SC84855

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,
Respondent,

v.

RONNIE C. GAINES,
Appellant.

Appeal from the Circuit Court of Greene County, Missouri
31st Judicial Circuit, Division 3
The Honorable Henry W. Westbrooke, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Missouri Bar No. 48122
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax No: (573) 751-9456

ATTORNEYS FOR RESPONDENT

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from a conviction for assault in the second degree, § 565.060, RSMo 2000, obtained in the Circuit Court of Greene County, and for which appellant was sentenced to terms of six years in the custody of the Department of Corrections. The Missouri Court of Appeals, Southern District, reversed appellant's conviction and remanded for a new trial. State v. Gaines, SD24252, slip opinion (Mo. App., S.D. September 11, 2002). This Court sustained respondent's application for transfer pursuant to Supreme Court Rule 83.04 on November 26, 2002, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Ronnie Gaines, was charged by indictment with assault in the first degree in the Circuit Court of Greene County (L.F. 8). An information in lieu of indictment was later filed charging appellant as a prior offender (L.F. 19). The case went to trial by jury on beginning on March 5, 2001, the Honorable Henry W. Westbrooke presiding (Tr. 68; L.F. 5-6).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: In the summer of 1997, the victim, twenty-year-old Terri Tarwater, was waiting at a bus stop when she met appellant (Tr. 272). The victim and appellant soon began dating, and appellant moved into the victim's apartment, a duplex located at 526 Nichols Street in Springfiled, Missouri, where the two lived together for approximately three months (Tr. 273). The victim soon became depressed, however, because appellant did not have a steady job and he was not coming home (Tr. 273).

On the morning of December 12, 1997, the victim was running a bath for her daughter (Tr. 275). While in her bedroom, she began arguing with appellant, telling him that she was "fed up" with him, so he needed to get out of the house (Tr. 275). The two started to scuffle (Tr. 275). The victim separated herself from the scuffle and went into the bathroom to check the water temperature (Tr. 276). Appellant came up behind the victim and stuck her head into the bath water in an attempt to drown her (Tr. 275-276). The victim was able to fight appellant off after a couple of seconds (Tr. 276). She reached for a bottle of hairspray to spray in appellant's eyes, but he knocked it out of her hand (Tr. 277).

The next thing the victim remembered was that she was sitting on the edge of her bed crying (Tr. 276). Appellant took the victim's coat and started pulling on it in an attempt to rip it (Tr. 276). Someone knocked on the door of the apartment, which appellant went to answer (Tr. 276-277). In retribution for trying to rip her coat, the victim grabbed his coat and a pair of scissors and held them where appellant could see them (Tr. 277). As she was getting ready to cut the coat, appellant hit her in the face with his fist, knocking the victim out (Tr. 277-278).

When the victim came to, appellant was standing over her, leaning against her daughter's bed and smoking a cigarette (Tr. 278). He flicked cigarette ashes on her and said, "Die, bitch" (Tr. 278). Appellant then picked up the victim and put her in the bathtub (Tr. 278). The victim wiped blood off of her face and out of her hair (Tr. 278). She felt a horrible pain in her eye, and noticed that her nose and the side of her face were numb (Tr. 279).

The victim did not report the incident to the police because she was scared (Tr. 279). A few days later, the victim's neighbor saw her face and called the police (Tr. 279). The police came to the victim's house and took pictures of her injuries (Tr. 279, 356). The victim did not tell the police anything about how the injuries had occurred (Tr. 281, 357-358).

The victim's face continued to throb and hurt, so she eventually went the hospital emergency room (Tr. 282). She initially told them she had been in a car wreck and then told them she had fallen down some stairs (Tr. 282-283). She lied about how the injuries had occurred because she liked appellant and wanted to protect him (Tr. 283). The doctor believed that it was unlikely that she was injured in a fall, and again asked her what happened (Tr. 361). She told the doctor that she had been hit in the face (Tr. 362). The doctor told her that her nose was broken and prescribed Vicodin for pain relief (Tr. 283, 364, 366). The victim went home, but over the next few days she did not get any pain relief as the pain increased and her eye remained "very swollen" (Tr. 283-284).

Ten to eleven days after going to the emergency room, the victim suddenly lost sight in her eye (Tr. 284-285). The victim was holding her eye because it was going to "pop out" of the socket (Tr. 285). The victim's mother and appellant took the victim to the emergency room (Tr. 286). The victim had suffered a "blow-out" fracture to the orbit, or bony "floor" that the eyes sits on in the skull (Tr. 365, 380-382, 384-386). Surgery was performed on her right eye, but the victim did not regain sight in the eye (Tr. 286-287). The victim had to have another surgery in February 2001 to straighten the eye (Tr. 287). The victim's nose was disfigured, as it now had two lumps and a scar that were not their prior to the assault (Tr. 296). The victim's face also remained numb, as nerves and endings were cut, but that had gotten better over time (Tr. 297).

Appellant took the stand in his own defense (Tr. 419). He denied assaulting the victim and said that, when he returned home

on December 14, 1997, she had major injuries to her face and told him that she had been in a car wreck (Tr. 432).

At the close of the evidence, instructions, and arguments of counsel, appellant was acquitted of assault in the first degree, but found guilty of the lesser offense of assault in the second degree (L.F. 31; Tr. 489). The court sentenced appellant to six years in the custody of the Department of Corrections (L.F. 38; Tr. 510). This appeal follows.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE VICTIM'S TESTIMONY REGARDING AN ASSAULT AGAINST HER BY THE VICTIM THAT OCCURRED ONE MONTH PRIOR TO THE CHARGED ASSAULT BECAUSE THAT EVIDENCE WAS ADMISSIBLE IN THAT IT TENDED TO PROVE APPELLANT'S INTENT, WHICH WAS AS ISSUE IN THE CASE, MOTIVE AND ANIMUS TOWARD THE VICTIM. FURTHER, APPELLANT SUFFERED NO OUTCOME-DETERMINATIVE PREJUDICE BECAUSE THE EVIDENCE TO WHICH HE OBJECTED WAS CUMULATIVE TO OTHER EVIDENCE ADMITTED WITHOUT OBJECTION.

Appellant argues that the trial court erred in admitting evidence that appellant had assaulted the victim about a month before the charged assault (App.Br. 12). Appellant claims that this evidence was inadmissible propensity evidence (App.Br. 15). Appellant contends that the evidence was not admissible to prove intent and motive, even though it involved an assault against the same victim, because "intent was not in issue" (App.Br. 18).

A. Facts

The victim was asked on direct examination about the events of December 12, 1997 (Tr. 273). The victim testified that she "got sick of" appellant's tendency not to come home and his lack of a steady job (Tr. 273-274). She told appellant to get his stuff and get out (Tr. 274). The victim then went to the closet and started take appellant's belongings out of the closet to pack (Tr. 274). The victim and appellant started to argue, which led to a scuffle (Tr. 274). Appellant then punched the victim in the left eye (Tr. 274). The prosecutor then asked if the

victim had been "getting ready to do something" with her daughter, who also lived in the apartment (Tr. 274). The following exchange occurred:

A. In November?

Q. In December. I'm talking about December.

A. Oh, you're talking about December? Oh - -

Q. Were you talking about November, earlier?

A. Yeah.

Q. Okay. Well, I want to talk about December.

(Tr. 275). There was no objection to or motion to strike any of this testimony (Tr. 275). The victim then started to testify about the events surrounding the charged offense (Tr. 275).

Later in the direct testimony, the prosecutor asked the victim if the assault in December was the only time appellant ever hit her, and she replied, "No" (Tr. 287). Appellant then objected, arguing that it was "evidence of another crime and prejudicial" (Tr. 288). The prosecutor responded that the evidence was offered to show intent, motive, and appellant's animosity towards the victim, arguing that numerous Missouri cases allowed such evidence (Tr. 288-289). The court asked if appellant had any more comments, and counsel replied, "No" (Tr. 289). The court overruled the objection (Tr. 289).

The victim then testified to the same facts regarding the November incident that she had testified to previously (Tr. 273-274, 290-291). The prosecutor offered into evidence pictures of injuries sustained in the November assault (Tr. 291). Appellant objected to a lack of foundation, and the court directed the prosecutor to ask more questions (Tr. 292). After asking

more questions, the prosecutor again introduced the photos (Tr. 293). They were admitted without objection (Tr. 293). The victim further testified that she had lied to police about how she sustained the injuries from the November incident so appellant would not get in trouble (Tr. 293-294). She also testified that she suffered a broken nose from that incident (Tr. 294).

Further evidence of the victim's injuries from November incident (Tr. 328-333, 392-398). Appellant's only objection to any of this evidence was to hearsay (Tr. 330, 394).

B. Standard of Review

Trial courts are vested with broad discretion over the admissibility of evidence, and appellate courts will not interfere with those decisions unless there is a clear showing of an abuse of that discretion. State v. Winfield, 5 S.W.3d 505, 515 (Mo. banc 1999), cert. denied 528 U.S. 1130 (2000). The trial court clearly abuses that discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. State v. Brown, 939 S.W.2d 882, 883-84 (Mo. banc 1997). If reasonable persons can differ about the propriety of an action taken by the court, it cannot be said the trial court abused its discretion. Id.

C. The Evidence of the Prior Assault was Admissible

1. Evidence of Prior Bad Acts Against the Same Victim are Admissible

The general rule is that evidence of uncharged misconduct is inadmissible to show the defendant's propensity to commit the charged crimes. State v. Bernard, 849 S.W.2d 10, 13 (Mo.banc 1993). There are, however, exceptions, and proof of prior bad acts is admissible if it tends to establish motive, intent, absence of mistake or accident, identity, a common scheme or plan, or signature

modus operandi. State v. Gilyard, 979 S.W.2d 138, 140 (Mo. banc 1998). Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. State v. Sladek, 835 S.W.2d 308, 311 (Mo. banc 1992). Evidence is legally relevant if its probative value outweighs its prejudicial effect. State v. Mallet, 732 S.W.2d 527, 534 (Mo. banc 1987), cert. denied 484 U.S. 933 (1987). The balancing of the effect and value of evidence rests within the sound discretion of the trial court. Bernard, 849 S.W.2d at 13.

In this case, the evidence of the prior assault was logically relevant to prove intent. To convict appellant of assault in the first degree, the State was required to prove that he knowingly caused serious physical injury to the victim (L.F. 29). § 565.060, RSMo 2000. "Knowingly" means that appellant was aware that his conduct was "practically certain to cause that result." § 562.016.3(2), RSMo 2000. Here, the evidence that, one month before this assault, appellant struck the victim in the face with his fist, resulting in a broken nose, was highly relevant to prove that hitting her in the face with his fist again was "practically certain" to result in broken bones to the face. Therefore, the evidence of the prior assault tended to prove that defendant acted knowingly with result to the result of his conduct, and was therefore admissible for that purpose.

The evidence of the prior assault was also logically relevant to prove intent, motive, and animus against the victim, because it involved the same victim as the charged assault. The appellant courts of this State have long held that evidence of prior bad acts against the victim of the charged offense is relevant to proving these factors. In State v. Bolden, 494 S.W.2d 61

(Mo. 1973), the defendant was charged with assault for shooting his estranged wife. Id. at 62. In addition to testifying about the actual shooting, she testified that approximately one month before the shooting, Bolden had broken her jaw. *Id.* at 64-65. Bolden claimed this was improper evidence of uncharged misconduct, but this Court rejected his argument, stating:

> The law presumes malice as a concomitant of a shooting with a dangerous and deadly weapon, [citation omitted] but the element of intent remains a question for the jury and the law raises no presumption about it [citation omitted]. Accordingly, the evidence of prior assault and accompanying threats . . . tended to show the intent and motive behind the present crime, and evidence of such was thus properly admitted.

Id. at 65.

This principle has been upheld in numerous Court of Appeals cases, all finding that previous bad acts against the same victim are legally and logically relevant to establish intent, motive, and animus towards the victim. See State v. Smotherman, 993 S.W.2d 525, 528-529 (Mo.App. S.D. 1999) (evidence that the victim was beaten by the defendant at least twice a year throughout 26-year-marriage relevant tended to establish motive and intent in assault case); State v. Jacobs, 939 S.W.2d 7, 9-10 (Mo.App. W.D. 1997)(various acts of abuse by defendant against the victim over a three-year period relevant to prove intent, motive, and animus in kidnapping case). This rule has been upheld even in cases, such as this one, where the defendant was claiming as an alibi defense. See State v. McCracken, 948 S.W.2d 710, 712-714 (Mo.App. S.D. 1997)(evidence that defendant physically assaulted his ex-wife during the

marriage and called and threatened the ex-wife's boss because he thought they were having an affair was admissible to show animus and demonstrate the defendant's motive and intent to injure the ex-wife); State v. Patterson, 847 S.W.2d 935, 937-938 (Mo.App. E.D. 1993)(evidence that a few days prior to shooting the victims, defendant pointed a pistol at one of the victims and tried to fire it but it jammed and that he threatened another of the victim's for "messing with" his brother's girlfriend was admissible to show animus toward victims and intent to inflict injury); State v. Earvin, 743 S.W.2d 125, 127 (Mo.App. E.D. 1988) (evidence that the defendant had previously threatened the victim and her son and had pulled a gun on the victim was admissible to prove intent).

Just as in all of these other cases, the evidence of the prior assault was logically relevant in this case, because it showed that appellant intended to injure the victim because she had threatened to throw him out of her apartment, as he had done one month earlier (Tr. 273-278, 290-291) . Therefore, it was logically relevant to prove appellant's intent, motive, and animus toward the victim.

2. Intent was "At Issue"

Appellant attempts to circumvent this conclusion by arguing that "intent was not in issue" in this case because he presented no defense "which would have put his intent in issue" so the evidence of appellant's animus towards the victim was "unnecessary" (App.Br. 18-19). Appellant cites State v. Conley, 873 S.W.2d 233 (Mo. banc 1994), for support of his position (App.Br. 19). However, appellant is mistaken for a number of reasons. First, Conley does not require reversal in this case, as it dealt with the introduction of uncharged acts against *other*

victims, not of acts against the same victim which establish that appellant knowingly inflicted serious injury and the motive for causing that injury. Id. at 235-236. At no point does Conley state that it overrules Bolden and its lengthy progeny upholding the admission of such evidence as it relates to the same victim. Therefore, Conley provides no relief.

Second, intent is always at issue in a case where the State must prove a mental state, as the State is required, as a matter of due process, to prove beyond a reasonable doubt each and every element of the charged offense. State v. Bass, 81 S.W.3d 595, 614 (Mo. App., W.D. 2002); State v. Lubbers, 81 S.W.3d 156, 162 (Mo. App., E.D. 2002); State v. Calicotte, 78 S.W.3d 790, 796 (Mo. App., S.D. 2002). Therefore, in order to convict appellant of first-degree assault, the State was required to prove that appellant knowingly caused serious physical injury.

Finally, the record shows that intent was actually in question in this case. Appellant waived his opening statement, thus depriving the State of knowing, until after it rested and thus lost the opportunity to prove intent, what his defense would be (Tr. 270). The jury was instructed on both first-degree assault and assault in the second degree, with the only difference being whether appellant knowingly or recklessly caused the victim's injuries, therefore the jury had to determine the level of intent (L.F. 29-30). It is evident that the jury believed that intent was a questionable issue, as it acquitted appellant of acted knowingly, and convicted him of only acting recklessly. Because the issue of intent was at issue, it was necessary for the State to prove that element. The probative value of evidence demonstrating appellant's intent was therefore high, outweighing the prejudicial impact of this evidence.

Therefore, the evidence of the prior assault was legally relevant, making it admissible.

D. There Was No Outcome-Determinative Prejudice

In any event, appellant is not entitled to relief in this case because he suffered no harm from the testimony to which he objected. To be entitled to reversal in a case of improper admission of evidence of uncharged bad acts, that admission must have resulted in outcome-determinative prejudice. State v. Barriner, 34 S.W.3d 139, 150 (Mo. banc 2000). Any error in the admission of evidence which is merely cumulative of other matters testified to without objection is, of necessity, harmless. State v. Clark, 26 S.W.3d 448, 458 (Mo. App., S.D. 2000); State v. Sloan, 998 S.W.2d 142, 145-146 (Mo. App., E.D. 1999); State v. McWhorter, 836 S.W.2d 506, 508 (Mo. App., W.D. 1992). Prior to his objection to the evidence of the uncharged incident, the victim had testified to all of the facts regarding that assault—she told him to get out, she started to take out his belongings to pack, they argued and struggled, and appellant struck her in the left eye (Tr. 273-274, 290-291). Appellant offered no objection to or motion to strike this earlier testimony (Tr. 273-275). Further, appellant failed to object to testimony of Officer Steve Hosinger or Dr. Daniel J. Burke regarding the injuries the victim suffered in the November incident on the basis that it was improper evidence of an uncharged bad act (Tr. 328-333, 392-398). Because the jury heard all of the exact same facts without objection that they heard in the testimony subject to appellant's objection, the outcome of appellant's trial could not have been affected by the admission of the victim's additional testimony about the November incident.

Because the evidence of the November incident tended to prove appellant's intent,

motive, and animus toward the victim in the charged offense, and because the evidence objected to was cumulative of other evidence admitted without objection, the trial court did not abuse its discretion in admitting the victim's testimony about the November incident. Therefore, appellant's sole point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P. O. Box 899
Jefferson City, MO 65102
(573) 751-332l
Fax (573) 751-5391

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains 3736 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 6th day of January, 2003, to:

Nancy McKerrow
Office of the State Public Defender
3402 Buttonwood
Columbia, Missouri 65201

JEREMIAH W. (JAY) NIXON
Attorney General

RICHARD A. STARNES
Assistant Attorney General
Missouri Bar No. 48122

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Fax (573) 751-5391
Attorneys for Respondent

APPENDIX