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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 5, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000593-MR

CHARLES KIMBLE

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
NOS. 11-CR-001711 AND 12-CR-003475

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Charles Kimble appeals as a matter of right from a judgment of the Jefferson Circuit Court sentencing him to a twenty-year prison term for first-degree robbery, kidnapping, third-degree terroristic threatening, and being a persistent felony offender in the first degree. Ky. Const. § 110(2)(b). Kimble argues that the trial court abused its discretion when it excluded his testimony concerning prior illegal drug activity in the victim's home. We affirm the judgment of the Jefferson Circuit Court.

FACTS

On May 20, 2011, apartment manager Sherry Corley was on duty when James Gray, a resident at the apartment complex, entered her office. Gray appeared shaken and was screaming. Electrical cords hung from Gray's bloodied arms and wrists. After Gray told Corley his girlfriend's cousin had

robbed him, Corley called 911. Gray then told the 911-operator that Appellant Charles Kimble had beaten him, tied him to a chair, and held a butcher knife to his throat before leaving with Gray's truck, jewelry, and money.

On June 2, 2011, Charles Kimble was indicted for the offenses of robbery in the first degree, kidnapping, intimidating a participant in the legal process, wanton endangerment in the first degree, and tampering with physical evidence.¹ A Grand Jury bench warrant was issued for Kimble on the same day. Kimble was subsequently arrested and arraigned on March 14, 2012.

Kimble's trial commenced on May 7, 2013. The Commonwealth called five witnesses in its case-in-chief. Gray testified that Kimble had been staying at his apartment for several weeks while visiting from Chicago. Gray explained that on the morning of May 20, 2011, he left his apartment to go to a dialysis treatment and a doctor's appointment. Upon returning from his appointments, Kimble told Gray that he needed help with one of the computers in the bedroom. Gray testified that he entered the bedroom and was promptly struck in the head by Kimble. He was then thrown onto the bed where Kimble continued to punch him in the head and chest. Gray stated that Kimble threatened to kill him, held a knife to his throat, and cut him behind his ear. He testified that Kimble pulled various wires and electrical cords from beneath the bed and used the cords to tie Gray to a chair. Gray explained that Kimble took \$200 from his wallet, \$8,000 from beneath Gray's dresser, as well as

¹ Kimble was indicted for being a persistent felony offender ("PFO") in the first degree on November 3, 2012.

various pieces of jewelry. The attack, according to Gray, lasted roughly forty-five minutes before Kimble left the apartment in Gray's truck. Gray testified that the \$8,000 represented money saved toward the purchase of a home. On cross-examination, Kimble's defense counsel read from a letter that Gray sent to the "America's Most Wanted" television program. In the letter, which contained details of the robbery, Gray claimed that the \$8,000 was money that he had saved for his son's college education.

Sherry Corley testified and described the injuries to Gray's arms and wrists as "deep cord marks." Corley's 911 call was played for the jury. April Kimble, Gray's fiancé and Kimble's cousin, confirmed that Kimble was staying at the apartment she shared with Gray at the time of the alleged attack. She stated that diamond earrings and a DVD player were missing from the apartment after the robbery. She further testified that she observed Kimble's mother wearing the missing earrings at a family reunion a year later. The ER doctor who treated Gray after the attack testified that Gray suffered injuries to his head, back, chest, and behind his ear. The lead investigator in the case, Detective Jonathan Scott Irish, testified that Gray identified Kimble from a photo array. He stated that Gray reported three rings, a necklace, his truck, and \$150 in cash as stolen. Detective Irish testified that Gray did not report as stolen the diamond earrings or the \$8,000 in cash.

Kimble took the stand in his own defense, testifying that he stayed with Gray in Louisville while he was looking for work. Kimble explained that he was uncomfortable staying with Gray and that his mother had sent him a bus

ticket so that he could return to Chicago. He testified that Gray returned to the apartment on May 20 and immediately fell asleep. While Gray slept, Kimble packed his personal belongings and placed them in Gray's truck. He explained that he then drove himself to the Greyhound station in Gray's truck and returned to Chicago by bus. Kimble testified that he did not ask for Gray's permission to take the truck, nor did he call Gray before leaving Louisville to tell him where his truck could be found.

The jury found Kimble guilty of first-degree robbery, kidnapping, and terroristic threatening in the third degree.² Following the penalty phase of the trial, the jury found Kimble guilty of being a persistent felony offender in the first degree. Kimble moved for a new trial, but the trial court denied Kimble's motion and imposed the jury's recommended sentence of twenty-years imprisonment.³ This appeal followed.

ANALYSIS

During Kimble's direct examination, he testified that certain occurrences at Gray's apartment made him feel uncomfortable. Kimble explained that he observed April Kimble crying, and witnessed arguments between Gray and April. When defense counsel asked Kimble if he had ever seen Gray "do something" that made him feel uncomfortable, the Commonwealth objected. At

² The Commonwealth successfully moved to dismiss the tampering with physical evidence count of the indictment prior to the trial. The jury found Kimble not guilty of intimidating a witness in a legal process and wanton endangerment.

³ The jury recommended that Kimble serve two concurrent twenty-year sentences for the first-degree robbery and kidnapping charges. Both parties agreed to a one-day sentence for the third-degree terroristic threatening charge.

the bench, defense counsel explained that the question was intended to elicit testimony from Kimble that he had witnessed Gray sell drugs in the apartment. That testimony, according to defense counsel, was pertinent in light of Gray's conflicting answers concerning the purpose of the \$8,000 and would explain Kimble's surreptitious departure from Louisville. The Commonwealth argued that the testimony constituted improper character evidence. The trial court sustained the Commonwealth's objection on the grounds that bad character evidence was inadmissible.⁴ However, the trial court allowed Kimble to testify that he had seen Gray do something that made Kimble uncomfortable, and that it was a specific action involving other people. Kimble raised the issue a second time in his motion for a new trial, where he argued that he was denied his right to present a full and complete defense when the trial court excluded his testimony regarding Gray's alleged drug transactions. Kimble contended that he would have testified that he had seen Gray conduct numerous drug transactions during the two weeks he resided with him. The trial court denied the motion for a new trial.

On appeal, Kimble asserts that the trial court's refusal to allow him to testify about supposed drug deals at Gray's residence abridged his right to present a full and complete defense. He further argues that the trial court abused its discretion when it denied his motion for a new trial pursuant to Kentucky Rule of Criminal Procedure ("RCr") 10.02 on the same grounds. Specifically, Kimble contends that his testimony was admissible under

⁴ Kimble did not question Gray or any other witnesses on avowal.

Kentucky Rule of Evidence (KRE) 404(b)(1) because it was relevant to show that the robbery was a result of a drug transaction “gone bad.” Kimble claims that the evidence would also prove that Gray was a biased witness who had a motive to lie about the crime. His argument, in essence, is that the proposed testimony would have supported the defense theory that an alternative perpetrator committed the charged offenses.

We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005) (citing *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Only relevant evidence, that is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable,” is admissible. KRE 401; KRE 402. “Relevancy is established by any showing of probativeness, however slight.” *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999). In a criminal prosecution, relevant evidence will “[tend] to prove or disprove an element of the offense.” *Little v. Commonwealth*, 272 S.W.3d 180, 187 (Ky. 2008) (internal citations omitted). Generally, evidence of a person’s “bad acts” is not admissible to prove the character of that person, but may be admitted for some

other purpose, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” KRE 404(b)(1).

As a preliminary matter, we note that the proposed testimony concerning the alleged drug transactions was not offered for the purpose of proving Gray’s character, but rather to prove that Gray was a biased witness, to wit, the robbery was the result of a drug deal “gone bad,” and Gray named Kimble as the perpetrator to avoid exposing his illegal drug operation. While this testimony may have been offered for a proper purpose under KRE 404(b), the exclusion of this evidence did not violate Kimble’s constitutional right to present a complete defense.

A criminal defendant’s fundamental constitutional right to present a defense also includes the right to introduce evidence that an alleged alternative perpetrator, or “aaltperp,” actually committed the crime. *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 (Ky. 2003); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986). In *Beaty*, the Court held that an alternative perpetrator theory could be advanced at trial once it had been established that an alternative perpetrator had both motive and opportunity to commit the crime. *Id.* at 204-210. However, subsequent decisions crystallized this approach and strongly suggested that a showing of both motive and opportunity was required to advance an alleged alternative perpetrator theory.

Recently, in *Gray v. Commonwealth*, 480 S.W.3d. 253 (Ky. 2016), we clarified this issue emphasizing that the motive-and-opportunity approach is not an “absolute prerequisite” nor is it the only path to advance an alleged

alternative perpetrator theory. Still, the Court's willingness to entertain multiple avenues to the introduction of an alleged alternative perpetrator theory does not permit the presentation of wholly unsupported theories. Rather, to determine whether the proffered alleged alternative perpetrator evidence should be admitted, the trial court should employ the balancing test found in KRE 403. *Id.* at 267. While the defendant is not required to articulate a precise theory of how the alleged alternative perpetrator committed the crime, it is necessary that the proffered evidence establish a legal or factual basis to support the alternate perpetrator theory. *Id.* at 268. "Speculative" and "far-fetched" theories are not sufficient. *Id.*

Our decision in *Malone v. Commonwealth*, 364 S.W.3d 121 (Ky. 2012) is instructive. The defendant in *Malone* was charged with a murder that took place in a Louisville home. 364 S.W.3d at 124. During the defense's cross-examination of the homeowner who witnessed the shooting, the defendant attempted to establish that another witness was a "drinker." *Id.* at 127. The Commonwealth objected on the grounds that the other witness's drinking habits were irrelevant. *Id.* The defendant responded that the questions were intended to provide context as to "what went on in the house," and that evidence of "drinking, smoking, and partying" in the house was relevant. *Id.* The trial court sustained the objection, but allowed the defendant to ask more general questions about the atmosphere in the house. *Id.* On appeal, the defendant argued that the trial court's ruling denied him a fair opportunity to present a meaningful defense. *Id.* This Court disagreed, holding that evidence

that a witness “drank, used drugs, and knew other people who did, does not, without more, permit a reasonable inference either that the crime was drug or alcohol related or that the witness was lying or was involved in the crime.” *Id.* Absent evidence that the witness had a reason to be biased against the defendant, the Court found no abuse of discretion in the trial court’s limitation of the defendant’s cross-examination. *Id.*

A trial court may infringe upon the defendant’s right to present a defense “when the defense theory is ‘unsupported,’ ‘speculative,’ and ‘far-fetched’ and could thereby confuse or mislead the jury.” *Beatty*, 125 S.W.3d at 207 (internal citations omitted). In the case at bar, the trial court did not abuse its discretion in excluding Kimble’s testimony about Gray’s alleged status as a drug dealer. In weighing the evidence under KRE 403, it is clear that the probative value of the proffered evidence was outweighed by the risk of prejudice.

Kimble’s statement that the drug trade frequently involves violence is an insufficient basis for the introduction of an alleged alternative perpetrator theory. While motive and opportunity are not required to admit an alleged alternate perpetrator theory, the introduction of that proof would have been one way for Kimble to successfully assert this defense. Rather, Kimble offered little in the way of proof, other than his observations on the violent nature of the drug trade. His attempt to introduce evidence of alleged drug transactions would invite the jury to “speculate about causes not supported by the evidence.” *Malone*, 364 S.W.3d at 127-28. As such, the trial court’s exclusion

of proffered evidence that Gray was a drug dealer did not deprive Kimble of his right to present a defense.

Nor was Kimble entitled to a new trial. Under RCr 10.02, a trial court may in its discretion grant a defendant's motion for a new trial, "for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." *See also Commonwealth v. Bailey*, 71 S.W.3d 73, 75 (Ky. 2002). In his motion for a new trial, Kimble did not put forward any new evidence for the trial court to consider. *See Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997). Instead, he reasserted the argument that Kimble should have been permitted to testify about witnessing multiple drug transactions in Gray's apartment.⁵

Kimble's defense was that he did not commit the crimes for which he was on trial. He exercised his right to testify in his own defense, wherein he explained that he witnessed arguments between Gray and April Kimble. These incidents made him uncomfortable, and, according to Kimble, were the impetus for his clandestine departure from Louisville. Kimble attempted to impeach Gray's credibility by illustrating the inconsistencies in his testimony as it concerned the \$8,000. On direct examination, Gray explained that he was saving the \$8,000 in order to purchase a house with April Kimble. However, on cross-examination, defense counsel read from a letter written by Gray wherein

⁵ In his motion for a new trial, Kimble argued the following: "Because Mr. Kimble was not permitted to present evidence that would have enabled the jury to infer Mr. Gray's reasons for lying, or to infer that the incident was really a drug deal gone bad, Mr. Kimble's defense was not a full and complete one and his right to a fair trial and to present a defense was violated."

he stated that the \$8,000 was being saved for his son's education. Gray did not deny that the money was originally intended to benefit his son, but explained that his son had dropped out of school and was "locked up"; therefore, Gray was no longer saving money for that purpose.

The jury was entitled to weigh Gray's credibility in light of his testimony and the evidence submitted. *See Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 2005). For the reasons stated, Kimble's totally unsubstantiated testimony that the robbery was related to a drug deal was properly excluded by the trial court, and the exclusion of that testimony did not prevent Kimble from having a fair trial. RCr 10.02. As such, the exclusion of Kimble's testimony about witnessing earlier drug transactions in the apartment did not significantly undermine his ability to present a full and complete defense. *See Dickerson v. Commonwealth*, 174 S.W.3d 451, 471 (Ky. 2005). Accordingly, we agree that the trial court did not abuse its decision when it denied Kimble's motion for a new trial.

CONCLUSION

For the reasons stated herein, we affirm the judgment and sentence of the Jefferson Circuit Court.

All sitting. All concur.

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