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Supreme Court of Kentucky

FINAL

2007-SC-000924-MR

DATE 3/12/09 Kelly Klaben D.C.
APPELLANT

HOWARD BRYAN

V.

ON APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
NO. 06-CR-00208

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

The facts relied on by the jury in this case relate yet another sad and disturbing story of despicable human behavior. Because of the issues raised herein, a substantial recounting of the evidence is necessary.

In the year 2000, Appellant, Howard Bryan, and his five children, JDB, RRB, Bruce, Chris, and Jasper, moved to Boyd County.¹ They lived there during the course of the criminal acts described herein. Throughout this period, the family operated the Winchester Trading Post, a bait shop and video rental business on Winchester Avenue in Ashland. JDB worked with Bryan at the business.

¹ For the protection of their privacy as sexual assault victims, Bryan's daughters are referred to by their initials.

While the children presented evidence to suggest the abuse had occurred since they were old enough to remember, JDB indicated the attacks became worse beginning sometime between April and June of 2006. This period coincided with two events: first, JDB began taking interest in a boyfriend; and second, Jasper was removed from the home in May of 2006.

JDB, who was twenty-five years old at the time of the trial, described five incidents whereby Bryan forced sexual intercourse upon her. She testified that she was raped once in the bathroom, once starting in the kitchen and ending on the couch in the living room, once in the bedroom, another time in the kitchen, and another time in the living room.

On one occasion in May of 2006, two customers entered the business and found JDB crying. While Bryan was helping other customers, JDB asked the couple to contact the police. However, when the Ashland Police arrived JDB claimed her father had only gotten loud with her during an argument. The police left when she refused to provide any more information or file charges. Then one day in June of 2006, Bryan locked the store and beat JDB. He apparently thought she was becoming too interested in a boyfriend. During this incident, Bryan held a Buck knife to JDB's throat. Bryan, after threatening to kill her, used the knife to inflict puncture wounds to her throat and chest. Her seventeen-year-old brother, Chris, testified to having witnessed Bryan's actions, including his use of the Buck knife.

In another incident, witnessed in part by Chris, Bryan again beat JDB at the store. Taking her into a back room, Bryan held her head under the water in the bait tank and punched her as she gasped for air. JDB also recalled

Bryan threatening to kill her and stating that he wished she was dead. In yet another incident, JDB claimed Bryan held D-cell batteries in his fist while beating her in the head.

In late June of 2007, Bryan overheard a customer say, "Thank you, honey," to JDB. Apparently, this comment enraged Bryan and he began beating JDB. The beating continued after Bryan and JDB arrived home. Bryan made JDB sit in a chair while he questioned her about the boyfriend. If he did not like the answers given by JDB, Bryan would stomp and kick her with his boots. While choking JDB, Bryan threatened to disfigure her and to kill her. Using his knee, Bryan bruised her crotch. Before the incident was over, Bryan had bitten JDB (leaving a scar) and had struck her with a bathroom scale until the scales broke in his hands.

At the beginning of July, Bryan again severely beat JDB. This time the beating was triggered by Bryan's belief that the phone had been disconnected because JDB had failed to pay the phone bill. Bryan slammed JDB against a wall and threw hot coffee in her face. Only the fortuitous ringing of the telephone convinced Bryan that it had not been disconnected. When JDB and one of her brothers went to pay the phone bill, the brother asked the phone company clerk to contact the police. Again, when the Ashland Police arrived at the Winchester Trading Post, JDB refused to press charges. However, the severity of her injuries led JDB to leave for her Aunt Carol's house. At her aunt's urging, JDB was taken by ambulance to the hospital.

JDB's examining physician, Dr. Haleem, documented numerous injuries. The medical records, introduced at trial, indicated blunt trauma to

the chest and abdomen; bruising and swelling to various areas of the body, including the back, legs, breasts, and pubic area; and knots on JDB's head.² Dr. Haleem also noted puncture wounds to the neck and chest. In the doctor's opinion, JDB was in substantial risk of death, prolonged disfigurement, or substantial loss of a body part.

Bryan's second daughter, RRB, also testified that she had been raped and assaulted by her father. According to RRB, on the date of her mother's birthday in 2001, Bryan took her to JDB's room and raped her. Immediately following the incident, RRB packed her personal belongings and attempted to leave. However, when she went downstairs, Bryan began berating her. When RRB attempted to stand up to him, Bryan struck her in the forehead and she fell to the floor bleeding. Bryan then kicked her in the ribs, buttocks, and crotch. RRB, who was over eighteen years of age, left the next day and never returned to live in the family residence.

The oldest son, Bruce, was twenty years old at the time of the trial. As did all the children, he also recounted a pattern of physical abuse. Asserting the abuse got progressively worse when he turned fifteen, Bruce recited three incidents of severe beatings while the family lived in Ashland. The first incident occurred when Bryan struck Bruce in the head with a crescent wrench. The second incident ignited when Bryan thought Bruce had rolled his eyes at him. Bryan was so enraged that he struck Bruce in the face, splitting his upper lip. The final incident described by Bruce occurred in the summer of

² JDB's injuries were recorded by photographs taken by members of the Ashland Police while she was at the hospital. These photographs were introduced at trial.

2006. Bryan became enraged when Bruce overfilled the bait tank. After giving Bruce a severe beating, Bryan chained him in a standing position to a pole inside the store and left him there for the night. At around 10:00 a.m. the next morning, JDB, who had witnessed part of the beating the night before, unlocked the chain and freed Bruce from the pole. This final incident led Bruce to leaving home for good.

Chris, as the middle son, believed he was beaten less because he tried to help more in the store. However, Chris also recalled incidents of physical abuse throughout his childhood. He refused to change clothes during physical education classes at school in order to hide bruises on his back and buttocks. As with several of the other children, Chris recalled that they were allowed only limited contact with friends. In addition to being instructed to say everything was fine at home, Chris recalled Bryan threatening to kill them if they disclosed the abuse.

Despite his belief that he was not beaten as severely as the others, Chris described three specific incidents beginning in the spring of 2004. While helping Bryan build shelves, Chris accidentally ran a screw into Bryan's hand. Enraged at the injury, Bryan struck Chris on the head and back with a board. The remaining two incidents occurred in the spring of 2006. In both cases, Bryan severely beat Chris when he caught him and one of his brothers smoking marijuana. Bryan used whatever he could get his hands on to strike Chris, including a chair and a board. During the first incident, Bryan slammed Chris's head into a sink and then pushed him down the stairs. In both cases, Bryan stomped on Chris while he was down. Chris believed these beatings

were worse because he and his brother had been smoking marijuana they had taken from Bryan's stash.

Jasper, the youngest son, was fifteen years old at the time of the trial. He was the first to raise allegations of abuse. Jasper related one incident when he had used Bryan's hammer and had misplaced it. When Bryan could not locate the hammer, he beat Jasper with his fists, feet, and a bicycle tire rim. The second incident occurred in April of 2006. Bryan became enraged when Jasper went to Wendy's for lunch before finishing a job Bryan had assigned him. For failing to dust the tires, Jasper was thrown to the floor, kicked, and stomped on.

The final incident described by Jasper occurred toward the end of April of 2006. Jasper had ridden his bike to the home of a friend. Bryan followed Jasper, told him to go to the store, and once there threw him to the floor in the bait room and began kicking him. JDB, who witnessed the beating, saw Bryan take a handle from a commercial dust pan and use it to continue to beat Jasper. As a result of this beating, Jasper ran away from home. After two nights on his own, Jasper told school officials that he would not return home. Chris Elliot, a social worker, investigated the incident and noted Jasper's injuries, including lacerations on his left arm and bruising on one leg. In addition to the injuries, Elliot was equally troubled by the fact that Jasper had been away from home for two days, yet Bryan had neither reported his son missing nor had he made any attempt to find him. In the end, Jasper was removed from the home.

Evidence at trial indicated that shortly after JDB left home, Bryan went looking for her. When he discovered her car at his sister's home, Bryan removed the fuel pump relay fuse. Bryan also broke into his sister's home and discovered the number for social services by the phone. At that point, Bryan returned home, packed up anything of value, and left with Chris for Huntington, West Virginia. Upon stating that he would have to kill Chris's dog before leaving, Chris walked back to Ashland. Several days later, Chris discovered Bryan at home. Bryan had shaved his head, beard, and mustache. Shortly thereafter, Bryan again left for Huntington, West Virginia. In the days following, Bryan made several attempts to reach JDB at Carol's home. At one point, Bryan admitted to Carol that he was staying in a hotel in Huntington. Carol passed this information on to the Ashland Police, who in turn contacted the Huntington Police. Bryan was arrested on a fugitive warrant.

At trial, Bryan assisted in his representation to the extent that he was allowed to conduct some of the questioning of the witnesses. Throughout the trial, Bryan argued that his children had fabricated the charges in order to allow JDB to seize control of the store and sell off all of the assets. While he admitted to some acts of abuse, Bryan denied the rapes and kidnapping. Further, during the sentencing hearing, Bryan claimed that he and JDB had lived openly as husband and wife, and that any acts between them had been consensual.

Bryan was indicted on 33 counts and a Boyd County jury convicted him on 22 counts as follows: two (2) counts of Assault in the First Degree;³ thirteen (13) counts of Assault in the Second Degree;⁴ five (5) counts of Rape in the First Degree;⁵ one (1) count of Wanton Endangerment in the First Degree;⁶ and one (1) count of Kidnapping.⁷ The jury recommended a sentence of 285 years in prison. Of the remaining eleven counts set out in the indictment, five were dismissed by the Commonwealth and the jury found Bryan not guilty of six others. The trial court, pursuant to KRS 532.110(1)(c), imposed a maximum aggregate sentence of 70 years in prison.

II. Discussion

Appealing to this Court as a matter of right,⁸ Bryan argues the trial court committed reversible error by: (1) allowing evidence of prior bad acts under Kentucky Rules of Evidence (KRE) 404(b); and (2) allowing a social worker to improperly testify as an expert that the victims were telling the truth.

A. The trial court did not abuse its discretion when it allowed evidence of Bryan's prior bad acts to be introduced under KRE 404(b).

Bryan argues Kentucky law mandates that he be tried for the offenses for which he was indicted and not for prior bad acts. See O'Bryan v. Commonwealth, 634 S.W.2d 153,156 (Ky. 1982); Holland v. Commonwealth, 703 S.W.2d 876, 879 (Ky. 1985). Bryan notes that the children were allowed to testify to incidents that occurred from early childhood (which clearly would

³ Kentucky Revised Statute (KRS) 508.010

⁴ KRS 508.020

⁵ KRS 510.040

⁶ KRS 508.060

⁷ KRS 509.040

⁸ Kentucky Constitution §110(2)(b)

have taken place prior to the period covered in the indictment), as well as to incidents within the indicted period for which he had never been charged. Bryan contends this was error under KRE 404(b). Further, Bryan contends the trial court failed to consider whether the probative value substantially outweighed the danger of undue prejudice of the evidence. See Bell v. Commonwealth, 875 S.W.2d 882, 891 (Ky. 1994). See also KRE 403.

Bryan's argument is correct insofar as it sets out the rule that evidence of prior bad acts is generally not admissible. However, Bryan neglects to address whether the evidence falls within any of the exceptions set out in KRE 404(b). The rule states:

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. It may, however, be admissible: (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 (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.

Prior to trial, Bryan's counsel objected to the introduction of the uncharged misconduct. The court refused to sustain or overrule Bryan's objection.⁹ At issue are two broad categories of evidence presented at trial. First is evidence of incidents which occurred prior to the period of time covered by the indictment, some of which went back to the victims' earliest childhood memories. Second is evidence of incidents which occurred during the period covered by the indictment for which Bryan was never charged. Thus, Bryan

⁹ The Commonwealth contends that this objection has not been properly preserved. While there may be problems with the validity of the objection as it relates to some of this evidence, the record makes it clear that Bryan generally contested the Commonwealth's use of prior bad acts.

claims the evidence: (1) comprises prior bad acts; (2) is prejudicial; and (3) is only admissible if it falls within the exceptions set out in KRE 404(b).

The evidence admitted involved the same victims and demonstrated Bryan's actions toward each of them over a period of years, culminating with the abuse leading to the charges in this case. Kentucky courts have concluded that evidence demonstrating both a pattern of conduct toward the victims and the means by which the defendant exercised control over his victims is admissible. See Young v. Commonwealth, 335 S.W.2d 949, 950 (Ky. 1960) (Evidence of a pattern of conduct toward the same child was admissible.); Pendleton v. Commonwealth, 685 S.W.2d 549, 552 (Ky. 1985) (Evidence of a pattern of conduct between defendant and persons other than the prosecuting witness was admissible.); Lear v. Commonwealth, 884 S.W.2d 657, 659-60 (Ky. 1994) (Evidence of a pattern of conduct involving victims other than the prosecuting witness over many years was admissible.); Richardson v. Commonwealth, 161 S.W.3d 327, 331 (Ky. 2005) (not improper to admit evidence of the modus operandi for controlling the victim). Given the precedent set forth in these cases, the trial court did not abuse its discretion in admitting evidence of abuse, even incidents occurring prior to the period of time covered by the indictment.

In addition, the Commonwealth correctly notes that evidence of incidents occurring during the time period of the indictment was often inextricably interwoven with evidence of the charged offenses. While the victims provided evidence as to each of the counts of the indictment for which Bryan was indicted, the narratives were often tied to incidents that occurred immediately

surrounding the specific incident charged. Where such evidence furnishes the context of the crime or is necessary for the full presentation of the charged offense, it is admissible as inextricably interwoven with the offense. See Norton v. Commonwealth, 890 S.W.2d 632, 637-38 (Ky.App. 1994). See also KRE 404(b)(2).

The trial court has discretion concerning the admission of evidence. See Anastasi v. Commonwealth, 754 S.W.2d 860, 861 (Ky. 1988); Pendleton, 685 S.W.2d at 554. As the evidence falls within the exceptions set forth in KRE 404(b), we are unable to find an abuse of discretion in the admission of the prior bad acts evidence.

B. Admission of the testimony of the social worker who stated she acted because she believed the statements of the victims was not properly preserved nor palpable error.

Bryan's final argument concerns a portion of the testimony of a social worker assigned as the ongoing case worker for Chris and Jasper. Kathryn Bustos, with the Cabinet for Family Services, was called as a witness by the Commonwealth to report on the state's plan to get the two youngest children, Chris and Jasper, into foster care. In the course of her testimony, she explained why no effort was being made to reunite the two children with their father:

Why was it that we did not reunite? Because of the heinous nature of these charges we are here about today. There was just too much abuse. The children were scared to death to ever go back. I believed the children. So our goal was to never reunite them with the father. The mother wasn't around, so we tried to find a relative to put the children with – Chris and Jasper being the two children I worked with.

Bustos went on to say this case was the “worst case I had ever had in my career as a social worker.”

In his argument, Bryan seems to be objecting to the Commonwealth’s attempt at trial to make Bustos an expert on the credibility of the two youngest victims. Bryan submits that such statements by the social worker were improper as they invaded the province of the jury which is solely charged with deciding the credibility of witnesses.

The response of the Commonwealth is unclear. The Commonwealth claims that the social worker’s statements did not constitute an “expert opinion.” But most all of the state’s response speaks to the lack of preservation of the alleged error without ever defending the purpose and nature of the testimony. An opinion by a witness, expert or not, as to whether other witnesses are telling the truth is not admissible at trial. Bussey v. Commonwealth, 797 S.W.2d 483, 484-85 (Ky. 1990); Dickerson v. Commonwealth, 174 S.W.3d 451, 472 (Ky. 2005). Neither has this Court carved out an exception for experts when the determination of credibility is synonymous with the ultimate fact of guilt or innocence. Stringer v. Commonwealth, 956 S.W.2d 883, 889-92 (Ky. 1997).

However, if there was error, it was clearly unpreserved. In order to prevail on an unpreserved claim of error on direct appeal for palpable error, one must show that the error resulted in manifest injustice. RCr 10.26. There is no manifest injustice unless, upon consideration of the whole case, there is a substantial possibility that the outcome would have been different except for

the error. Graves v. Commonwealth, 17 S.W.3d 858, 864 (Ky. 2000); Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

Apparently, the testimony of the social worker only bolstered the credibility of the two youngest witnesses. The three oldest who testified extensively as to Bryan's wrongdoing were not mentioned. The testimony in this case has been recounted in detail to illustrate the overwhelming evidence of Bryan's guilt. Any unpreserved error does not rise to the level of being palpable.

III. Conclusion

Bryan has failed to demonstrate an abuse of discretion in the admission of prior bad acts evidence under KRE 404(b). Likewise, Bryan has failed to demonstrate that the testimony of the social worker rises to the level of palpable error. For these reasons, the judgment of the Boyd Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Perry Thomas Ryan
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204