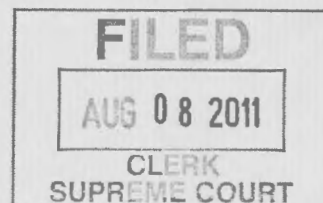


COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
FILE NO. 2007-CA-1996



STEPHEN DRIVER

2009-SC-639

APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HON. DENNIS R. FOUST, JUDGE
INDICTMENT NO. 07-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

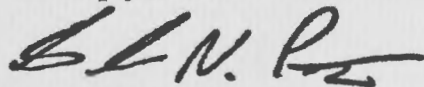
REPLY BRIEF FOR APPELLANT, STEPHEN DRIVER

Submitted by:

SAMUEL N. POTTER
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
SUITE 302, 100 FAIR OAKS LANE
FRANKFORT, KENTUCKY 40601
(502) 564-8006

COUNSEL FOR APPELLANT

The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Dennis R. Foust, Judge, Marshall Circuit Court, Unit 215, Judicial Bldg., 80 Judicial Drive, Benton, Kentucky 42025; the Hon. Mike Ward, Commonwealth Attorney, P.O. Box 1488, Murray, Kentucky 42071; the Hon. Cirrus E.C.B. Hatfield, Asst. Public Defender, 503 N. 16th Street, Murray, Kentucky 42071; and served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on August 5, 2011. The record on appeal was not checked out for the purpose of this Reply Brief.



SAMUEL N. POTTER

Purpose of the Reply Brief

The purpose of this Reply Brief is to address only those matters presented in the Brief For Appellee that deserve further comment, argument, and/or citation of additional authority.

Statement Concerning Oral Argument

Apparently, significant disagreement exists between the parties regarding how the facts apply to law in Stephen Driver's case. Therefore, Mr. Driver requests oral argument to aid the Court in rendering a fair and just opinion.

Statement of Points and Authorities

Purpose of the Reply Brief	i
Statement Concerning Oral Argument	i
Statement of Points and Authorities	ii
Arguments	1
I. The Commonwealth’s use of inadmissible prior bad acts unduly prejudiced Mr. Driver.	1
<i>Clark v. Commonwealth</i> , 223 S.W.3d 90 (Ky. 2007).....	passim
<i>Dillman v. Commonwealth</i> , 257 S.W.3d 126 (Ky. App. 2008)	1
KRE 404(b)	passim
<i>Commonwealth v. Buford</i> , 197 S.W.3d 66 (Ky. 2006).....	2
<i>Bell v. Commonwealth</i> , 875 S.W.2d 882 (Ky. 1994)	2
<i>Mullikan v. Commonwealth</i> , ___ S.W.3d ___ (Ky. 2011) (2011 WL 2434045, 4).....	4, 5
<i>Wiley v. Commonwealth</i> , ___ S.W.3d ___ (Ky. 2011) (2010 WL 4146148, 9).....	4, 6
<i>Brison v. Commonwealth</i> , 519 S.W.2d 833 (Ky. 1975)	5
II. Learning that his wife had an affair constituted sufficient evidence that required instructing the jury on Assault Under Extreme Emotion Disturbance.	6
<i>Holland v. Commonwealth</i> , 114 S.W.3d 792 (Ky. 2003)	6, 7
<i>Spears v. Commonwealth</i> , 30 S.W.3d 152 (Ky. 2000)	6, 7
<i>Gall v. Commonwealth</i> , 607 S.W.2d 97 (Ky. 1980)(<i>cert. denied</i> , 450 U.S. 989 (1981))(overruled on other grounds, <i>Payne v. Commonwealth</i> , 623 S.W.2d 867 (Ky. 1981).....	6

Conclusion8

Arguments

I. The Commonwealth's use of inadmissible prior bad acts unduly prejudiced Mr. Driver.

Mr. Driver argued in the Brief for Appellant that the Commonwealth's introduction of prior bad acts involving both his current wife—the complaining witness in this case—and his ex-wife unduly prejudiced him. The Appellee responded by arguing that this evidence was admitted to prove the absence of mistake. Brief for Appellee, 8-9. This Reply Brief will demonstrate the flaw in the Appellee's argument.

Fundamental fairness requires that the accused be tried only for the particular crime for which he is charged. This broad principle renders the prior bad acts of a defendant generally inadmissible. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). "Fundamental fairness requires that a jury's verdict be predicated on the particular crime charged in the indictment and not prior bad conduct dovetailed to the charged offense with the effect of emphasizing a general criminal disposition." *Dillman v. Commonwealth*, 257 S.W.3d 126, 129 (Ky. App. 2008). This does not render all prior bad acts inadmissible.

Mr. Driver does not dispute that the Rules of Evidence allow prior bad acts to be introduced to prove absence of mistake or accident, intent, and other similar purposes, so long as the prior bad acts are not admitted "to

show action in conformity therewith.” KRE 404(b). This Court has consistently interpreted this rule as exclusionary in nature in order to protect the accused’s fundamental right to a fair trial on only the crimes charged. *Clark*, 223 S.W.3d at 96. “It is a well-known fundamental rule that evidence that a defendant on trial had committed other offenses is never admissible unless it comes within certain exceptions, which are well-defined in the rule itself.” *Commonwealth v. Buford*, 197 S.W.3d 66, 70 (Ky. 2006)(quoting, *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994)).

The Appellee argued that the prior bad acts were introduced to show absence of mistake. Brief for Appellee, 8-9. This argument fails for two reasons.¹ First, the volume and specificity of prior bad acts the Commonwealth introduced, as detailed on page 5 of the Brief for Appellant, violated Mr. Driver’s right to a fair trial for only those crimes with which he was then charged. Instead, he was retried for crimes for which he had already served his sentence. Some of those crimes related to the complaining witness in this case. These could arguably go to show the absence of mistake. However, no context was provided for why those previous altercations occurred, unlike in this case, where the mitigating factor of Ms. Driver’s infidelity confession existed.

¹Mr. Driver reaffirms and rests upon his argument that the prior bad acts never should have been admitted because they were not relevant. Brief for Appellant, 7-8. He does not repeat it here so that he may more narrowly respond to Appellee’s specific argument.

Other crimes related to Mr. Driver's ex-wife and were completely unrelated to the indicted offenses—other than to show Mr. Driver acted in conformity with his criminal disposition. The Commonwealth asked Ms. Driver if she was aware that Mr. Driver had broken into his ex-wife's home, attacked his former family, and threatened to burn down her trailer. She did not know this. VR No. 1: 7/11/07; 11:44:15. Additionally, Ms. Driver admitted to knowing that Mr. Driver had served time in the penitentiary for assaulting his ex-wife. VR No. 1: 7/11/07; 11:41:40. This evidence lies beyond the exclusionary scope of KRE 404(b). What Mr. Driver did to a different person under different circumstances more than a decade before the instant case does not prove absence of mistake.

Second, the Commonwealth used the prior bad acts to show more than absence of mistake or intent. The Commonwealth used the prior bad acts to construct its argument that Mr. Driver acted in conformity with his criminal disposition. The Commonwealth referred to it as pattern of behavior in his questioning of Ms. Driver. VR No. 1: 7/11/07; 11:54:35. The phrase 'pattern of behavior' is merely a different way of saying 'criminal disposition' or 'acting in conformity therewith.' The purpose of the Commonwealth's characterization was to make the point that in this case, Mr. Driver was acting just as he always acted.

The Commonwealth continued this line of argument during his closing statement. The language quoted on page 10 of the Brief for Appellant reveals that the Commonwealth used the prior bad acts to show conformity therewith rather than just absence of mistake: “look at history, look at prior bad acts. . . . look at what he’s done.” VR No 1: 7/12/07; 9:23:17-9:23:54. Essentially, the Commonwealth was arguing ‘he’s done it before, and he did it again.’ This is precisely what KRE 404(b) was designed to prevent. The amount of prior bad acts introduced by the Commonwealth and the manner in which the Commonwealth used the evidence violated KRE 404(b).

Finally, this error unduly prejudiced Mr. Driver. The Appellee argued that if any error did occur, it was harmless. Brief for Appellee, 11. This Court has not reversed other cases even though fleeting references to prior incarceration were made. *Mullikan v. Commonwealth*, ___ S.W.3d ___ (Ky. 2011)(2011 WL 2434045, 4-5)(final 7/7/11)(*pro se* defendant failed to object to witnesses’ references to his prior stints in jail during his direct cross-examination); *Wiley v. Commonwealth*, ___ S.W.3d ___ (Ky. 2011)(2010 WL 4146148, 9)(final March 24, 2011)(this Court found one reference to be harmless error: “being familiar with Mr. Wiley I went back to our division to kind of check for his status, maybe being wanted or anything like that”).

Not all references to prior incarceration are harmless. In *Brison v. Commonwealth*, the trial court permitted a witness to relate that a person

allegedly involved with the defendant in commission of the crime was “a known thief.” 519 S.W.2d 833, 837 (Ky. 1975).² Later, another witness compounded the prejudice by stating, “[t]here was another fellow involved in the break in . . . and we have sent him on to the penitentiary.” *Id.* Trial counsel in *Brisson* moved for a mistrial, but the trial court overruled the motion. On appeal, the court held that the admissions served “no purpose other than to create in the minds of the jury the impression that the three accused were guilty by association.” *Id.* Although the trial court sustained the objections and admonished the jury, the remedy was not sufficient to serve the purpose of destroying any prejudicial atmosphere that may have been created. The convictions were reversed. *Id.*, at 837-838.

In this case, the Commonwealth informed the jury through Ms. Driver that Mr. Driver had gone to the penitentiary for assaulting his ex-wife. VR No. 1: 7/11/07; 11:41:40. Just as in *Brisson*, no admonition could have cured the error and erased the prejudice. Further, Mr. Driver requested an admonition after the Commonwealth told the jury during closing argument that the prior bad acts proved Mr. Driver’s intent, but the court refused to admonish the jury. No. 1: 7/12/07; 9:23:54; 9:32:30. Mr. Driver preserved the error, unlike in *Mullikan*. The Commonwealth introduced more than a

²While *Brisson* predates the adoption of the Rules of Evidence, Mr. Driver asserts that the holding in *Brisson* is in accordance with KRE 404(b). See, *Clark*, 223 S.W.3d at 96, fn. 12.

fleeting reference and then engaged in an improper argument during closing statements, unlike in *Wiley*.

Reversal is required where Mr. Driver is tried for only the charged crime instead of for acting in conformity with his criminal disposition or for having served time in the penitentiary.

II. Learning that his wife had an affair constituted sufficient evidence that required instructing the jury on Assault Under Extreme Emotion Disturbance.

The penal code doctrine of “extreme emotional disturbance” (EED) has replaced the common law concept of “sudden heat of passion.” *Holland v. Commonwealth*, 114 S.W.3d 792, 806 (Ky. 2003)(citing, *Spears v. Commonwealth*, 30 S.W.3d 152, 154-155 (Ky. 2000) and *Gall v. Commonwealth*, 607 S.W.2d 97, 108–109 (Ky. 1980)(cert. denied, 450 U.S. 989 (1981)(overruled on other grounds, *Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981))).

The classic example of a heat of passion crime is an act of violence precipitated by the discovery of a sexually unfaithful spouse or partner. This is precisely what occurred in Mr. Driver’s case. The fight began because Ms. Driver revealed to Mr. Driver that she had an affair. VR No. 1: 7/11/07; 1:07:20.

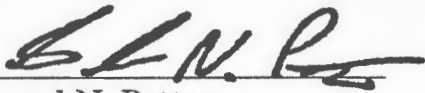
That the complaining witness testified that the fight began because she revealed she was having an affair was evidence that supported instructing the jury on assault under EED. Finding a lover in bed with his ex-wife supported providing the jury with an EED instruction. *Holland*, 114 S.W.3d at 807-808. "Appellant's discovery of his wife's adultery was a sufficient triggering event. It was for a jury to decide whether Appellant acted under the influence of EED." *Spears*, 30 S.W.3d at 155.

It was for the jury to decide whether Mr. Driver acted under the influence of EED when he struck his wife after learning she had an affair. It would have been reasonable for the jury to conclude that this revelation so temporarily enraged, inflamed, or disturbed him that he lost control and struck his wife. The twelve men and women of Marshall County were not given this choice, however. Reversal is required with instructions that the jury receive the assault under EED instruction if similar evidence is presented during retrial.

Conclusion

For these reasons and those stated in the Brief for Appellant, Stephen Driver requests this Court to reverse and remand his case to the Marshall Circuit Court with instructions to grant a new trial that is consistent with arguments raised in his appeal. Mr. Driver also respectfully requests any and all other relief this Court determines is appropriate.

Respectfully submitted,



Samuel N. Potter
Counsel for Appellant
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601