

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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

2005-SC-000341-MR

DATE 9-14-06 ELLAGROW, H.D.C.  
APPELLANT

PATRICK SCOTT PRYOR

V. ON APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
NO. 03-CR-01527

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Patrick Scott Pryor, was convicted of intentional or wanton murder under KRS 507.020. Appellant was sentenced to life imprisonment. This appeal is as a matter of right.<sup>1</sup> Appellant contends that the Fayette Circuit Court, under Kentucky Rules of Evidence (KRE) 404(b), improperly admitted testimony of Appellant's former wife and former brother-in-law relating to physical violence against Appellant's children. We discern no error warranting reversal and affirm the conviction.

On October 25, 2003, Appellant, a father of three children, strangled his thirteen month old son, Conner, with a costume jewelry necklace. When the paramedics arrived, Appellant was giving mouth to mouth resuscitation to Conner. As a result of the injuries Conner died on November 2, 2003. A physician determined the cause of the child's death to be asphyxia from ligature strangulation.

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<sup>1</sup> Ky. Const. § 110(2)(b).

After giving several explanations for the child's death, Appellant confessed to the investigating officer that he had strangled his son. Appellant introduced evidence that he was under the influence of extreme emotional disturbance at the time of the strangulation due to his unstable marriage, family financial difficulties, and the sexual assault of his daughter.

Appellant contends that the Fayette Circuit Court erred with respect to two evidentiary issues involving prior bad acts. The prior acts were admitted into evidence through the testimony of Appellant's ex-wife and Appellant's former brother-in-law.

The first instance involved the testimony of Appellant's ex-wife who said that near in time to the strangulation of Conner, July or August 2003, Appellant had struck their daughter when the child painted on the walls with make-up. Appellant's wife heard a smack, saw the child holding her cheek, and noticed a visible handprint across the child's face. Appellant admitted hitting the child. Prior to trial, the Commonwealth gave notice under KRE 404(c) of its intent to present this evidence. On October 29, 2004, the trial court held a hearing on the admissibility of the KRE 404(b) evidence. The Commonwealth stated that the evidence of prior violence against Appellant's other child was sufficiently similar to be probative in this case. Appellant stated that the evidence was merely character evidence that would be unfairly prejudicial. The trial court allowed the evidence.

The second instance of alleged error involved the testimony of Appellant's ex-wife and Appellant's former brother-in-law. The Commonwealth also gave notice under KRE 404(c) during the early part of trial, disclosing its intent to present testimony from Appellant's ex-wife that Appellant grabbed his oldest son and threw him down

because the child jumped on the bed in a hotel room. The child suffered some red marks and bruises, but was not seriously injured. Appellant's former brother-in-law was allowed to testify that he saw Appellant punch the child in the face, but the record is unclear as to whether these were separate or the same incidents. The Commonwealth asserted that the evidence showed proof of intent, state of mind, and absence of mistake or accident.<sup>2</sup> Appellant responded that the evidence was prejudicial, but the trial court allowed it on the view that the evidence showed lack of mistake and its probative value was not outweighed by undue prejudice. The issue on appeal is whether this KRE 404(b) evidence was properly admitted.

Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings.<sup>3</sup> "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."<sup>4</sup> Appellant contends that admission of the evidence was error, and sufficient to require reversal of his conviction. Appellant objected to the admission of the prior bad acts evidence thereby preserving the issue for our review. The Commonwealth questioned preservation, asserting that Appellant is presenting a different ground for objection on appeal than he presented at trial. However, the substance of Appellant's argument, both at trial and before this Court, is that the evidence was unfairly prejudicial, and lacked sufficient probative force to be relevant.

The preliminary inquiry required to determine admissibility of prior bad acts evidence is whether the evidence falls within one of the exceptions listed in KRE

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<sup>2</sup> KRE 404(b).

<sup>3</sup> Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996).

<sup>4</sup> Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000) (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)).

404(b). Of course, to be admissible, such evidence must also meet the balancing test of KRE 403 which requires that its probative value not be outweighed by the danger of undue prejudice. Appellant's argument attacked the admissibility of the prior bad acts evidence under both rules. We first address the admissibility of the evidence under KRE 404(b).

KRE 404(b) provides the general rule, as well as a non-exhaustive list of exceptions: "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."<sup>5</sup> KRE 404(b)(1) provides that other crimes, wrongs, or acts, however, may be admissible "if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>6</sup>

Here, the Commonwealth sought to introduce evidence of previous acts of violence by Appellant against his other children for one or more of the "other purposes" identified in KRE 404(b). Specifically, the Commonwealth argued, and the trial court agreed, that the alleged prior bad acts were admissible to prove intent and lack of mistake or accident with respect to his infant child, Conner. Appellant claimed that he never intended to hurt Conner, and emphasized trying to save the child's life. He further argues that he performed the acts that killed his son under the influence of extreme emotional disturbance and did not deliberately kill Conner. Thus, Appellant's main defense was that he lacked the required *mens rea*. Specifically, he asserted that Conner's death was accidental rather than intentional.

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<sup>5</sup> KRE 404(b).

<sup>6</sup> KRE 404(b)(1).

As previously noted, one of the exceptions under KRE 404(b) provides that evidence of prior bad acts may be admissible to prove intent or to exclude the possibility of accident or mistake. This Court has noted:

Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense.<sup>7</sup>

The evidence in question revealed that Appellant's two other children were not significantly older than the victim at the time of the assault. Respectively, they were five years old, four years old, and fourteen months old. The prior acts of violence occurred within a few months before the death of the victim and all three acts involved Appellant's use of physical violence against his young children. The evidence of Appellant's past instances of violence against his children is probative of the contention that Appellant acted intentionally or wantonly to harm his child Conner.<sup>8</sup> Thus, the evidence was admitted for some purpose other than to prove the propensity of the defendant to commit criminal acts.

Next we must address Appellant's argument that the probative value of the evidence was outweighed by the danger of undue prejudice under KRE 403. Three

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<sup>7</sup> Walker v. Commonwealth, 52 S.W.3d 533, 537 (Ky. 2001) (citing United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979)).

<sup>8</sup> At trial, there was no issue as to corpus delicti, i.e., whether the crime had occurred, and Appellant admitted the act that caused the child's death. Thus, it is unnecessary here to discuss the Billings v. Commonwealth, 843 S.W.2d 890 (Ky. 1992), "modus operandi" line of cases. The only issue here is whether appellant intended to harm his child or whether the harm was the product of mistake or accident.

factors must be considered by the trial court in evaluating the admissibility of such evidence: “the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth.”<sup>9</sup>

While the trial court did not clearly articulate its reasons for resolving the KRE 403 issue in favor of admitting the prior bad acts evidence, it is clear that it viewed it as more probative than prejudicial. As KRE 403 is a rule of exclusion, the burden is upon a party seeking to exclude such evidence to persuade the trial court that it should be excluded. Failing this, KRE 402 is controlling. We conclude, therefore, that the trial court sufficiently applied the KRE 403 test.

The outcome of this balancing inquiry should be clear. Appellant claims that the evidence prejudiced the jury against him. However, the two limited instances of prior bad acts toward his other children were only a small part of the testimony, and further, the question of guilt was not an issue. Thus, the probative value outweighs any prejudice against Appellant.

For the foregoing reasons, the final judgment of the trial court is affirmed.

Lambert, C.J., and Graves, McAnulty, Minton, Roach, Scott, and Wintersheimer, JJ., concur.

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<sup>9</sup> Partin, 918 S.W.2d at 222 (citing Robert Lawson, The Kentucky Evidence Law Handbook, § 2.10 at 56 (3<sup>rd</sup> Ed. 1993)).

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