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RENDERED: FEBRUARY 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

NO. 2005-SC-000237-MR DATE 3-15-07 EdAGroupPC

JOHN L. SIMEON — APPELLANT

V.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
INDICTMENT NO. 03-CR-00227

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted John L. Simeon of sexual abuse and sodomy, and the trial court imposed a sentence of a maximum of twenty years' imprisonment.[1]

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[1] Simeon was convicted of one count each of the following crimes: first-degree sexual abuse, second-degree sexual abuse, third-degree sexual abuse, second-degree sodomy, and third-degree sodomy. The trial court sentenced Simeon according to the jury's recommendation: ten years' imprisonment on the second-degree sodomy count; five years' imprisonment on the first-degree sexual abuse count; and five years' imprisonment for the third-degree sodomy count, with the sentences to be served consecutively, for a total of twenty years' imprisonment. The jury had also recommended a sentence of twelve months in the county jail and a fine of $500 for the second-degree sexual abuse count and a sentence of nine months in the county jail and a fine of $250 for the third-degree sexual abuse count.

On direct appeal,[2] he argues that the trial court erred by allowing (1) his daughter to testify during the guilt phase of the trial about Simeon's prior sexual acts with her, which Simon argues were too dissimilar and remote to be admissible; and (2) his son to testify during the penalty phase of the trial about Simeon's threatening a witness, especially in light of the fact that the witness intimidation charge against Simeon was dismissed before trial. Simeon argues that his conviction must be reversed and the case remanded for a new trial or, at least, the case be remanded for a new sentencing phase of the trial proceeding. We find no merit to either argument and affirm.

I. FACTS.

Simeon was indicted on one count of first-degree sodomy, two counts of first-degree sexual abuse, one count of second-degree sodomy, two counts of second-degree sexual abuse, one count of third-degree sodomy, and two counts of third-degree sexual abuse. The alleged victim of these charges was his stepdaughter, A.B. Simeon was also charged in the same indictment with one count of intimidating a witness in a judicial proceeding. The alleged victim of this charge was his daughter, K.W.

Simeon's first trial ended in a mistrial when a person unrelated to the case made prejudicial remarks to the jury. Before the first trial commenced, the trial court sustained the Commonwealth's motion to dismiss the witness intimidation charge, without prejudice. The trial court also dismissed or amended other charges that are not germane to this appeal.

Following an evidentiary hearing before the second trial, the trial court ruled that based on certain similar factual circumstances with the charged crimes,

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[2] Ky. Const. § 110(2)(b).

Simeon's daughter, K.W., was allowed to describe at trial Simeon's prior sexual acts with her. So both A.B. and K.W. testified at trial concerning Simeon's alleged sexual acts toward each of them.

A. A.B.'s Testimony about Sexual Acts.

A.B. testified that Simeon, her stepfather, had subjected her to sexual conduct, beginning when she was eleven years old and continuing until she was fourteen years old. The sexual conduct consisted of Simeon exposing himself to her, making her undress before him, touching her vagina and breasts, making her touch his penis, making her perform oral sex on him, him performing oral sex on her, and him examining her vaginal area with a flashlight. The sexual conduct occurred when A.B.'s mother was either at work or was showering or exercising on another floor of the house. Sometimes A.B.'s half-sister was in the home while the conduct occurred behind locked doors. The sexual conduct always occurred in the home—in Simeon's bedroom, in a basement office, and in A.B.'s bedroom—and it often followed A.B. requesting a privilege. When A.B. requested a privilege, such as renting a movie or going to a friend's house or getting fast food, Simeon would say "Benjamin," which was a code word to let her know he expected oral sex when he got home. Simeon also threatened to hurt A.B.'s mother or her half-sister if she told anyone, and he told A.B. that her mother would not believe her. When A.B. was fourteen, she told a relative about the conduct, which led to her mother being notified and an investigation commencing.

B. K.W.'s Testimony about Sexual Acts.

K.W. testified that Simeon, who had adopted her as a baby when he married her mother, first initiated sexual contact with her when she was twelve years old. She stated that he continued such contact until she reported the abuse when she was 14 years old.[3] In her case, the sexual conduct consisted of Simeon inserting his finger into her genitals, making her touch his penis, touching her breasts and thighs, performing oral sex upon her while playing pornographic videotapes, and attempting to induce her to perform oral sex on him.

K.W. testified that Simeon brought a flashlight into her room on occasions when it was dark and that he had examined her genitals. But she did not specifically testify to him examining her using the flashlight. The abuse always occurred while her mother was at work, sometimes occurring in the home, particularly when her brothers were in bed or outside; and sexual contact sometimes occurred in his truck when he took her to the store. She testified to Simeon using the word "candy" to indicate that he expected some sort of sexual contact that night and her associating this word with being rewarded for sexual acts with a Kit Kat® bar.

In addition to testifying concerning the factual circumstances surrounding Simeon's sexual misconduct toward her, K.W. also testified during the guilt phase of the trial to Simeon's contacting her by phone following A.B.'s allegations. Specifically, K.W. testified that after social workers contacted her about A.B.'s allegations, she received a phone call from Simeon, who said the two of them needed to talk, and that she hung up

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[3] In 1986, Simeon was convicted of sodomy and sexual abuse of K.W. and received a five-year prison sentence; although, he was granted shock probation after serving only thirty-one days. No reference was made to the 1986 conviction or sentence during the guilt phase of the trial in the instant case.

on him. Immediately following this testimony and while still in the guilt phase of the trial, the Commonwealth attempted to present the testimony of Simeon's son, Stephen, regarding a phone call that Stephen received from Simeon in which Simeon allegedly implied threats toward K.W. But the trial court indicated that it would "sustain an objection to him," stating that the prejudicial effect of testimony that Simeon effectively threatened a potential witness outweighed its probative value.

C. Stephen's Testimony about Alleged Threatening Acts in Penalty Phase.

The defense called Stephen as its witness in the penalty phase of the trial to testify about his relationship with his father. Stephen testified that after Simeon was released from custody following his conviction for sexual abuse and sodomy of K.W., Stephen went to live with Simeon, rather than with Stephen's mother, and that Stephen remained in Simeon's residence until he left home as an adult.

The Commonwealth requested a ruling on whether it would be allowed to question Stephen at that juncture about Simeon's alleged statements to him intended to intimidate K.W. The Commonwealth argued that the presumption of innocence on the charges against A.B. was lifted when the jury found Simeon guilty. Defense counsel objected to the admission of the evidence on the basis that this evidence concerned uncharged conduct and that undue prejudice of this testimony outweighed its probative value. The Commonwealth responded that protection of the public was a valid consideration in sentencing so that the jury should be made aware of Simeon's contacting K.W., despite Stephen telling him she did not want such contact. The trial court then simply stated it would allow the Commonwealth to proceed.

The Commonwealth began by asking Stephen about his relationship with K.W., eliciting a response that the two were raised as brother and sister and their sibling relationship continued. The Commonwealth then asked Stephen whether he had a conversation with his father about contacting K.W. after A.B.'s allegations came out. He responded in the affirmative and stated that his father asked him to have K.W. call him. In response to further questions, Stephen stated that K.W. had not had any contact with Simeon since the trial of her abuse allegations against Simeon in 1986. Stephen responded to his father's request to have K.W. call Simeon by stating, "[i]t's not going to happen." Stephen testified that he did not tell K.W. to call Simeon but that K.W. called him later to say that Simeon had called her and that she was upset by Simeon's call. Stephen then told her of Simeon's request for a call, which made her even more upset. The Commonwealth then re-directed Stephen's attention to the earlier phone call between Stephen and Simeon and asked if Simeon made any reference to K.W.'s family. Stephen responded that Simeon said, "he knew the two kids, and knew they were going to school, and knew where she lived," and when asked if Simeon wanted him to tell K.W. this, responded, "I perceived that." When questioned further about his perception, he further stated that Simeon knew of K.W.'s two boys in school and that he believed Simeon said he knew their birthdays and where they lived.

Defense counsel followed-up by asking Stephen on re-direct if he perceived the call as a threat; and he responded, "no," and that he just told Simeon he would not relay the message. In response to further questions from defense counsel, Stephen further stated that he had not known Simeon to contact K.W. previously. In response to defense counsel's suggestion that Simeon was just trying "to keep track of

what had been going on in [K.W.'s] life, Stephen stated, "that's only my assumption, you know." Defense counsel then asked if he was aware of any no-contact order, and Stephen responded in the negative. No further questions were asked of Stephen.

II. ANALYSIS.

A. The Trial Court did not Err in Admitting Evidence of Prior Bad Acts.

Simeon argues that the trial court erred to his substantial prejudice when it allowed K.W. to testify to prior bad acts of a sexual nature, which he argues were too dissimilar and remote to support a finding of modus operandi. We disagree.

Although evidence of prior bad acts must be excluded if offered to prove the character of a person in order to show that he acted in conformity with that character trait, such evidence may be admitted "for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]"[4] In the instant case, K.W.'s testimony would not necessarily tend to prove any of the exceptions enumerated in KRE [Kentucky Rules of Evidence] 404(b)(1). But this list of exceptions is "illustrative rather than exhaustive."[5] And we have recognized the validity of admitting prior bad acts evidence to show un-enumerated exceptions, such as "common scheme or plan,"[6] or modus operandi.[7]

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4 KRE 404(b)(1).

5 Tamme v. Commonwealth, 973 S.W.2d 13, 29 (Ky. 1998).

6 *See* Commonwealth v. English, 993 S.W.2d 941, 943-44 (Ky. 1999) (discussing case law recognizing exception for "common scheme or plan" prior to adoption of the Kentucky Rules of Evidence in 1992 and determining that this exception is still viable, despite the lack of specific mention of "common scheme" in KRE 404(b)(1), due to the non-exhaustive nature of the list of exceptions in KRE 404(b)(1)).

In the instant case, as in English, the evidence of prior sexual misconduct directed toward a different victim was not offered to prove "common scheme or plan" since this exception requires that "the charged offenses were part and parcel of a greater endeavor which included the prior acts of sexual misconduct."[8] Rather, the evidence was offered to prove modus operandi. The modus operandi exception requires that "the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*."[9]

In English, we affirmed the trial court's admission of evidence of prior acts of sexual misconduct toward other victims, recognizing that "the evidence was offered to show a modus operandi for the purpose of proving motive, intent, knowledge, and the absence of mistake or accident[.]"[10] Specifically, the prior bad acts evidence in English demonstrated that contrary to the defendant's statements to police that he "might" have inappropriately touched a victim without realizing it, he "knew what he was doing (knowledge), he did it on purpose (intent, absence of mistake or accident), and he did it for his own sexual gratification (motive)."[11] In other words, the prior bad acts demonstrated the necessary *mens rea* or mental state.

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7 *See id.* at 945.

8 *Id.* at 945.

9 *Id.* (also stating that if such striking similarities are not present, "the evidence of prior misconduct proves only a criminal disposition and is inadmissible.").

10 *Id.*

11 *Id.*

In the instant case, however, K.W.'s testimony was presumably not offered to prove mental state since there were no contentions that Simeon might have unintentionally committed the acts against A.B. Nor were there contentions that the alleged acts against A.B. were committed by another perpetrator, such that the perpetrator's identity in and of itself was at issue—which would provide another proper reason to admit modus operandi evidence.[12] Rather, K.W.'s testimony was offered to prove the other "fundamental" element of the crimes against A.B.: "corpus delicti—whether the event occurred at all."[13] Nonetheless, the question of corpus delicti is intertwined with that of identity in the sense that striking similarities in factual details could demonstrate that "[i]f the act occurred, then the defendant almost certainly was the perpetrator[,]" such that it is proper "to treat the evidence as if offered to prove identity by similarity, and to require that the details of the charged and uncharged acts be sufficiently similar as to demonstrate a modus operandi."[14]

We conclude that the evidence of prior acts in this case revealed enough "striking similarities" to establish a reasonable probability that the acts were committed by the same person. One such striking similarity, as explained by the trial court, was the use of a code word to signal to the victim, when in the presence of others, that sexual favors were expected. Other such striking similarities included the fact that

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[12] UNDERWOOD & WEISSENBERGER, KENTUCKY EVIDENCE 2002 COURTROOM MANUAL, (p. 108) 2001.

[13] Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992) (rendered a few months after the adoption of the Kentucky Rules of Evidence and mentioning the list of exceptions in the newly-enacted KRE 404(b)(1); although, KRE 404(b) was presumably not technically applicable to this case).

[14] *Id.* at 893.

Simeon was the long-standing live-in father figure to both victims when the misconduct allegedly occurred;[15] the misconduct allegedly occurred to victims of similar ages;[16] the abuse occurred when the mother of the victims was either out of the house or occupied in some manner in another part of the house; some sort of bribery was often involved (such as offering candy or privileges to gain the performance of sexual favors); the abuse involved inappropriate touching and performing oral sex on victims and demanding oral sex for himself, whether the victim refused or not.[17] The fact that some minor differences occurred, such as pornography only being played while abuse of one victim occurred or the fact that one victim was abused in a truck at times rather than in the house, is not dispositive. Although a high degree of commonality of facts suggesting a "signature crime" is required to allow evidence of prior bad acts on the basis of modus operandi, identical facts are not required.[18] Given the common factual elements in A.B.'s and K.W.'s testimony, K.W.'s testimony regarding Simeon's

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[15] As mentioned previously, K.W. had been adopted as an infant by Simeon; and A.B. had been living with Simeon since her mother's marriage to him when she was a toddler, age three or four years old.

[16] As mentioned previously, the alleged abuse had begun when A.B. was eleven years old and when K.W. was twelve years old. In both cases, the abuse ended when each victim reported the abuse at age fourteen.

[17] Each victim had also alluded to Simeon's using a flashlight in some manner when the abuse occurred. At the pretrial hearing and trial, A.B. testified specifically to Simeon's using a flashlight to examine her genitals. K.W. testified at the pretrial hearing to Simeon's using a flashlight to "look at her"; although, she could not say exactly how he was using it. At trial, she testified to his bringing a flashlight with him when he came to see her at night and also testified to his examining her genitals when she had a rash. But she did not specifically testify to his using a flashlight to examine her genitals. Although there appears to be a slight factual commonality, this factor was not mentioned by the trial court; and we do not find it to be a major factor in determining modus operandi given the apparent lack of specificity regarding Simeon's flashlight use in K.W.'s testimony.

[18] Dickerson v. Commonwealth, 174 S.W.3d 451, 470 (Ky. 2005).

treatment of her was relevant as modus operandi, tending to prove the corpus delicti of the charges related to A.B.

Once prior bad acts are shown to be relevant to demonstrate modus operandi, the trial court must next determine whether the probative value of the evidence outweighs any danger of undue prejudice.[19] This determination is "a task properly reserved for the sound discretion of the trial judge[,]"[20] resulting in an abuse of discretion standard of review.[21]

We conclude that the trial court did not abuse its discretion in determining that the probative value of K.W.'s testimony outweighed the danger of undue prejudice and, thus, properly admitted the testimony. In doing so, we recognize that the sexual misconduct perpetrated on K.W. took place approximately fifteen to twenty years before the misconduct perpetrated on A.B. and that "temporal remoteness tends to lessen the probative value of the evidence of [] prior sexual misconduct[.]"[22] But temporal remoteness goes to the weight, rather than the admissibility of the evidence.[23] And given the striking factual similarities, we cannot conclude that the trial court abused its discretion in not finding the danger of undue prejudice to outweigh the probative value

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[19] English, 993 S.W.2d at 945 *(citing* KRE 403).

[20] *Id., citing* Rake v. Commonwealth, 450 S.W.2d 527, 528 (Ky. 1970).

[21] *Id., citing* Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996).

[22] *Id.* at 945.

[23] *Id.* at 944.

of the evidence.[24] So we affirm the conviction because the trial court properly admitted K.W.'s testimony regarding prior sexual misconduct.

B. Simeon is not Entitled to Relief for the Trial Court's Allowing Cross-Examination in the Penalty Phase About Implied Threats.

Simeon argues that the trial court erred by allowing the Commonwealth to cross-examine Stephen in the penalty phase of the trial about the phone call Simeon made to Stephen.

Simeon contends that the Truth in Sentencing Act[25] forbids this type of evidence because the evidence of the phone call concerns conduct for which charges had been dismissed. He cites KRS 532.055(2)(a)(2), which permits the Commonwealth to offer evidence of "[t]he nature of prior offenses for which he was convicted[.]" And he argues that this provision, which explicitly allows the Commonwealth to introduce evidence of the nature of convicted offenses, implicitly prohibits the Commonwealth from introducing evidence of bad acts for which the defendant was not convicted.[26] We note that KRS 532.055(2)(a) allows the Commonwealth to present during the penalty phase of the trial evidence in its case in chief of the defendant's history of convictions

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[24] We also take note that the trial court was careful not to "re-try" K.W.'s allegations, which had resulted in a prior conviction, by limiting somewhat the amount of detail in counsel's questioning of her—she was allowed to testify to basic facts of misconduct, without going into so much detail as to overwhelm the jury with this evidence.

[25] KRS 532.055(2)(a).

[26] No evidence was presented concerning the fact that Simeon was originally *charged* with witness intimidation; rather, the Commonwealth simply presented evidence of the underlying facts that led to the witness intimidation charge. Thus, we find this case distinguishable from Robinson v. Commonwealth, 926 S.W.2d 853, 854 (Ky. 1996) (finding error in admission of fax printout of charges against defendant in another state, based on both lack of authority to introduce such dismissed charges in KRS 532.055(2)(a)(2) and authentication problems), which Simeon claims to bar introduction of evidence of threatening conduct in the penalty phase.

and factors affecting how long the defendant will actually serve in prison.[27] But the challenged portion of Stephen's testimony was not presented by the Commonwealth in its case in chief. So KRS 532.055(2)(a) does not bar admissibility of this challenged evidence.

Rather, Stephen's testimony concerning the arguably threatening phone call was a proper subject of cross-examination adduced to rebut Simeon's "evidence in mitigation or in support of leniency[.]"[28] Simeon called Stephen to testify in the penalty phase of the trial for the purpose of mitigation or in support of leniency. Stephen testified that Simeon raised him after Simeon was released from custody following Simeon's conviction for having abused K.W. sexually. This defense evidence was introduced to suggest that Simeon was not a public threat but was nurturing, caring, and capable of positive relationships with children and family members.

The Commonwealth sought to rebut this mitigation evidence by cross-examining Stephen about the phone call in which Simeon sought contact with the sex abuse victim from whom he was estranged. The Commonwealth argued at trial that Simeon wanted K.W. to know that he knew about her children, where they lived, and where they attended school. The Commonwealth argued at trial that Simeon intended this contact as a threat to K.W. Thus, the Commonwealth argued that the jury could infer that Simeon posed a threat to his victims and the public.

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[27] Commonwealth v. Higgs, 59 S.W.3d 886, 893 (Ky. 2001) (time served); Cornelison v. Commonwealth, 990 S.W.2d 609, 610 (Ky. 1999) (good time); Huff v. Commonwealth, 763 S.W.2d 106 (Ky. 1988) (parole eligibility); Brooks v. Commonwealth, 114 S.W.3d 818, 825 (Ky. 2003) (prior misdemeanor convictions properly admitted as types of offenses were directly relevant to crime for which defendant was just convicted).

[28] KRS 532.055(2)(b).

We hold that the trial court properly allowed this cross-examination to rebut the mitigation evidence presented by the defense under KRS 532.055(2)(b), and we affirm the sentence imposed by the trial court following the jury's recommendation. We recognized that the Commonwealth may offer rebuttal evidence in response to mitigation evidence presented by the defense in sentencing hearings in Neal v. Commonwealth.[29] And, as the Commonwealth argued to the trial court in the case at hand, protection of victims and the public is a valid jury consideration in sentencing proceedings.

III. CONCLUSION.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is hereby affirmed.

All concur.

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[29] 95 S.W.3d 843, 853 (Ky. 2003).

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