or vehicle. Conn also testified that the brothers were under the influence of crack cocaine.

Appellants made a motion for directed verdict at the end of the Commonwealth's case, which was denied. A second motion for directed verdict, made at the close of the trial, was also denied.

The jury convicted Appellants of both arson charges and the burglary charge and recommended sentences of twenty years imprisonment on each of the arson convictions and ten years imprisonment on the burglary conviction. The jury recommended that the sentences run consecutively for a total sentence of fifty years. The jury also found that Appellant Jason Goodan was a Second-Degree PFO and recommend an enhanced sentence of seventy years in lieu of the fifty-year sentence. The trial court sentenced Appellants in accordance with the jury's recommendations, and they appeal to this court as a matter of right.²

² KY. CONST. § 110(2)(b).

Appellants, who were tried together, have raised the same issues in this appeal, and, in fact, their briefs are almost identical. As such, we consolidate and address both appeals in this opinion.

III. ANALYSIS

Appellants make two claims on appeal. First, they contend that the trial court erred in its decision not to grant their proffered jury instruction concerning the dangers inherent in eyewitness testimony. Second, they argue that the trial court erred in admitting KRE 404(b) evidence.

Appellants contend that the eyewitness testimony in this case, though admissible, should have been accompanied by a detailed jury instruction about the risks of such evidence. We disagree. This Court held in Evans v. Commonwealth³ that such instructions were unnecessary because their substance was already covered by traditional jury instructions: “An instruction on eyewitness identification is not required in Kentucky. Such an instruction would give undue emphasis to a particular aspect of the evidence. The substance of the requested instruction was encompassed by the reasonable doubt instruction given by the trial court.”⁴ Appellants do not disagree with the Court’s interpretation of Evans, but argue that the Evans holding has been superseded by a subsequent case, Commonwealth v. Christie.⁵ According to Appellants, Christie, decided in 2003, explicitly supplants the Court’s holdings in Pankey v. Commonwealth⁶ and Gibbs v. Commonwealth⁷ and implicitly reverses the Court’s holding in Evans.

³ 702 S.W.2d 424 (Ky. 1986).

⁴ Id. at 424 (citations omitted).

⁵ Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002).

⁶ 485 S.W.2d 513 (Ky. 1972).

This position, however, is not consistent with our interpretation of Christie. In Christie, we said that “trial courts in the Commonwealth have the discretion under KRE 702 to admit expert-witness testimony regarding the reliability of eyewitness identification and we overruled Pankey and Gibbs to the extent that those cases hold otherwise.”⁸ Christie, however, does not contradict Evans. That Christie did not explicitly overrule Evans is without question. We had no qualms about overruling Pankey and Gibbs, to the extent they differed from Christie. But Christie did not implicitly overrule Evans either because our holdings in those cases address two separate issues. In Christie, we ruled that trial courts have the discretion to allow testimony concerning eyewitness identification during trial, i.e., we allowed a defendant to present evidence about the reliability of eyewitness testimony. But in Evans, by refusing to allow a separate instruction as to witness reliability, we held, in effect, that we refuse to accept as a matter of law that eyewitness testimony is unreliable. So, while these two cases deal with the same concern, the trustworthiness of eyewitness identification, they address distinct questions and, consequently, are not in conflict.

In this case, Appellants had the opportunity to offer evidence of the problems inherent in eyewitness testimony in the form of expert opinion, but they opted not to do this, choosing instead to insist that the trial judge admonish the jury about the risks of such evidence. The trial judge refused to grant Appellants’ request for this instruction. This decision was proper, and we will not disturb the trial judge’s ruling.

Appellants also contend that the trial court committed reversible error in its admission of KRE 404(b) evidence. Yet Appellants’ briefs do not properly present the

⁷ Gibbs v. Commonwealth, 723 S.W.2d 871 (Ky.App. 1986).

⁸ Christie at 488 (citations omitted).

preservation of this issue for appellate review.⁹ Under CR 76.12(4)(c)(v), which is applicable to criminal appeals through RCr 12.02, Appellant's brief must include "a statement with reference to the record, showing whether the issue was properly preserved for review and, if so, in what manner."¹⁰ Although Appellants' briefs claim that objections were made during Michelle Conn's testimony, there is no indication that Appellants properly preserved the KRE 404(b) issue for appeal. Appellants have failed to cite specifically to the testimony in the videotaped record as is required by our rules.¹¹ They have failed to mention the date or time for the relevant testimony, and it is not our responsibility to find the complained of testimony for them. Nonetheless, we have reviewed the witnesses' testimony. Notwithstanding Appellants' frequent claims of the admission of impermissible KRE 404(b) evidence, we find very little in the record that could be considered KRE 404(b) evidence. What little evidence we have found that begins to rise to the level of KRE 404(b) evidence, e.g., Conn's reference to Appellants' drug use, was never objected to and simply was not significant enough to prejudice Appellants, assuming, arguendo, that such evidence was not admissible. As such, we are compelled to reject Appellants' argument that the trial court committed reversible error.

IV. CONCLUSION

We hold that the trial judge properly refused to grant Appellants' requested jury instruction on the trustworthiness of eyewitness testimony, and we do not find a

⁹ CR 76.12(4)(c)(v).

¹⁰ *Id.*

¹¹ CR 98(4)(a) ("Each reference in a brief to a segment of the videotape recordings (hereinafter referred to as a tape reference) shall set forth in parentheses the word "TAPE," the number of the videotape, and the month, day, year, hour, minute, and second at which the reference begins as recorded on the videotape. For example: (TAPE No. 1; 10/27/86; 14:24:05)").

violation of KRE 404(b). For these reasons, we reject Appellants' claims of error and affirm their convictions.

All concur.

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