

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 0997

STATE OF LOUISIANA

VERSUS

WALTER A. KOTT, JR.

Judgment Rendered: February 10, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 378,041

Honorable Richard A. Swartz, Jr., Judge Presiding

Walter P. Reed
District Attorney
Covington, LA

Counsel for Appellee
State of Louisiana

Kathryn Landry
Special Appeals Counsel
Baton Rouge, LA

Frank Sloan
Appellate Attorney
Mandeville, LA

Counsel for
Defendant/Appellant
Walter A. Kott, Jr.

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

The defendant, Walter A. Kott Jr., was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. He now appeals, contending: (1) the trial court erred and/or abused its discretion in permitting the State to use evidence of another crime in rebuttal; and (2) the error was not harmless. For the following reasons, we affirm the conviction and sentence.

FACTS

On January 29, 2004, at 11:23 a.m., the defendant called for medical assistance to his motel room at the Plaza Inn on Lindberg Drive in Slidell. He told the responding police officers that the victim, Rebecca Roshto, was in his room and was not breathing. The police found her lying naked in the bathtub. She was dead and lividity was present in her body. She had mucus coming from her nose and an apparent puncture wound and "track mark" from a needle on her inner right arm.

The defendant had eight pills of hydrocodone in his pocket. There was a pill bottle for Diphenhydramine, containing numerous pills, located in the drawer of the motel room. The defendant also had prescription bottles in his name containing thirty Dilaudid pills and fifty-six hydrocodone (Lorcet) pills in the glove compartment of his car. Additionally, a syringe and needle were recovered from a bag in the dumpster at the motel.

Analysis of the victim's blood and liver revealed the presence of a trace amount of carisoprodol (Soma); a low-end therapeutic amount of alprazolam (Xanax), a muscle relaxant; and a lethal amount of hydromorphone (Dilaudid). The victim died within two to four hours of being injected with the Dilaudid.

Dilaudid, an opiate six to twelve times more potent than morphine, affects the receptors in the brain controlling breathing. It can cause the fluid in blood to flow into the lungs, preventing breathing and causing a "froth column" at the nose and mouth.

Eric Scott Williams testified that the defendant confessed he had injected the victim with "K4 Dilaudids," and "[t]here was mention of Xanax and Somas," when Williams was incarcerated in St. Tammany Parish Jail with the defendant in January or February of 2004. Williams also claimed the defendant stated he disposed of the syringe or syringes and the drugs from the room at a convenience store on Voters Road in Slidell.

Catherine Grace "Rena" Boyen, the defendant's stepdaughter, testified the defendant called her on January 29, 2004, at approximately 8:00 a.m. or 8:30 a.m., stated he was having heart problems and asked her to come to his hotel room. Boyen indicated the victim was deceased and lying on the bed in the room. Boyen and the victim had been friends for a few years. Boyen put ice on the victim to try to "bring her back." According to Boyen, the defendant had previously injected her and the victim with Dilaudid. In a January 29, 2004 statement to the police, Boyen indicated the defendant told her he "shot [the victim] up with four K4s in the past two hours."

The defendant gave multiple statements to the police concerning the incident. Initially, he claimed the victim came to his motel room between 10:50 p.m. and 12:00 a.m., on the night prior to her death, after calling him and asking to come over to talk because she was having a "bad evening." He claimed the victim then went to get gas, cigarettes, and milk. He claimed he went to sleep and woke up at 9:00 a.m. or 10:00 a.m. when Boyen came to his room. He claimed Boyen helped him put the victim in the bathtub, and when the victim did not respond, he called the police. The defendant had needle marks on both of his arms.

In his second statement, the defendant claimed he "shot Dilaudid" with Boyen in the days prior to, and on the morning of, the victim's death. In his third statement, the defendant claimed he administered a four milligram tablet of Dilaudid to himself and a lady friend, "Rebecca," by injecting the drug into one of her veins with a hypodermic needle. He claimed he then went to sleep, while "Rebecca" watched the Discovery Channel.

At trial, the defendant denied injecting the victim with anything on the day of the incident or at any other time. He also denied confessing to Williams. Additionally, he denied confessing to Boyen. Further, he denied injecting Boyen with drugs. He claimed his statements to the police were the result of the police putting his "medications" in front of him and promising to give him the drugs in exchange for the statements. He also claimed he made the statements so the police would not take Boyen to jail.

IMPROPER REBUTTAL; OTHER CRIMES EVIDENCE

In assignment of error number 1, the defendant argues the trial court erred and/or abused its discretion in permitting the State to use evidence of another crime in rebuttal. In assignment of error number 2, the defendant argues the erroneous admission of the other crimes evidence was not harmless error.

Generally, evidence of other crimes committed by the defendant is inadmissible due to the substantial risk of grave prejudice to the defendant. To admit "other crimes" evidence, the State must establish that there is an independent and relevant reason for doing so, *i.e.*, to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act. La. C.E. art. 404(B)(1). The Louisiana Supreme Court has also held other crimes evidence admissible as proof of other crimes exhibiting almost identical modus operandi or system, committed in close proximity in time and place. Evidence of other crimes,

however, is not admissible simply to prove the bad character of the accused. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. La. C.E. art. 403; State v. Tilley, 99-0569, p. 20 (La. 7/6/00), 767 So. 2d 6, 22, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001).

Rebuttal evidence is that which explains, repels, disproves or counteracts. The determination of whether evidence is rebuttal evidence and, hence, admissible is an issue which is addressed to the sound discretion of the trial court. Contradiction is one means of rebutting testimony of a witness. Tilley, 99-0569 at 20, 767 So. 2d at 22.

The defendant testified that he allowed the victim to come to his motel room after she called him and tearfully asked him if she could “come over and stay.” He denied injecting her with anything on the day of the incident or at any other time. He claimed Boyen had a drug problem, and she or “someone else could have [injected the victim with drugs].” He also denied injecting the victim with drugs approximately a year before the incident or injecting Boyen with drugs. He indicated he knew Shante Brady, but denied injecting her or anyone else with drugs.¹ The State told the defendant, “She’ll be here tomorrow to talk.” The defendant replied, “Well, good. Let’s go.”

On rebuttal, the State called Shante Brady. At a bench conference, the defense asked what Brady was being called “to rebut.” The State indicated the defendant had denied injecting Brady with Dilaudid, but she would testify to the contrary. The defense objected it had no “404(B)” notice of Brady’s testimony. The State responded, “[t]his isn’t 404(B). This is for credibility[.]” The defense then objected that the State had “jarred the door open ... to uncharged misconduct”

¹ The record indicates the State asked the defendant if he knew Shante “Grady,” and he replied, “Absolutely – I know – she goes by ‘Rose.’”

by improperly questioning the defendant about other criminal activity. The court pointed out the defense had failed to contemporaneously object to the alleged improper questioning.²

Outside the presence of the jury, Brady indicated in 2002, the defendant told her a mutual friend was waiting for her in his motel room, sent a cab to bring her there, and then repeatedly injected her with Dilaudid. The State indicated, as part of discovery, the defense had been provided with a copy of the 2004 letter discussing the incident that Brady had sent to the district attorney's office. The court asked the State for what purpose it was offering Brady's testimony. The State replied it was offering the testimony to impeach the defendant's testimony that he had never injected Brady. The defense objected for lack of notice of La. C.E. art 404(B) evidence. The court ruled it would allow the testimony from Brady, with a limiting instruction. The court observed that in his direct testimony, the defendant had claimed the nonexistence of a material fact, *i.e.*, the distribution by injection of Dilaudid to the decedent. On cross-examination, he had also denied injecting Brady with Dilaudid. The court held notice of other crimes evidence was not required on rebuttal when the defendant made the other crimes evidence relevant by his own testimony.

Within a reasonable time before trial, the State must furnish defendant with a statement in writing of the criminal acts or offenses it intends to offer in evidence specifying the exception to the general exclusionary rule upon which it relies for admissibility. State v. Prieur, 277 So. 2d 126, 130 (La. 1973). Absent evidence that the State evaded Prieur notice requirements by deliberately reserving its other crimes evidence for cross-examination or rebuttal, the Prieur notice requirements

² See La. C. Cr. P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."); La. C.E. art. 103(A)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless ... a timely objection ... appears of record, stating the specific ground of objection[.]").

do not apply where the defendant, through his own testimony, makes the other crimes evidence relevant. State v. Silguero, 608 So. 2d 627, 630 (La. 1992).

The State in a criminal prosecution has the right to rebut evidence adduced by the defendant. La. C.E. art. 611(E). In a criminal prosecution, the State does not and cannot know what evidence the defendant will use until it is presented at the trial of the case. It is for this reason that the State is given the right of rebuttal. The fact that the rebutting testimony in question tends incidentally to strengthen the case originally presented by the State does not render it inadmissible for the purpose for which it was offered and admitted. State v. Williams, 445 So. 2d 1171, 1181 (La.1984). The issue of what constitutes rebuttal evidence and is therefore admissible lies within the sound discretion of the trial court. State v. Castleberry, 98-1388, p. 23 (La. 4/13/99), 758 So.2d 749, 768, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999).

The trial court did not abuse its discretion in allowing the challenged rebuttal evidence. The evidence was properly admitted to contradict the defendant's testimony that he had not injected Brady with drugs. Additionally, the prejudicial effect of the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against its probative value. Accordingly, we find no merit in the defendant's first assignment of error regarding the admissibility of the rebuttal evidence, and based on our disposition of this assignment, we pretermit consideration of his second assignment of error.

CONCLUSION

Having found that the trial court did not abuse its discretion, but properly admitted the other crimes evidence without Prieur notice as rebuttal evidence, we affirm the defendant's conviction and sentence for second degree murder.

CONVICTION AND SENTENCE AFFIRMED.