

COURT OF APPEALS OF KENTUCKY
FILE NO. 2004-SC-00216-DG
FILE NO. 2005-SC-00068-DG

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COMMONWEALTH OF KENTUCKY APPELLANT/CROSS APPELLEE

V.

ON DISCRETIONARY REVIEW
COURT OF APPEALS NO. 2001-CA-002653-MR
APPEAL FROM GRANT CIRCUIT COURT
HON. STEPHEN L. BATES, JUDGE
INDICTMENT NO. 01-CR-0041

GREGORY A. LINK

APPELLEE/CROSS APPELLANT

BRIEF FOR APPELLEE/CROSS APPELLANT, GREGORY A. LINK

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CERTIFICATE REQUIRED BY CR 76.12(b)

I hereby certify that a copy the foregoing Brief for Appellee/Cross Appellant has been served by first-class mail upon Hon. Stephen L. Bates, Grant Circuit Court, 101 North Main Street, Williamstown, Kentucky 41097; Hon. James M. Crawford, Commonwealth's Attorney, PO Box 353, Carrollton, Kentucky 41008; Hon. William R. Adkins, PO Box 127, 1506 North Main Street, Williamstown, Kentucky 41097-0127; and Hon. Gregory Stumbo, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on this 1st day of August 2006. I hereby further certify that the record on appeal was not checked out.



SAMUEL N. POTTER

PURPOSE OF THE REPLY BRIEF

This is the reply brief for Appellee/Cross Appellant, Gregory A. Link. Mr. Link will address only Arguments III and IV of his Cross Appellant's brief. He reaffirms and rests upon Arguments V and VI as set forth in his Cross Appellant's brief.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Link believes the briefs of the parties have sufficiently addressed the issues to allow this Court to render a decision. However, should this Court decide to hear oral argument in this case, Mr. Link would welcome the opportunity.

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III. UNRELATED KRE 404(b) EVIDENCE SHOULD NOT HAVE BEEN ADMITTED.

The Commonwealth questioned the preservation of this issue. (Commonwealth's reply/response brief, p. 6). The record reflects Mr. Link adequately preserved this issue:

Commonwealth: All right, here's what I'm interested in. As a result of your investigation of what you saw at the bar, the information that you got from Mr. West, what would have been the two criminal charges, if any, that would have been applicable to the situation?

Posey: The two applicable criminal charges were criminal mischief first –

Defense: Objection.

Judge: Overruled.

Posey: The two charges would have been criminal mischief first for the damage to the bar and wanton endangerment first for pointing the weapon at Mr. West.

(TE, 139). Additionally, the Court of Appeals found no preservation problems regarding this issue, ruling that the evidence was properly admitted because it was inextricably intertwined with the shooting six hours later and necessary for the Commonwealth to establish context, background, and perspective. Slip Opinion, p. 7-9. Reversible error occurred when this evidence was admitted.

The law allows admission of KRE 404(b) evidence of other bad acts when either KRE 404(b)(1) or (2) is met, and the evidence is not excludable under KRE 403. The law also allows the Commonwealth to fully present its case to the jury. However, neither of these rules justify

the admission of the unrelated prior bad acts in this case. Mr. Link's accident at the Silver Bullet Bar and ensuing confrontation with Doug West at Ivey's Bar do not meet neither KRE 404(b)(1) or (2), nor are they necessary for the Commonwealth to fully present its case to the jury.

First, the evidence at issue fails to satisfy KRE 404(b)(1) or (2). It was not offered for a purpose other than to show conformity therewith. It was not inextricably intertwined with the conduct charged. Yet, the Commonwealth believes that an accident and subsequent confrontation that happened six hours earlier with a different person at a different location is directly related to Mr. Link's continuous course of conduct, and thus both KRE 404(b)(1) b and (2) are satisfied. (Commonwealth's reply/response brief, p. 7-9).

Whether Mr. Link committed first-degree assault depends on his actions and his state of mind when the conduct in question occurred, not six hours or even 60 minutes before if it is not relevant. Mr. Link was blinded by headlights, yelled at to drop his gun, and thought he heard someone cock a gun at 3:30 a.m. on his cousin's farm. He was not thinking of the damage to the Silver Bullet or his face off with Mr. West. He was scared for his life, so he fired a warning shot. Unfortunately, he fired in the direction of where an unknown person was standing.

These two events have no connection with each other, save that they occurred in the life of Mr. Link. They are separate events that took place at different locations that dealt with different people at different

times. The previous accident and confrontation cannot prove that Mr. Link had the motive, nor opportunity, nor intent, etc., to shoot Deputy Keith Newman. Likewise, the two events are so distinct from each other, they cannot be inextricably intertwined and should not have been admitted.

Second, the evidence at issue is not necessary for the Commonwealth to fully present its case against Mr. Link regarding the shooting of Deputy Newman. The Commonwealth is entitled to "present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective." Lawson, *The Kentucky Evidence Law Handbook*, §2.25(II) (3d ed. 1993); (Commonwealth's reply/response brief, p. 9). This reflects the rule in *Smith v. Commonwealth*, 366 S.W.2d 902, 906 (Ky. 1962) and subsequent cases that pertinent evidence that tends to prove the crime is admissible, even if tends to prove other crimes or facts. *Stanford v. Commonwealth*, 793 S.W.2d 112 (Ky. 1990); *Norton v. Commonwealth*, 890 S.W.2d 632 (Ky. App. 1994).

However, the cases the Commonwealth cited that state the general rule can be distinguished from the case at bar. In *Smith*, 366 S.W.2d 902, the testimony of a liquor store clerk robbed by the defendant two days earlier was admissible to show that the defendant possessed the murder weapon and used it to obtain money by force. In *Stanford*, 793 S.W.2d 112, evidence that that the defendant stole the gun and the

automobile that the defendant used to commit robbery, kidnapping, and murder were interwoven. In *Norton*, 890 S.W.2d 632, the defendant was charged with selling LSD to an undercover officer and that during the sale the defendant discussed a possible marijuana sale with the officer. This conversation was admissible. In *U.S. v. Masters*, 622 F.2d 83 (4th Cir. 1980)(cited by Commonwealth's reply/response brief, p. 9), statements made by the defendant to three different undercover agents about defendant's ability to illegally provide firearms was relevant to a charge of illegally dealing in firearms without a license.

In the cases just discussed, the prior bad act evidence was necessarily connected with the charged crime: stealing a gun to commit robbery, discussing another possible illegal drug sale during an illegal drug sale, or statements to others about illegally providing firearms and being tried for illegally providing firearms. These are prior events that courts have considered appropriate to establish the necessary context for a given case. Mr. Link's case is distinctly different. That Mr. Link had an accident and a confrontation six hours earlier with a different person at a different location over a different matter had no real effect on what happened at his cousin's farm.

Having a confrontation over a traffic accident in unrelated circumstances does not support the inference that Mr. Link assaulted Deputy Newman. The only necessary context required to determine whether Mr. Link was guilty were the circumstances immediately

surrounding the shooting. As argued above, the last thing on Mr. Link's mind was the earlier accident. He just wanted to get out of the situation alive. This is what the jury needed to make a decision, not an unrelated event that happened earlier. The evidence regarding the Silver Bullet accident, subsequent confrontation with Mr. West, and what potential charges Mr. Link faced should not have been admitted. This error violated Mr. Link's rights to a fair trial and due process of law and requires a new trial. §2 , §11 Ky. Const.; 5th , 14th Amend. U.S. Const.

IV. THE ADMISSION OF THIS HEARSAY EVIDENCE WAS NOT HARMLESS.

The Commonwealth asserted that any error in admitting the hearsay testimony of an anonymous caller and Mr. Link's brother was harmless because "an abundance of other evidence" supported the jury's verdict. (Commonwealth's reply/response brief, p. 12). This argument exposes the overarching problem with Mr. Link's trial.

Mr. Link argued to the Court of Appeals below and now to this Court that this hearsay evidence—along with the events involving the Silver Bullet Bar, Mr. West, and Trooper Posey—were irrelevant to whether Mr. Link intended to shoot Deputy Newman. His argument as set forth in his Cross Appellant's brief demonstrates that admitting all of this evidence amounted to reversible error. He reaffirms that position and asserts that it should not have been admitted in the first place.

Nevertheless, the trial court admitted it, and the Court of Appeals affirmed those rulings to show the context, background, and perspective

of the situation and the state of mind of Mr. Link. However, an inescapable and logical consequence of admitting this evidence for those reasons is that the same evidence justified instructing the jury on assault under extreme emotional disturbance. When the trial court wrongly admitted the evidence but refused to fully and accurately instruct the jury on its possible effects, it left Mr. Link to suffer the extraordinary prejudice of hearsay testimony that he wanted a shootout with the police because he had a death wish since he faced other felony charges for an accident and fight he had been in earlier that night without the benefit of the jury being properly instructed on all the relevant law arising from these facts.

The Court of Appeals understood that the situation in which the trial court placed Mr. Link violated his fundamental right to a fair jury trial. It determined that this hearsay and prior bad acts evidence was properly admitted but that it necessitated instructing the jury on assault under EED. While Mr. Link still believes and still argues that the evidence should not have been admitted, the Court of Appeals opinion at least mitigated the unfairness of the trial court's rulings.

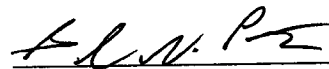
The Commonwealth's argument here would reimpose the unfairness of the trial court's ruling. The hearsay testimony of Mr. Link's brother and the anonymous caller involved conduct that occurred hours earlier and was wholly separate from whether Greg Link was guilty of assault. To admit this evidence was reversible error. This error would

have been harmless only had the trial court originally instructed on assault under extreme emotional disturbance. To hold otherwise is to deny Mr. Link of a fair jury trial. §2 , §11 Ky. Const.; 5th , 14th Amend. U.S. Const.

CONCLUSION

For the reasons stated above and in his initial brief, Mr. Gregory Link respectfully requests this Honorable Court to reverse his conviction, or in the alternative, reverse and remand this case to the Grant Circuit Court with instructions to grant a new trial and/or any other appropriate relief determined by this Court.

Respectfully submitted,



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