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RENDERED: MAY 14, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000801-MR

EVALENE CHILDERS — APPELLANT

V.

ON APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
NOS. 13-CR-00059, 13-CR-00060 AND 13-CR-00061

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Evalene Childers, sold Oxycodone to confidential informant ("CI") Brian Ward, on three separate occasions between August 15th and September 25th of 2012. Each transaction took place in Johnson County, Kentucky. Brian Ward's wife, Erica Ward, also participated as a CI in two of the transactions. Both CI's were working with the Johnson County Sheriff's Department. The transaction that occurred on August 15, 2012, was documented by an audio recording. There is no recording of the August 30, 2012, sale because the recording equipment malfunctioned. The transaction that occurred on September 25, 2012, was documented by an audio and video recording.

Appellant was arrested and charged under four separate indictments. Only three are at issue here. For the sale that occurred on August 15th, Appellant was charged with complicity to first-degree trafficking in a controlled

substance of ten or more dosage units; a Class C felony. Appellant received the same charge for the transaction that occurred on August 30th. For the September 25th sale, Appellant was charged under a third indictment for first-degree trafficking in a controlled substance of less than ten dosage units; a Class D felony. These three indictments were tried together.

A Johnson County jury convicted Appellant of each of the three trafficking charges. The jury recommended a maximum sentence of ten years' imprisonment for the conviction arising from the August 15th transaction and five years for each of the other two convictions. The jury further recommended that the sentences be served consecutively for a total sentence of 20 years' imprisonment. Appellant now appeals her conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution. Three issues are raised and addressed as follows.

Joinder

Appellant argues that the trial court erred in joining the trafficking charges for a single trial. RCr 6.18 provides that two or more charges may be joined in an indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." Similarly, "[t]he court may order two (2) or more indictments . . . to be tried together if the offenses . . . could have been joined in a single indictment." RCr 9.12.

Peyton v. Commonwealth addressed a similar joinder issue. 253 S.W.3d 504, 513 (Ky. 2008). In that case, the trial court consolidated two separate

drug trafficking indictments for a single trial. *Id.* We concluded that the charges were of the same character because each involved the sale of cocaine. *Id.* at 514. We further determined that "[d]espite the fact that the acts leading to the charges occurred over several months, they were not too remote from each other to prevent joinder." *Id.* (citing *Violett v. Commonwealth,* 907 S.W.2d 773, 775 (Ky. 1995) (holding that offenses occurring approximately four years apart were not too remote in time to be joined for purposes of trial)). Therefore, we held that the trial court did not abuse its discretion in consolidating the two trafficking indictments for trial. *See also, Penman v. Commonwealth,* 194 S.W.3d 237 (Ky. 2006) (upholding joinder of six cocaine trafficking charges based on sales and possession spanning a couple of months), *overruled on other grounds by Rose v. Commonwealth,* 322 S.W.3d 76 (Ky. 2010).

Similar to *Peyton*, the three transactions at issue in the present case involved the sale of the same drug, in this case Oxycodone. All three sales followed a nearly identical procedure where Ward purchased the pills from Appellant after first contacting her directly and arranging the buy. Thus, the transactions were of the same character and constituted a common plan. Furthermore, the exchanges occurred within six weeks of each other. This temporal proximity is similar to the time periods involved in *Peyton* and *Penman.* The drug buys in the present case were also much closer in time than the offenses that occurred in *Violett.* Therefore, the three separate indictments upon which Appellant was convicted could have been properly joined under one indictment pursuant to RCr 6.18. Since the charges could

have been joined in a single indictment, they were properly tried together under RCr 9.12.

Appellant also contends that RCr 9.16 forbids the joinder of the charges for trial. That rule "requires separate trials if joinder would result in undue prejudice to either party." *Rogers v. Commonwealth*, 366 S.W.3d 446, 453 (Ky. 2012). Effective January 1, 2015, however, we ordered that RCr 9.16 be deleted and shifted to RCr 8.3. Since Appellant was charged and tried when the previous version of RCr 9.16 was still in effect, we will apply it to the present case.

In support, Appellant contends that joinder of the three indictments for trial resulted in the admission of improper KRE 404(b) evidence. She specifically argued before the trial court that "[t]rying the cases as a batch invites the jury to bootstrap the weaker cases with the stronger, and essentially convict by improper propensity evidence." We will review Appellant's underlying KRE 404(b) argument in the overarching context of her argument for severance.

KRE 404(b)

Evidence of prior crimes or bad acts must be relevant "for some purpose other than to prove the criminal disposition of the accused . . . ." *Meece v. Commonwealth*, 348 S.W.3d 627, 662 (Ky. 2011); *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994) (noting that trial courts must apply KRE 404(b) cautiously). Nevertheless, "[t]his Court will not overturn a trial court's joinder

determination absent a showing of actual prejudice and a clear abuse of discretion." *Murray v. Commonwealth*, 399 S.W.3d 398, 405 (Ky. 2013).

Here, the "evidence necessary to prove each offense would have been admissible in a separate trial of the other." *Roark v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002); KRE 404(b)(1). In fact, evidence of a final conviction resulting from any one offense would have also been admissible in separate trials of the other offenses. *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005) (defendant's manufacturing methamphetamine conviction was admissible to prove defendant's motive, intent, and plan to manufacture methamphetamine in subsequent trial); *United States v. Harris*, 293 F.3d 970, 976 (6th Cir. 2002) (prior conviction of drug trafficking admissible to prove intent and knowledge in trial for distribution of crack cocaine). The evidence presented at trial in the present case was also indicative of a common plan. *Howard v. Commonwealth*, 787 S.W.2d 264, 266 (Ky. App. 1990) (evidence that defendant sold a pound of marijuana to an undercover policeman four months after the charged offense was admissible to prove plan, scheme, or system).

Thus, if the charges presented under each indictment at issue here had been tried separately, evidence admitted in any one trial would have been admissible in the other trials pursuant to the above-stated exceptions to KRE 404(b). *See Rogers*, 366 S.W.3d at 453 (holding that joinder of three trafficking counts for trial was proper and did not violate KRE 404(b) or RCr 9.16). It is also clear in the present case that "promotion of economy and efficiency in judicial administration . . . was not outweighed by any demonstrably

unreasonable prejudice to the defendant as a result of the consolidations." *Brown v. Commonwealth*, 458 S.W.2d at 444, 447 (Ky. 1970) (holding that joinder of offenses of armed robbery and escape from custody for trial was not an abuse of discretion).

Moreover, the jury awarded the minimum sentence for the transaction that occurred on August 30th. Therefore, the jury was clearly able to differentiate between the evidence relevant to each crime charged, and did not inappropriately use evidence of one crime as evidence of another. *See Peyton*, 253 S.W.3d at 514. Here, as in *Penman*, "it was a simple and logical decision for the trial court to join these offenses for trial and the Appellant has not shown that the trial court abused its discretion in doing so . . . ." *Penman, 194* S.W.3d at 254.

The September 25th Recording

Appellant further contends that the video and audio recording of the September 25th transaction presented improper KRE 404(b) evidence. That recording contained a segment where Appellant boasts to Ward about selling pills on previous occasions. Appellant also expressed her willingness to engage in subsequent transactions with Ward and invited him to call her later that same evening if he needed more pills. These statements do not reference the two prior incidents for which she was convicted in the present case. The court denied Appellant's objection and the entire recording was played for the jury. We review this evidentiary determination for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 120 (Ky. 2007).

This Court addressed a nearly identical issue in *Warick v. Commonwealth*, No. 2010-SC-000432-MR, 2012 WL 601246 at *3-4 (Ky. Feb. 23, 2012). In *Warick*, a CI successfully recorded purchasing methadone from the defendant. During the transaction, the defendant discussed his previous experiences selling marijuana. *Id.* The defendant objected to the admissibility of that portion of the recording, arguing that it presented improper KRE 404(b) evidence. *Id.*

We held that the trial court did not abuse its discretion in admitting that contested portion of the recording at trial because the discussion of marijuana was "'inextricably intertwined' with the video evidence of the methadone sale." *Warick*, 2012 WL 601246 at *4 (citing KRE 404(b)(2)). We also concluded that the probative value of that evidence was not substantially outweighed by the danger of undue prejudice. *Id.* (citing KRE 403).

Similar to *Warick*, the discussion of prior drug deals and potential deals at issue here, was "inextricably intertwined" with the audio and video evidence of the September 25th sale. KRE 404(b)(2). Specifically, it would have been difficult to redact the recording without presenting the jury with a limited and confusing exchange. The actual transaction lasted approximately three minutes and would have been greatly obscured by any attempts to redact. Also, due to the poor video quality, the entire verbal exchange that occurred between Appellant and Ward was critical in providing clarity and context.

Furthermore, we agree with the Commonwealth that this evidence demonstrates absence of mistake as well as knowledge and intent. KRE

404(b)(1). Appellant's recorded statement concerning her previous experience selling drugs demonstrated that she understood the drug trade, and that she specifically understood that the September 25th sale was illegal. Therefore, the contested statements referencing prior drug sales and experience in the narcotics trade were admissible under the exceptions provided in KRE 404(b)(1) and (2). In addition, this evidence was relevant, probative, and not unduly prejudicial.

KRE 401; 402; and 403

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. This test requires "only a slight increase in probability . . . ." *Harris v. Commonwealth*, 134 S.W.3d 603, 607 (Ky. 2004).

The September 25th recording documented Appellant selling pills to Ward and her self-professed experience in the drug trade. Clearly, this tends to prove the trafficking in a controlled substance charge arising out of the drug buy that occurred on September 25th. Appellant's statements were particularly relevant in proving knowledge, intent, and absence of mistake. This evidence was highly probative because the statements were Appellant's own.

Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of undue prejudice . . . ." KRE 403. "[A]ll evidence demonstrating that a defendant is guilty beyond a reasonable

doubt prejudices the defendant. KRE 403 requires something more." *Mayse v. Commonwealth*, 422 S.W.3d 223, 228 (Ky. 2013).

Here, any prejudice resulting from the admission of the contested portion of the recording was minimal. As previously noted, the drug buys that occurred on September 25th were memorialized using an audio/video recording device. Although the visual quality of the recording was very poor, the police were able to obtain a clear still shot photo from that footage. The photo depicted the license plate number of the vehicle Appellant drove to and from each transaction.

Furthermore, Brian Ward testified at trial and provided the details of each transaction. He specifically testified that during each drug buy, Appellant handed him the pills in exchange for cash. Law enforcement officers also testified as to their involvement in the three transactions and authenticated the Commonwealth's exhibits, including the recordings and still shot photos. Thus, the Commonwealth presented overwhelming evidence supporting the convictions. Accordingly, we cannot determine that the trial court clearly abused its discretion in admitting the September 25th recording, or any portion thereof.

Severing Indictment No. 13-CR-62

As previously discussed, Appellant was also charged under a fourth indictment—13-CR-62. That indictment was originally to be tried along with the other three. However, indictment 13-CR-62 was severed prior to trial because it involved a different CI who failed to appear at trial to testify. The

Commonwealth has appended the trial court docket demonstrating that indictment 13-CR-62 has been subsequently dismissed. Therefore, this issue is moot. *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994).

Conclusion

For the foregoing reasons, we hereby affirm the judgment of the Johnson Circuit Court.

All sitting. Minton, C.J.; Barber, Cunningham, Keller, Noble, and Venters, JJ., concur. Abramson, J., concurs in result only.

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