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RENDERED: MAY 22, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000376-MR

DAVID K. BENTLEY — APPELLEE

V.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
NO. 03-CR-00086

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A circuit court jury convicted David Bentley of sodomizing his young son for which the jury recommended life in prison. The trial court entered a judgment of conviction that imposed the recommended life sentence. Bentley appealed to this Court as a matter of right.[1]

Bentley alleges errors that relate only to the conduct of the trial of his case. He argues that the trial court committed reversible error by (1) denying his motion for a directed verdict based on the alleged insufficiency of evidence establishing the venue of the trial, (2) allowing testimony concerning uncharged acts of his alleged sexual abuse of another child, and (3) allowing testimony

[1] Ky. Const. § 110(2)(b).

about his alleged acts of domestic violence directed at his wife. We reject Bentley's argument regarding the failure of proof on venue; but we conclude that admitting evidence of the sexual abuse of another child without a showing of proper purpose under Kentucky Rules of Evidence (KRE) 404(b) constituted reversible error, which was compounded by the admission of evidence of Bentley's alleged penchant for anal sex with his wife.

I. FACTS.

Bentley and his wife, Melissa, had five children. The family moved frequently during the children's early years, including to various residences in the Franklin County area during the years 1992 to 1998. Following a myriad of problems, including Bentley's admitted frequent alcohol abuse, domestic violence, emergency protective orders entered against Bentley, and the children often being seen by others as dirty and hungry, the state removed the children from the Bentley home in 1998. The children never lived with David and Melissa again.

In 2002, the oldest child, A.B., told a counselor and an investigating police officer that Bentley had anally sodomized him repeatedly during the time that they lived together. When the detective asked A.B. when the last act of sodomy occurred, A.B. stated that the last act of sodomy occurred about a week before he was removed from his home. The detective then found out that A.B. and his siblings had been living in an apartment in Frankfort at the time they were removed from their home in 1998. So, in 2003, the Franklin County Grand Jury indicted Bentley for one count of first-degree sodomy occurring between 1992

and 1998, the approximate time frame during which the Bentley family lived mainly in Frankfort. A.B. was born in 1987, so he was less than twelve years old during the time frame referenced in the indictment.[2]

The case then proceeded to trial in the Franklin Circuit Court. At trial, the crux of the evidence of sodomy consisted of A.B.'s word against Bentley's. A.B. testified to Bentley putting his penis into A.B.'s "butt" while in the bathtub and in the bedroom more than once. He stated that his father had threatened to kill him if he told anyone, which caused him to keep the secret for years. When asked on direct examination whether he recalled telling the investigating officer that the sodomy last took place just a few days before he was removed from his home, A.B. was not sure about the time frame when the sodomy last occurred.

When asked on cross-examination to identify a particular residence where these actions took place, A.B. stated that he could only specifically recall that the abuse took place in a trailer that had a tire swing. A.B. stated that this trailer was in Frankfort. Other witnesses could only recall the family's living in a trailer with a tire swing when they lived in Anderson County. The Commonwealth's exhibits of photographs of places where the family had lived in Franklin County did not contain a photograph of a trailer. Melissa testified to the family having lived in a trailer with a tire swing in Anderson County. She did not recall such a trailer in

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[2] For this case, the relevant definition of first-degree sodomy is *deviate sexual intercourse* with a person less than twelve years old. Kentucky Revised Statutes (KRS) 510.070(1)(b)(2). *Deviate sexual intercourse* is defined, in pertinent part, as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another[.]" KRS 510.010(1). First-degree sodomy is a Class A felony when committed against a person less than twelve years old. KRS 510.070(2).

Franklin County, but she acknowledged that she might not remember every place where they had lived.

Bentley eventually moved for a directed verdict of acquittal, arguing that the evidence was insufficient to establish that the charged offense took place in Franklin County. The trial court denied the directed verdict motion.

Bentley testified in his own defense. He denied that he had sodomized A.B. He stated that he had frequently engaged in heavy drinking, which caused problems in his relationship with Melissa. He admitted violating emergency protective orders and domestic violence orders that forbade him from contacting Melissa, but he denied ever hitting her and admitted to pushing her on only one occasion. He acknowledged having a prior felony conviction for driving under the influence of alcohol. When cross-examined about whether his drinking may have caused him to forget sodomizing A.B., he denied that he had ever been that intoxicated.

II. ANALYSIS.

A. The Trial Court Correctly Denied the Motion for Directed Verdict of Acquittal Based on Alleged Insufficient Evidence of Venue.

Although we reverse on other grounds, we will analyze the venue issue because it is likely to recur on retrial. Bentley argues that the trial court erred in denying his motion for a directed verdict of acquittal, alleging that the evidence

was insufficient to establish that the charged offense took place in Franklin County.[3] We disagree.

The trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth in ruling on a directed verdict motion.[4] And "[s]light evidence[] and slight circumstances warranting reasonable inferences[] are sufficient to prove venue."[5] Applying these minimal standards, the Commonwealth's venue evidence was enough to withstand the directed verdict motion.

A.B. testified to having been anally sodomized repeatedly by Bentley while in their home. And A.B. admitted some uncertainty about the exact timing of the last act of sodomy. He also was only able specifically to describe one residence where sodomy occurred—in a trailer with a tire swing. At first, he testified that this trailer with the tire swing was located in Frankfort; but, later on cross-examination, he stated he was unsure where the trailer was located. In response to leading questions from the prosecutor, he stated that he lived in Frankfort between his fifth and eleventh birthdays and that Bentley sodomized him during this same time frame. But, on cross-examination, A.B. stated that he did not remember sodomy occurring in any of the places shown in exhibits of where the family lived in Frankfort.

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3 Kentucky law generally provides that the venue of a criminal action is where the alleged criminal offense occurred. KRS 452.510; Ky. Const. § 11.

4 Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

5 Collins v. Commonwealth, 508 S.W.2d 43, 45 (Ky. 1974).

Others, including Melissa and her sister, testified that the family lived in Frankfort during most of their last few years together. But they could not recall the family's living in a trailer in Frankfort, and the Commonwealth's photographic exhibits of places where the Bentley family had lived together in Frankfort did not include a photograph of a trailer. The investigating officer testified that the case was first reported as a possible sexual offense in Anderson County. The officer recounted A.B.'s reporting that the last act of sodomy occurred just days before the children's removal, and the officer discovered that the family lived together in an apartment in Frankfort when the children were removed from the home. The officer admitted that possible Anderson County locations were not investigated.

Although evidence bearing upon venue was conflicting,[6] the evidence was, nonetheless, sufficient to withstand Bentley's directed verdict motion, especially drawing all reasonable inferences in favor of the Commonwealth and taking note that only slight evidence suffices to establish venue. Bentley does not cite, nor are we aware of, any authority requiring that the victim pinpoint the time and location where the crime occurred as the only means of establishing venue. Rather, the evidence—that the Bentley family lived mainly in Frankfort during their last few years together; that A.B described being anally sodomized by Bentley in the home during that time frame; and that A.B., at least at one point, stated that the alleged sodomy last took place just a few days before his removal from his home—was sufficient for the jury to find that the crime occurred in Franklin County, drawing all reasonable inferences in favor of the

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[6] "Credibility and weight of the evidence are matters within the exclusive province of the jury." Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999).

Commonwealth. So the trial court did not err in denying Bentley's motion for a directed verdict of acquittal on this ground.

B. Reversible Error in Admitting Evidence of Sexual Abuse of Another Child without Showing Proper Purpose for Admission under KRE 404(b).

The Commonwealth filed a pretrial KRE 404 notice of intent to present evidence about Bentley's prior bad acts directed toward A.B. and his siblings. At trial, the prosecutor called A.B.'s sister, D.Z., as a witness and asked her if she remembered having told her aunt or the police about things Bentley had done to her. D.Z. professed a lack of memory. Then, the prosecutor asked vaguely whether things had happened to D.Z. that should not have happened and, after a brief pause, continued more directly to ask, "Did your dad [Bentley] . . . ." Defense counsel interrupted the question with an objection, arguing at the bench that the prosecutor was leading the witness; that the subject matter was unrelated to the charged offense; that Bentley was not charged with a sexual offense against D.Z.; and that D.Z. apparently did not recall the matter. The prosecutor responded that she would try to refresh D.Z.'s memory using a recent letter D.Z. had written to the investigating officer. The trial court then simply stated that the prosecutor could proceed to refresh D.Z.'s memory using the letter.

The prosecutor then showed D.Z. a letter she had recently written to the investigating officer and summarized the contents of the letter with D.Z. In the body of the letter, D.Z. alleged that Bentley had been violent toward the children and hit them with a chair. The letter further recounted that Bentley had hit his

wife to keep her from leaving. The letter also said that Bentley had touched D.Z. in a sexually inappropriate manner. The prosecutor read these allegations aloud before the jury and asked whether these allegations were true. D.Z. answered yes.[7]

On cross-examination, defense counsel asked D.Z. whether she had later denied the sexual touching to her aunt and even stated that a family friend or "Bart Simpson"[8] was the one who really touched her. D.Z. denied telling her aunt that someone other than Bentley had touched her improperly. The aunt later testified that D.Z. initially alleged that Bentley sexually abused her but later denied this and stated she did not want her father to go to jail.[9]

On re-direct, the prosecutor elicited from D.Z. that she had been to the doctor after her father touched her inappropriately, that she had a rash and some bruising, and that it was Bentley who hurt her when she lived with him. When the prosecutor then asked her what part of her body was hurt, defense counsel asked to approach the bench. The judge stated that the prosecutor was going too far at that point; that the prosecutor was trying Bentley on an uncharged offense. The trial court also stated that he could see the relevance of violence in

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7 Bentley complains on appeal that the contents of the letter should not have come in as evidence but, rather, that the letter should have been shown to D.Z. to refresh her memory and to elicit direct testimony about what actually happened. We note no contemporaneous objection made to the way the prosecutor refreshed D.Z.'s memory about the contents of the letter.

8 Because D.Z. stated she did not know Bart Simpson and used to watch the television show "The Simpsons," the reference (if any) was apparently to the character Bart Simpson of "The Simpsons."

9 During the aunt's testimony, the prosecutor attempted to introduce documents related to an investigation concerning D.Z.'s sexual abuse allegations. But the trial court sustained the defense's objection, stating that the case had gotten way off track by focusing on the alleged abuse of D.Z. and that this had to stop.

the home, possibly even "pattern of conduct"; but the trial court said, "I don't know about that," (in apparent reference to pattern of conduct) and told the prosecutor to "drop it" because this information was too prejudicial. After D.Z. stated that the prosecutor had told her to tell the truth and that she had done that, she was excused from the witness stand.

Although the Commonwealth claims that the issue was not preserved by the defense's failure to state a specific KRE 404(b) objection, we think the defense's objection to evidence of sexual abuse of D.Z. in terms of being an uncharged crime and being irrelevant to the case at hand embodied the substance of KRE 404(b). So the defense preserved its objection on KRE 404(b) grounds.

Unfortunately, it is unclear whether the trial court actually made a ruling on the admissibility of uncharged sexual abuse allegations on KRE 404(b) grounds when it allowed the prosecution to proceed to attempt to refresh D.Z.'s memory with the letter. Possibly, the trial court simply meant to allow the Commonwealth to attempt to refresh D.Z.'s memory with the letter in response to the defense objecting on the basis of D.Z.'s professed lack of memory. But it is also possible that the trial court was implicitly overruling the objection on KRE 404(b) grounds relating to relevancy of uncharged conduct at that time. In hindsight, the better practice would have been for defense counsel to insist upon a clear ruling from the trial court on the admissibility of uncharged sexual abuse allegations and explicitly to renew its objection when the prosecutor began asking about Bentley's inappropriate touching of D.Z. By the time the prosecutor asked on re-

direct what part of her body was injured and the defense successfully objected that this line of inquiry was too prejudicial, much of the damage had already been done by D.Z. testifying to being touched inappropriately and obtaining medical treatment for the apparent results of this inappropriate touching. Despite the imperfect record on preservation, we, nonetheless, must reverse because of the undue prejudice of this testimony and the violation of KRE 404(b).

KRE 404(b) generally provides that: "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." But evidence of other crimes, wrongs, or acts may be admitted for other purposes:

> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
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> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.[10]

In the instant case, the Commonwealth made no showing that evidence concerning allegations of Bentley's having sexually abused D.Z. was "inextricably intertwined" with other essential evidence or that the evidence was offered for a purpose other than showing Bentley's character "in order to show action in conformity therewith." Although we agree with the trial court that evidence of Bentley's physically violent acts directed toward A.B. and his siblings was

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[10] KRE 404(b). Although we note that the list of exceptions in KRE 404(b) is "illustrative rather than exhaustive[,]" Tamme v. Commonwealth, 973 S.W.2d 13, 29 (Ky. 1998), *quoting* R. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 2.25 at 87 (3d ed. 1993), the evidence must, nonetheless, be offered for some purpose other than to show character "to prove action in conformity therewith." KRE 404(b).

admissible to show the atmosphere of violence in the home that apparently caused A.B. to keep quiet about the sexual abuse for years, the Commonwealth developed no facts to demonstrate how any alleged sexual abuse of D.Z. contributed to A.B.'s silence. For example, the parties do not indicate that sexual abuse of siblings occurred in A.B.'s presence or that he suspected any sexual abuse of his siblings. Both parties agree that no attempt was made to show modus operandi or pattern of conduct.[11] No particular reason—other than atmosphere of violence or pattern of conduct—was ever elicited at trial as the purpose for admitting the evidence of sexual abuse of D.Z.[12] So we are left with this highly prejudicial evidence of sexual abuse of another child being admitted apparently for the purpose of showing that Bentley had a propensity toward committing sexual offenses against his children. The prejudicial effect of this evidence was exacerbated by the prosecutor's closing argument reminding the jury of D.Z.'s allegations of Bentley's sexual abuse. We have no choice but to find error in this violation of KRE 404(b).

We cannot say that the error was harmless.[13] Because no medical or scientific evidence was presented to prove Bentley's sodomy of A.B and no other

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[11] *See generally* Clark v. Commonwealth, 223 S.W.3d 90, 96-101 (Ky. 2007) (discussing how modus operandi is properly established only by striking factual similarities between prior bad acts and currently charged offense).

[12] We note that the prosecution's notice of its intent to prove prior bad acts, including sexual abuse of A.B. and his siblings, listed several possible purposes for the admission of this testimony: "to prove guilty mental state, motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident and/or because it is so inextricably intertwined with other evidence essential to the case . . . ." A supplemental notice specific to a statement D.Z. made about being sexually abused by her father did not offer a particular reason for its admission but, presumably, was premised on one of the several reasons listed in the first notice.

[13] RCr 9.24.

witnesses testified to observing the charged sodomy or to observing signs that A.B. was the victim of a sexual offense during the relevant time frame, the prosecution's case was A.B.'s testimony pitted against Bentley's testimonial denial. Given this conflict, D.Z.'s statement that Bentley had "touched her where he shouldn't have" likely had a significant impact on the jury's verdict. Although we must reverse because of this admission of prior bad acts of sexual abuse against D.Z. without a showing of a proper purpose under KRE 404 (b), we note that upon remand, such evidence might be admissible if a foundation were established for admitting the evidence for a proper purpose under KRE 404 (b).

C. Evidence of Domestic Violence of Melissa Bentley.

When Melissa[14] was called as a witness, defense counsel objected to her testifying about domestic violence, especially that which took place when A.B. would not have been aware of it. But the trial court indicated it would permit her to testify about violence directed toward her because it was relevant to the atmosphere of violence in the home, which allegedly led A.B. to keep silent for years. Melissa testified to years of violence, even to Bentley's causing her to miscarry when A.B. was around four years old. The prosecutor asked her about her sex life with Bentley, with no objection at that time; and she replied that he often wanted violent anal sex, sometimes causing her to need to get stitches.

We note at the outset that the KRE 404(c) notice of intention to present evidence of prior bad acts, including domestic violence, specifically referred to such acts directed toward A.B. and his siblings without any reference to Melissa.

[14] Although the Bentleys were no longer together as a couple by the time of trial, they had not divorced.

Bentley objected to the admission of evidence of domestic violence against Melissa on relevancy grounds at trial but, apparently, did not argue failure to provide KRE 404(c) notice of bad acts against Melissa to the trial court. In fact, defense counsel admitted in opening statement that domestic violence was "of record" and even suggested Bentley lacked frequent contact with the children because of protective orders entered on Melissa's behalf, thus, making A.B.'s allegations less credible.

Melissa described a long history of abuse from Bentley beginning early in their marriage and feeling only safe when he was incarcerated.[15] Bentley objected to this presentation of evidence of domestic violence toward Melissa, especially that which A.B. would not have been aware of. We conclude that in general, the admission of some evidence of domestic violence toward Melissa would not be an abuse of discretion given its relevance in establishing the violent home atmosphere, which apparently may have motivated A.B. to keep silent for years.[16] Furthermore, we recognize that some of the prejudicial effect of evidence of domestic violence was presumably cured by the trial court's

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[15] Other witnesses (such as D.Z. and Melissa's sister) also testified to some degree regarding domestic violence directed towards Melissa and/or Melissa's actions in response to apparent domestic violence. As we reverse on other grounds, we will not examine their testimony on this matter in detail.

[16] Because we reverse on other grounds, we do not reach the merits of Bentley's arguments that the "sheer volume" of domestic violence evidence presented went way beyond establishing a violent home atmosphere and, ultimately, led to him being tried on uncharged acts. Naturally, the parties and trial court can revisit on remand the proper limits of such evidence under KRE 403, which permits exclusion of otherwise relevant evidence due to considerations such as "undue prejudice" or "needless presentation of cumulative evidence[,]" KRE 404, and any other relevant authority.

admonition;[17] although, the trial judge's apparently inadvertent mistake in advising the jurors to consider such evidence only as it would impact the "accused's state of mind," rather than the victim's state of mind, may have lessened the ameliorative effect of this admonition. This mistake was, apparently, not caught at the time by Bentley, who failed to object.

We find troubling the admission of evidence regarding Bentley's alleged appetite for rough anal sex with his wife. Although we note that Bentley made no specific contemporaneous objection when the prosecution asked a question about her sexual relations with her husband,[18] this evidence of rough anal sex between Bentley and his wife, nonetheless, appears to be evidence admitted to prove nothing other than a propensity to engage in anal sex. Although possibly demonstrating the violent atmosphere of the home, we are unaware of any suggestion that the children would have been aware of their parents' sexual relations; and the probative value of this evidence seems clearly outweighed by the significant prejudicial effect.[19] Since we are already reversing based on the admission of sexual abuse of D.Z. without showing a proper purpose, we need not address the question of whether the specific issue of admission of rough anal

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[17] The trial court advised the jury that evidence of domestic violence should not be considered as evidence of guilt of the charged offense and that Bentley was not charged with any offenses against his wife or other children in this proceeding.

[18] We recognize that defense counsel had clearly established its objection to admission of evidence of domestic violence against Melissa in general, which could be construed as an objection to admission of evidence of the various subsets of domestic violence, such as the sexual domestic violence testified to by Melissa. Furthermore, the defense had also lodged an explicit objection to admission of domestic violence which A.B. would have been aware of; and A.B., presumably, would not have been aware of the nature of his parents' sexual relations.

[19] KRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice . . . .").

sex between Bentley and Melissa was properly preserved or whether it constituted palpable error.[20] In the event of a retrial, such evidence should not be allowed without proper evidentiary analysis.

III. CONCLUSION.

For the foregoing reasons, we reverse the judgment of conviction and remand for proceedings consistent with this opinion.

All sitting. All concur.

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[20] RCr 10.26.

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