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ACTION.**

Supreme Court of Kentucky

2009-SC-000490-MR

JESSE BRIAN CONNER

APPELLANT

V.

ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
NO. 08-CR-00243

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Jesse Brian Conner of assault under extreme emotional disturbance,¹ first-degree burglary, first-degree rape, and first-degree sodomy. The trial court imposed a total sentence of 31 years' imprisonment as recommended by the jury. In this matter-of-right appeal,² Conner asserts the trial court erred by allowing

- 1) testimony describing Conner's flight before arrest even though the trial court had severed from the present trial the charge of fleeing or evading police;

¹ KRS 508.040(2)(a) states that "[a]n assault committed under the influence of extreme emotional disturbance is . . . [a] Class D felony when it would constitute an assault in the first degree or an assault in the second degree if not committed under the influence of an extreme emotional disturbance."

² Ky. Const. § 110(2)(b).

- 2) the jury to hear Conner's recorded statement in which he mentions a prior domestic violence emergency protective order that was issued against him even though the trial court had severed from the present trial the charge of violating an existing protective order; and
- 3) impermissible hearsay to be introduced through the treating physician's testimony recounting potentially incriminating statements contained in the alleged victim's medical history.

We conclude that the trial court did not err on any issue raised in this appeal and affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY.

Jesse and Mary³ Conner were married for about nine years and had two children. Although they separated several months before October 30 — the date on which the incidents allegedly occurred that gave rise to the charges against Conner — the couple continued to have sexual contact after separation. According to Mary, all sexual contact between them ceased a couple months before October 30. But Conner denies any cessation of regular sexual contact. Mary and Conner have very different versions of what happened between them on October 30.

According to Mary, Conner was waiting for her inside when she arrived home from work on October 30. He was there without her permission or knowledge, she said. Conner said that Mary invited him to meet her at her

³ Although most documents of record refer to her as Mary Conner, some parts of the record refer to Conner's ex-wife as Mary Lakes. To avoid confusion, we refer to her as "Mary" in this opinion.

home for sex. Both Mary and Conner testified to engaging in three sex acts that day: vaginal sex twice and anal sex once. Mary described the sexual encounters as entirely nonconsensual on her part, all accomplished by Conner's threats and acts of violence. Conner stated that the sex was consensual, and the sex acts were consistent with their customary sexual practices.

Mary and Conner both described acts of bondage and physical violence accompanying the sex.⁴ At some point in the encounter, Conner allowed Mary to leave to go to the hospital where she underwent a CAT scan and received pain medication. At the request of Detective Lee Ann Boyle, a detective investigating the report of Mary's rape claim, Mary submitted to a hospital-conducted rape examination. After her initial hospital visits, Mary's personal physician, Dr. Regina McDaniels, assumed responsibility for Mary's care.

While Detective Boyle interviewed Mary at the hospital, Deputy Phillip Sturgill attempted to locate Conner. When Deputy Sturgill eventually found him, Conner was in the process of parking his truck in a driveway to exit the truck. When Deputy Sturgill attempted to make contact, Conner got back into his vehicle and backed out of the driveway. After what was described as a low-

⁴ According to Mary, Conner struck her with his fist and the butt of a rifle, fired the rifle in her direction twice, zip-tied her to a bed, and threatened to kill her. Conner testified that Mary fired the rifle in his direction after she caught him looking through her phone. He also stated that during the course of the encounter, he slapped her, slammed her, and head-butted her. Conner confirmed he tied Mary to the bed with plastic zip-ties, but he contends that the bondage was consensual and consistent with their customary sexual encounters.

speed pursuit, Conner stopped his truck and threatened to shoot himself if law enforcement approached him any further. Deputy Sturgill could see that Conner had a rifle in his possession.

After a short exchange, Sergeant Scotty Anderson persuaded Conner to exit his truck and surrender his rifle. Conner was arrested, given *Miranda*⁵ warnings, and transported to police headquarters. En route, Conner made potentially incriminating statements to the law enforcement officers transporting him and made more statements after his arrival at headquarters.

The grand jury indicted Conner on one count of each of the following charges: first-degree assault, first-degree unlawful imprisonment, first-degree burglary, first-degree rape, first-degree sodomy, first-degree fleeing/evading police, tampering with a witness, and violation of an Emergency Protective Order (EPO)/Domestic Violence Order (DVO). Before trial, the trial court severed by agreement the counts of fleeing/evading, violation of an EPO/DVO, and tampering with a witness and dismissed the unlawful imprisonment charge.

At trial, Conner admitted he assaulted Mary; but he contended Mary invited him into her home on October 30, and the sex acts were all consensual. The jury found Conner guilty of assault under extreme emotional disturbance, first-degree burglary, first-degree rape, and first-degree sodomy.

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966).

II. ANALYSIS.

A. The Trial Court Did Not Err When It Permitted Evidence of Conner's Flight.

Before trial, Conner moved to sever from the present case the counts of fleeing/evading police, violation of an EPO/DVO, and tampering with a witness. Conner asserted as grounds for severance his argument that these particular charges would be "incredibly prejudicial" during a trial for burglary, rape, sodomy, and assault. The Commonwealth informed the trial court that the parties agreed to sever these charges, and the court granted severance without hearing argument from the parties.

During the trial, the Commonwealth questioned Deputy Sturgill and Sergeant Anderson regarding Conner's behavior when they tried to apprehend him. Conner objected to the admission of that testimony, requested a mistrial, and later made a motion for a new trial on the grounds that the testimony regarding Conner's conduct before arrest should have been excluded. Consequently, this issue is preserved; and we review the admission of the testimony regarding Conner's conduct under an abuse of discretion standard.⁶ The test to determine an abuse of discretion is whether the decision by the trial court is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.⁷

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

⁷ *Id.* at 581.

In *Rodriguez v. Commonwealth*,⁸ this Court held that the common law rule that flight was evidence of a sense of guilt was a principle that survived the adoption of the Kentucky Rules of Evidence (KRE).⁹ The Court in *Rodriguez* found that Rodriguez's theft of a truck followed by his flight from law enforcement was admissible after (1) subjecting evidence of flight to relevancy analysis and the KRE 403 balancing test *and* (2) considering that evidence under the parameters of KRE 404(b). We apply the same tests to Conner's claim.

1. KRE 403 Balancing Test.

Neither Conner nor the Commonwealth addresses the relevancy of the testimony regarding flight. We recognize that proof of flight has long been accepted as admissible because flight suggests a sense of guilt.¹⁰ As a result, we focus on the balancing test from KRE 403.

Under KRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice." Conner argues the probative value of the testimony regarding flight is diminished in value because he did not dispute he was guilty of a crime — assault — so the introduction of testimony that he attempted to avoid apprehension was excessive information about a bad act. And he claims that the trial court's

⁸ 107 S.W.3d 215 (Ky. 2003).

⁹ *Id.* at 219.

¹⁰ 107 S.W.3d at 218.

grant of his motion to sever, in which Conner argued for severance because of the prejudicial nature of the fleeing/evading charges, made the testimony regarding flight improper evidence at trial.

The Commonwealth responds that the flight testimony does not rise to a prejudicial level because the officers' testimony described a low-speed chase in which Conner did not threaten any of the law enforcement personnel involved.¹¹ As such, the facts in the present case were "much more benign and less potentially prejudicial than those allowed in *Rodriguez*."¹²

Over Conner's objection, the trial court deemed testimony regarding his flight relevant and implicitly denied that the prejudicial nature of the evidence substantially outweighed its probative value. The Commonwealth elicited this testimony regarding Conner's capture but did not attempt to characterize Conner's flight as a separate criminal offense. Conner's admission that he assaulted Mary does not make his flight from law enforcement less probative of

¹¹ Additionally, the Commonwealth argues that "testimony regarding [Conner's] suicidal behavior and agitated demeanor during the standoff served to support the extreme emotional disturbance (EED) mitigator instruction." *Baze v. Commonwealth*, 965 S.W.2d 817, 822-23 (Ky. 1997). Because of the mitigating instruction, the jury was able to consider first-degree assault and first- or second-degree assault under EED. The Commonwealth states that Conner was convicted under the mitigating EED instruction because it was supported by the testimony regarding the standoff. The Commonwealth makes the further point that evidence that benefits the appellant cannot be considered prejudicial. We find *Baze* distinguishable from the present case because in *Baze*, an incorrect manslaughter instruction was *entirely favorable* to the defendant and no prejudicial aspect existed. Since we resolve the issue on other grounds, we do not reach the argument in this opinion.

¹² In *Rodriguez*, the suspect nearly ran over a police officer while fleeing a parking lot. 107 S.W.3d at 217.

the possibility he committed rape. Conner provides no relevant legal authority for this specific argument, and the record does not reflect the existence of any pretrial agreement by the Commonwealth not to present evidence regarding Conner's flight simply because the fleeing/evading charges were severed. Because the Commonwealth did not use the flight testimony to suggest to the jury that Conner committed a separate offense and precedent holds that proof of flight can be evidence of guilt, we hold that the trial court did not abuse its discretion by permitting officers to testify to Conner's attempt to evade law enforcement and his eventual standoff.

2. KRE 404(b) Analysis.

We next consider whether the evidence is admissible under KRE 404(b). KRE 404(b) provides that evidence an individual committed other crimes is inadmissible unless that evidence falls within an exception to the rule¹³ and states, in pertinent part:

Other crimes, wrongs, or acts. 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

¹³ *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994); *See generally Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998) (stating the list of exceptions in KRE 404(b) is not exhaustive of all permissible uses).

In *Tamme v. Commonwealth*,¹⁴ this Court held that the “other purpose” provision is an illustrative list rather than an exhaustive one.¹⁵ In *Rodriguez*, the admission of Rodriguez’s flight was deemed permissible under the “other purpose” exception because it was offered for the “other purpose” of showing an expression of guilt.¹⁶ Similarly, the Commonwealth introduced the evidence of Conner’s flight at trial to indicate his sense of guilt. During his testimony regarding Conner’s capture, Deputy Anderson repeated a statement that Conner made to him: “I guess she’s going to say I raped her with a gun, huh?” This admission by Conner may be viewed as corroborating his flight with a sense of guilt. In light of the proof regarding flight and the statement made during Conner’s arrest, we conclude that the trial court did not err in allowing the officers’ testimony under the parameters of KRE 404(b)(1); and no abuse of discretion existed.

B. Any Error Regarding Conner’s Statements About an Earlier EPO was Unpreserved for Appellate Review and Does Not Constitute Palpable Error.

Conner’s recorded statement taken during the investigation of this matter was played before the jury. In it, Conner mentioned an EPO that he

¹⁴ 973 S.W.2d 13 (Ky. 1998).

¹⁵ *Id.* at 29 (quoting R. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 2.25 at 87 (3d ed. Michie 1993)).

¹⁶ 107 S.W.3d at 219.

claimed was no longer in effect.¹⁷ Toward the end of the recording, Conner made the following statement, "I've never touched that woman. One time before when she got the EPO when I was 21-years old. And I didn't hit her then. I just picked her up and slammed her. It's the only time I ever laid a finger on her." Although Conner violating an EPO/DVO was among the severed charges, the remarks in the recorded statement referenced an EPO that was no longer in effect.

Conner now argues that evidence he had an EPO was irrelevant, not probative, and impermissible evidence of other wrong acts. Further, Conner asserts that *if* any probative value existed, it was substantially outweighed by its prejudicial nature making it inadmissible under KRE 403's balancing requirement. Finally, he argues the fact that the Commonwealth did not give notice required by KRE 404(c)¹⁸ and the trial court did not exclude it resulted in an abuse of discretion.

¹⁷ Conner implicitly asserted that particular EPO was no longer valid when he said, "Last time I had an EPO out about five years when she got one out on me. I used to have to walk from Wal-Mart all the way to the trailer. Parked up Cherry Blossom Road. Parked all over the place. Because if the cops seen the car sitting there, then they could actually get us for EPO violation."

¹⁸ "In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure."

Conner states that objections to the introduction of evidence of the severed charges preserved this particular issue for appeal. But Conner's trial counsel made no objection to this recorded statement being played in court. And the EPO references are not specifically addressed in the motion for mistrial. Consequently, we find that the general objection to evidence of the severed charges is neither timely nor specific enough in nature to preserve this issue for appeal.¹⁹ As an alternative to review under an abuse of discretion standard, Conner requests we review the issue for palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26 and KRE 103(e). Finding the issue is not properly preserved, we review it for palpable error.²⁰

First, the EPO mentioned by Conner is not the same EPO he was separately charged with violating in the present case. In this respect, the Commonwealth did not make an effort to introduce facts from the underlying severed charge. The Commonwealth maintains that "[e]ven if the references to the EPO are taken as evidence establishing the fact that [Conner] had hit Mary in the past[] and, thus, was more likely to have hit her in this instance, there is no manifest injustice." We agree with the Commonwealth's position.

Although he consistently maintained he did not rape Mary, Conner admitted that he assaulted her. Conner took the witness stand and openly

¹⁹ *Winstead v. Commonwealth*, 283 S.W.3d 678, 688 (Ky. 2009).

²⁰ See RCr 10.26 (providing that relief may be provided for palpable errors, despite lack of proper preservation, if the party's substantial rights are affected and if manifest injustice resulted from the error).

admitted that he struck Mary, slammed her on the bed, and head-butted her on the day in question. And the recorded statement's reference to an earlier EPO cannot be said to have created an inference in the minds of the jury that Conner acted in conformity with prior acts of domestic violence on the date in question. So strong was Conner's own admission before the jury that he was guilty of an "assault of some sort," we consider highly unlikely the possibility that the outcome of the case would have been different if the jury never heard reference to Conner's earlier EPO. Conner's rights were not substantially affected; therefore, we find no palpable error.

C. Testimony from Treating Physician that Mary Told Her Conner Broke Into Her Home, Raped Her, and Struck Her with a Gun Does Not Constitute Palpable Error.

Dr. Regina McDaniels, Mary's personal physician, testified that Mary told her on the day in question that Conner "broke in" and "beat her, raped her, and broke a rifle barrel over her head." Dr. McDaniels stated that she saw Mary four days after the incident and that Mary's facial injuries were still obvious at that time. Mary complained of throbbing headaches, an inability to sleep, flashbacks, fear of being alone, and a racing heartbeat. Dr. McDaniels diagnosed post-traumatic stress disorder, traumatic head injury, and severe

insomnia. Dr. McDaniels took Mary off work, referred her to a counselor, and prescribed medication to treat both mental and physical trauma.²¹

Conner claims that the testimony from Dr. McDaniels about the source of her trauma constitutes impermissible hearsay that does not fall under any exception to the hearsay rule. Acknowledging that “on the surface” this testimony may fit the exception contained in KRE 803(4),²² Conner argues that exception is inapplicable because the statements regarding Conner breaking into Mary’s home and raping her were not “reasonably pertinent to treatment or diagnosis” of the head injuries Mary suffered.²³ Additionally, Conner insists that when Dr. McDaniels testified to the identity²⁴ of Mary’s attacker, this testimony violated “the general rule . . . that the identity of the perpetrator is not relevant to the treatment or diagnosis.”²⁵ Because Conner insists that the outcome of the burglary, rape, and sodomy charges hinge on whether the jury

²¹ Generally, the other portions of the testimony given by Dr. McDaniels dealt with Mary’s long-term care and the impact of Mary’s injuries on her life. This testimony is not at issue in this appeal.

²² Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

²³ Dr. McDaniels did not perform a rape examination on Mary. At the urging of law enforcement, Mary submitted to a rape kit at the Pattie A. Clay Hospital. Dr. McDaniels treated Mary in her capacity as Mary’s personal physician.

²⁴ Dr. McDaniels did not identify Conner by name, but she did state that Mary referred to her attacker as “her husband who she was separated from since March.”

²⁵ *Colvard v. Commonwealth*, 309 S.W.3d 239, 244 (Ky. 2010) (citations omitted).

believed Mary's version of the facts or his, he argues that Dr. McDaniels's testimony was inadmissible hearsay testimony that affected his substantial rights because this testimony unfairly bolstered Mary's version. Conner concedes this issue is unpreserved and requests review under RCr 10.26 and KRE 103(e). On this issue, we review for palpable error.

The Commonwealth insists that Dr. McDaniels properly testified under the hearsay exception created by KRE 803(4). Because Dr. McDaniels was responsible for Mary's continuing treatment, including both physical and mental injuries, the fact her house was broken into and she was raped was pertinent to medical treatment, particularly Mary's post-traumatic stress disorder. With respect to Conner's argument that the statements made by Dr. McDaniels improperly identified Conner as the perpetrator, the Commonwealth attempts to distinguish *Colvard v. Commonwealth*,²⁶ the case cited by Conner. The Commonwealth maintains that in *Colvard* — unlike the present case where Conner's identity is not an issue — the most critical issue was the identification of Colvard as the perpetrator because no other evidence physically linked him to the crime. In the event we conclude that the doctor's testimony is erroneous bolstering, the Commonwealth argues that this testimony is merely cumulative of other evidence, rendering it harmless error.

It is logical that a physician treating a patient's physical symptoms would need to know the individual was beaten, raped, and struck with a rifle.

²⁶ 309 S.W.3d 239 (Ky. 2010).

Inasmuch as Dr. McDaniels diagnosed Mary with a closed head trauma, these facts likely aided in the diagnosis of the conditions or explained the general character of the immediate source of her current complaints. Based on Mary's medical diagnoses, we find these particular statements made by Dr. McDaniels proper under KRE 803(4) since they relate to her physical trauma and treatments.

Conner characterizes the evidence against him as to burglary, rape, and sodomy charges as a choice by the jury between two competing versions of the facts — his story or Mary's. We disagree with this characterization based upon the record. Nonetheless, Conner properly takes specific issue with this statement by Dr. McDaniel:

Mary's story that day was that she had, on October thirty, had been abused by her husband that she was separated from since March. She said he had broken in and beat her . . . these are quote her words, beat her, raped her, and broke a rifle over her head.

The controversial elements of the statement are the identification of Conner and the characterization of Conner's presence in the home as a "break in."

With respect to the contents of this testimony, Dr. McDaniels's indirect identification of Conner violates our holding in *Colvard* in which we addressed identification of the offender as part of the medical diagnosis exception enumerated in KRE 803(4). We stated that "the general rule is that the identity

of the perpetrator is not relevant to treatment or diagnosis.”²⁷ While we recognize the utility in knowing that Mary was raped, beaten, and struck with a weapon in treating her physical condition, the statement that Conner “broke in” to the home was unnecessary for Mary’s medical treatment. Consequently, the identification of Conner and description of his presence in Mary’s home did not fall under the medical diagnosis exception of KRE 803(4) and constituted inadmissible hearsay.

As the Commonwealth states, “[Conner] suggests the conclusion that the jury could have disregarded all of the foregoing evidence, yet been convinced of Mary’s claims by Dr. McDaniels’[s] hearsay statement. Such a conclusion is untenable.” We agree. Dr. McDaniels’s controversial statements related to Conner’s identity and his breaking into the home were inadmissible hearsay. However, we cannot conclude that the verdict would have been different had Dr. McDaniels’s statements not been presented to the jury.

During the trial, the jury heard Detective Boyle testify regarding the rape investigation, threatening voicemails to Mary from Connor,²⁸ and testimony

²⁷ 309 S.W.3d 239, 244 (Ky. 2010) (citations omitted).

²⁸ Arguably, these voicemails contain more than just threats. A reasonable person might conclude these voicemails contradict Conner’s claims that he was in the home with Mary’s permission, and their sexual encounter was consensual. Recorded voicemails include in the following statements: “You won’t see me. You won’t (inaudible) with me. So I’m really sorry about the next thing that goes on because I will see you today. I will come to your house and knock on the door.” “I know that you went to the f**king law As you know, I done got what I want They better f**king catch me before I find you, because once I find you

from investigating law enforcement officers that tended to corroborate Mary's version of the events. Conner's own testimony placed him in Mary's home and described an encounter characterized by violence. With the exception of his own testimony, the overwhelming amount of evidence introduced at trial tended either to support Mary's description of the incident or to discredit Conner's. Although Conner maintains the trial of this case was about competing credibility, beyond the parties' disputed testimony, the weight of evidence squarely supports Mary's version of their encounter. Consequently, we conclude that Dr. McDaniels's statements that identified Conner and characterize his presence in the home as a "break in" did not approach the manifest injustice required for the error to be palpable.

III. CONCLUSION.

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

All sitting. All concur.

I'm going to kill you and everybody is going to be happy You know damn good and well I could have killed you The sex was consensual."

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