

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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

2004-SC-000885-MR

DATE 10-12-06 EJA/Growth/DC

GEORGE EDWARD MALONE, JR.

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
NO. 03-CR-000494 AND 03-CR-000970

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the spring of 2002, the victim, Candace Bell, became a pen pal with Appellant, George Edward Malone, Jr., one who was in prison. On Bell's first prison visit with Appellant, they began a sexual relationship. After Appellant was paroled in August of 2002, the couple moved in together.

Bell and Appellant had a tumultuous relationship from the start. In January of 2003, Bell approached the apartment of Mr. Andre Owen with cries for help and screams that someone was trying to kill her. Upon opening his door, Owen observed Bell "balled up" on his doorstep. She entered Owen's apartment and he called 911 for assistance. Emergency personnel took Bell to the emergency room where the examining physician observed various abrasions and bruises on her head, arm, hand, elbow and knee, and that both eyes were swollen. During the examination Bell revealed that she had been raped and sodomized by Appellant. Specifically, she

stated that Appellant had beaten her for several days, choked her with a belt to the point of loss of consciousness, sexually assaulted her both vaginally and anally with his penis and with a screwdriver and stuffed a sock in her mouth while tying her up with duct tape. She later repeated these statements to a detective, adding that Appellant would not allow her to leave the apartment.

Appellant was charged and indicted on one count of kidnapping, one count of wanton endangerment in the first degree, two counts of rape in the first degree, two counts of sodomy in the first degree, one count of assault in the fourth degree and of being a persistent felony offender (PFO) in the first degree. At trial, Bell's testimony differed significantly from the prior statements she had made at the hospital and to detectives immediately following the incident. However, a jury returned a verdict of guilty on all counts. Appellant was sentenced to fifty years on each of the rape counts and each of the sodomy counts, all to run concurrently. He was sentenced to twenty years for kidnapping and twenty years for wanton endangerment, to run concurrently. The fifty-year and the twenty-year concurrent sentences were ordered to run consecutively for a total of seventy years. Appellant appeals to this court as a matter of right,¹ asserting that the trial court erred by refusing to strike a juror for cause, permitting certain evidence of other crimes and bad acts to be introduced, prohibiting the introduction of certain letters written by the victim, and failing to instruct the jury on unlawful imprisonment in the second degree.

Appellant asserts that his conviction should be reversed due to prejudicial error resulting from the trial court's refusal to strike juror number 59413 for cause.

¹ Ky. Const. § 110(2)(b).

During voir dire, certain jurors expressed doubt about their ability to observe the presumption of innocence before all the evidence was presented. One juror specifically alluded to the fact that a grand jury had returned an indictment indicating probable cause. The trial court responded with a thorough explanation of the indictment process and emphasized the presumption of innocence.

Upon completion of voir dire, defense counsel moved the court to excuse certain jurors for cause based on their doubts regarding the presumption of innocence. When the motion was made to strike juror number 59413, the trial court noted that although this juror had initially voiced concern over her ability to observe the presumption, she retreated from this view following the court's explanation. Accordingly, the court denied the motion to strike the juror for cause.

Appellant contends that the trial court confused the juror in question with juror number 80776 who had also commented on the presumption of innocence during voir dire. It does appear that the trial court may have been mistaken initially as to the juror's identity. However, the trial court also noted that juror number 59413 retreated from her position and did not voice concerns following the court's explanation of the presumption of innocence. As the camera remained on the trial judge during her explanation and during follow-up questions, the video record does not reveal the jurors' non-audible responses. However, the video record does reveal that the trial court, using a diagram of the jurors' seat and badge numbers, diligently made written notes of juror responses throughout voir dire. Accordingly, we cannot conclude that the trial court abused its discretion by refusing to strike the juror.² Moreover, to demonstrate

² Mabe v. Commonwealth, 884 S.W.2d 668 (Ky. 1994).

reversible error, Appellant must show not only that the trial court abused its discretion, but also that he was prejudiced by the error.³ In the instant case, even assuming that the trial court confused the two jurors, no prejudice resulted as the trial court granted defense counsel's motion to strike juror number 80776 for cause and Appellant used a peremptory challenge to excuse juror number 59413. Under Morgan, there was no error.

Appellant also claims error in the trial court's admission of evidence of certain other crimes and bad acts, which included Appellant's prior assaults on the victim, violation of a no contact order, parole violations, and his possession of a stolen automobile. Prior to trial, the Commonwealth provided notice of its intent to introduce evidence of Appellant's prior assaults on the victim, the primary assault having been one which occurred in November or December of 2002, only a month or two before the acts giving rise to this case. This resulted in the victim's flight to a shelter in Elizabethtown. Appellant objected to the introduction of this evidence. After a hearing, the trial court held that evidence of the prior assault was admissible and deferred ruling on the admissibility of any additional assaults until trial. At trial, the Commonwealth did, in fact, solicit from the victim evidence of one additional prior incident of Appellant slapping her. However, no contemporaneous objection was made, rendering the issue unpreserved. Thus, we will review the only preserved issue, the assault that prompted the victim to flee to the shelter in Elizabethtown.

At the pre-trial hearing, the trial court ruled that evidence of the identified assault was admissible because it occurred close in time to the charged acts, was

³ Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006).

sufficiently similar to the charged acts, and was offered to demonstrate a pattern of conduct and to negate the assertion that some of the injuries were inflicted accidentally.

Evidence of prior bad acts is not admissible to prove the defendant's character.⁴ However, KRE 404(b) provides a non-exhaustive list of legitimate purposes for which such evidence may be admitted. For example, prior bad acts evidence may be admissible, inter alia, to prove motive, intent, plan, or absence of mistake or accident.⁵ In this instance, the trial court concluded that evidence of the prior assault was similar in nature as it involved physical abuse against the same victim for similar reasons; and that both altercations were provoked by suspicions and accusations of infidelity. Furthermore, the evidence was offered to prove that the injuries were not accidentally inflicted as Appellant asserted. After concluding that evidence of the assault was being offered for a legitimate purpose under KRE 404(b), the trial court determined that its prejudicial effect did not outweigh its probative value and it therefore satisfied the balancing test of KRE 403. As "abuse of discretion is the proper standard of review of a trial court's evidentiary rulings,"⁶ Appellant must demonstrate that the trial court's decision was arbitrary, unreasonable, or unsupported by sound legal principles.⁷ As noted above, the trial court articulated sound reasons for exercising its discretion to admit evidence of the prior assault. Thus, Appellant's contention is defeated.

With respect to the evidence of Appellant's violation of a no contact order, we discover no abuse of discretion. This order was granted subsequent to the occurrence of the charged acts. At trial, the victim stated that she had fabricated the

⁴ KRE 404(b).

⁵ Id.

⁶ Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

⁷ Id.

allegations of abuse in her initial statements to medical personnel and law enforcement officers. The Commonwealth asserted that Appellant's violation of the no contact order was admissible in support of its theory that the victim changed her story because of Appellant's influence over her. Thus, it appears that there was a legitimate purpose for admission of this evidence. That the testimony revealed the victim initiated and voluntarily maintained contact with Appellant and ultimately married Appellant supports admission of the challenged evidence.

Appellant also asserts error in the admission of evidence of his prior parole violations. The trial court acknowledged that generally such evidence would not be admissible, but could be properly admitted in the instant case because Appellant had put the issue of his compliance with parole conditions directly at issue. Specifically, when asked certain questions about his conduct during the time of the offenses, Appellant offered his parole status as proof that he would not have been using drugs or engaging in other prohibited conduct. Thus, the trial court concluded that the Commonwealth had a good faith basis to cross-examine Appellant regarding his prior compliance with parole conditions. We discern no abuse of discretion in this ruling.

Appellant claims error for failure of the trial court to grant a mistrial when a law enforcement witness testified that his first association with Appellant involved a pursuit of Appellant in a stolen car. Upon defense counsel's objection, the trial court immediately stopped the testimony. The Commonwealth stated that it had expected the officer to testify that his first association was when Appellant was in custody. Defense counsel requested a mistrial which was denied by the trial court. The court did, however, admonish the jury to disregard that testimony. A trial court has broad

discretion in determining whether errors create a manifest necessity for a mistrial.⁸

Here, the trial court concluded that the testimony was not unduly prejudicial, especially given the fact that Appellant had allowed the jury to know that he was already incarcerated despite the trial court's willingness to exclude such evidence. Thus, as the trial court determined, any prejudice was cured by the admonition. Refusal to grant a mistrial was not an abuse of discretion.

The next issue concerns the trial court's refusal to admit into evidence letters that the victim sent Appellant several months after the incident. Appellant was permitted to establish the victim's apparent obsession with him prior to the incident. Additionally, the trial court allowed Appellant to establish that the victim sent numerous letters after the fact. However, after reviewing the letters sought to be introduced, the trial court found nothing within them that appeared to have any relationship to the events surrounding the charged acts. Again, we discern no abuse of discretion in this ruling.

Appellant's final contention is that the trial court erred by failing to instruct the jury on unlawful imprisonment in the second degree as a lesser included offense of kidnapping. The trial court did instruct the jury on the lesser included offense of unlawful imprisonment in the first degree, but concluded that the evidence would not support a conviction for second degree unlawful imprisonment. A person is guilty of unlawful imprisonment in the second degree when he knowingly and unlawfully restrains another person.⁹ If he does so under circumstances which expose the victim

⁸ Shabazz v. Commonwealth, 153 S.W.3d 806 (Ky. 2005).

⁹ KRS 509.030.

to a risk of serious physical injury, then he is guilty of unlawful imprisonment in the first degree.¹⁰

Appellant argues that the jury could have found that Appellant restrained the victim, but rejected the testimony that he strangled her with a belt to the point of unconsciousness. Such a determination, the Appellant asserts, would have supported a conviction of unlawful imprisonment in the second degree. However, the victim's severe injuries demonstrate exposure to a risk of serious physical injury. Thus, the trial court correctly concluded that the evidence would not support a theory that Appellant restrained the victim, but did not expose her to a risk of serious physical injury.

For the foregoing reasons, Appellant's convictions are affirmed.

All concur.

¹⁰ KRS 509.020.

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