

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-002284-MR

LINWOOD EARL BURGESS-SMITH

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 09-CR-01655

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Linwood Earl Burgess-Smith appeals from the denial of his motion to suppress and the corresponding conviction of third-degree assault, two counts of second-degree fleeing or evading, resisting arrest, third-degree escape, and being a persistent felony offender in the first degree. Following a jury trial, Burgess-Smith was sentenced to a total of fifteen years' imprisonment. After

a thorough review of the parties' arguments, the record, and the applicable law, we find no error and, accordingly, affirm Burgess-Smith's conviction.

The facts of this appeal were testified to at a suppression hearing and later at a jury trial; the testimony proffered at the two were similar. At the suppression hearing, Officer Muravchick testified as to the events surrounding the arrest of Burgess-Smith. On August 29, 2009, he responded with other officers to a call at a residence where Burgess-Smith was staying. The nature of the call was a 911-call hang-up. The officers responded within three minutes of the call. Officer Muravchick informed the other officers that he was familiar with the residence from a domestic violence call five days earlier, where the male suspect (who was not Burgess-Smith), was known to carry a weapon and had absconded when the officers arrived at the scene. Thus, Officer Muravchick stated that he knew to be cautious when approaching the male suspect who had a warrant out for his arrest for fourth-degree assault. The officers approached the residence and could hear a male and a female in a loud argument. Officer Muravchick testified at that point he and another officer ran to the front door of the residence to make sure everyone was okay and to find out what was occurring.

Officer Muravchick testified that the front door of the residence was open and that the officers could see down the hall into the residence, but no people were visible at this time. Officer Muravchick knocked on the door and a female came over to speak with the police. She stated that she was fine and that "he" was not there anymore. Officer Muravchick testified that, even though they were not

given permission to search the entire residence, they performed a protective sweep of the residence to ensure the safety of themselves and the residents based on the exigent circumstances. These circumstances included the 911-call hang-up, the escalating fight with a male that they heard upon their approach, and the prior domestic violence call five days previously.

Officer Muravchick stated that he could not be sure whether the female who answered the door was under duress, and did not want someone in the back of the house to come out and attack the officers by surprise. Officer Muravchick testified that while he stayed at the front of the house, another officer located Burgess-Smith in a bedroom and asked him to come to the front of the house for safety. Officer Muravchick testified that once he saw Burgess-Smith, he immediately recognized him from his patrol briefing earlier in the night and knew that Burgess-Smith had an active warrant for first-degree robbery and was considered armed and dangerous.

Officer Muravchick then patted down Burgess-Smith for safety because he was uncertain whether Burgess-Smith's gym shorts concealed a weapon. Officer Muravchick asked Burgess-Smith his name, which he confirmed was Linwood Burgess-Smith. Officer Muravchick then informed Burgess-Smith that he was not under arrest but would be detained while they investigated the situation. When Officer Muravchick took out his handcuffs in order to detain

Burgess-Smith, Burgess-Smith threw his elbow down, pushed Officer Muravchick into a wall,<sup>1</sup> struggled with Officer Muravchick, and ran off.

Officer Maynard was outside when Burgess-Smith came running out the front door. Officer Maynard chased Burgess-Smith and tackled him. When the two fell, Officer Maynard<sup>2</sup> lost his grip on Burgess-Smith and he ran again.

Officer Muravchick then tased Burgess-Smith, handcuffed him and placed him under arrest. While waiting for the ambulance to arrive,<sup>3</sup> Burgess-Smith jumped to his feet and ran again. Officer Muravchick unsuccessfully attempted to tase Burgess-Smith again. Officer Muravchick and other officers then chased Burgess-Smith around the house where Officer Muravchick fell and sprained his ankle.<sup>4</sup> Burgess-Smith was then tased again by another officer. On the way to the hospital, Burgess-Smith was read his *Miranda* rights.

After hearing this evidence, the trial court overruled Burgess-Smith's motion to suppress the evidence based on a warrantless entry of the residence. In so doing, the trial court concluded that Burgess-Smith had an expectation of privacy while being an invited guest in the home. However, the court further determined that the police had reason to inspect the residence to determine if the female who answered the door was under duress, injured, or protecting her

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<sup>1</sup> There was conflicting evidence as to whether the elbow actually pushed Officer Muravchick into a wall or not.

<sup>2</sup> Officer Maynard suffered from abrasions and a bump to his shoulder from tackling Burgess-Smith.

<sup>3</sup> This is apparently standard procedure following a tasing by this department.

<sup>4</sup> Officer Muravchick claimed this was a slight injury not requiring medical attention.

assailant because of the 911-call hang-up, an earlier call concerning domestic violence, and the loud argument between a male and female that the officers heard upon approach. Thus, the trial court concluded that the police officers lawfully entered the residence, and lawfully detained Burgess-Smith. Accordingly, it overruled the motion to suppress. Thereafter, a jury trial was conducted.

At trial, the Commonwealth presented the testimony of Officers Muravchick and Maynard, as well as several other officers who responded to the scene. Notably, the trial court permitted Officer Muravchick to mention that he recognized Burgess-Smith from his outstanding warrant but did not permit him testify to the charge upon which the warrant was based. At the close of the Commonwealth's case, Burgess-Smith moved for a directed verdict on the assault charge, which was overruled.

The defense presented the testimony of Burgess-Smith's ex-girlfriend, Diane McDonald, who testified that no one gave the officers permission to enter the residence and that she saw Burgess-Smith jerk his elbow away while Officer Muravchick was attempting to handcuff him. At the end of the evidence Burgess-Smith moved again for a directed verdict, which was again denied. Burgess-Smith requested that the jury be instructed on fourth-degree assault, which was also denied. Burgess-Smith was convicted of third-degree assault, two counts of second-degree fleeing or evading, resisting arrest, third-degree escape, and being a persistent felony offender in the first degree. Burgess-Smith was sentenced to a total of fifteen years' imprisonment. It is from this that he now appeals.

On appeal, Burgess-Smith presents four arguments, namely: (1) the trial court erroneously denied his motion to suppress; (2) he was entitled to a directed verdict of acquittal on the charge of third-degree assault due to insufficiency of the evidence; (3) the trial court erred when it refused to instruct the jury on the lesser-included offense of fourth-degree assault; and (4) the trial court should have excluded Burgess-Smith's unrelated active arrest warrant. The Commonwealth disagrees and asserts that the trial court did not err. With said arguments in mind, we now turn to the first issue: whether the trial court erred in denying Burgess-Smith's motion to suppress the evidence.

In review of the trial court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, then they are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004); *see also Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky.App. 2008). "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky.App. 1999)).

Further, we note that when this Court reviews the facts for clear error, we should give due weight to inferences drawn from those facts by the trial judge

and the local law enforcement officers. *See Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000)(citing *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911(1996)). The burden is on the appellant to demonstrate that the ruling of the trial court on the suppression motion was clearly erroneous. *See Harper v. Commonwealth*, 694 S.W.2d 665 (Ky. 1985). In the absence of any showing to the contrary, the reviewing court must assume the trial court ruled correctly. *Id.*

As his first basis for appeal, Burgess-Smith argues that the trial court erred in denying his motion to suppress the evidence because police officers illegally entered the residence where they discovered Burgess-Smith; that there was no basis to perform the protective sweep; and that Burgess-Smith was improperly detained when the officers requested that he leave the bedroom and be seated in the living room.

*Sub judice*, Burgess-Smith was convicted of third-degree assault of an officer. In *Commonwealth v. Johnson*, 245 S.W.3d 821, 825 (Ky.App. 2008), this Court held, “The unlawfulness of an entry or search is not a defense to an assault on a police officer.” In so doing, the *Johnson* Court noted, “Although the courts have employed different reasoning, they have uniformly rejected motions to suppress evidence relating to the defendant's violence toward police officers subsequent to an unlawful warrantless entry or search and seizure.” *Id.* at 823. Thus, the trial court properly overruled Burgess-Smith’s motion to suppress the evidence related to these subsequent crimes after an alleged unlawful entry, search

or seizure. Moreover, regardless of our findings as to whether the entry of the police into the residence passed constitutional muster, Burgess-Smith's active outstanding warrant for his arrest was an intervening cause of such import that it was sufficient to purge the initial taint *sub judice*, especially since Officer Muravchick immediately recognized Burgess-Smith as having an outstanding arrest warrant. *See Birch v. Commonwealth*, 203 S.W.3d 156 (Ky.App. 2006). *See also Baltimore v. Commonwealth*, 119 S.W.3d 532, 541 n. 37 (Ky.App.2003) (citing *United States v. Green*, 111 F.3d 515 (7th Cir.1997)). Thus, the trial court did not err in denying Burgess-Smith's motion to suppress the evidence.

As his second basis of appeal, Burgess-Smith argues that he was entitled to a directed verdict of acquittal on the charge of third-degree assault due to insufficiency of the evidence. In support thereof, Burgess-Smith argues that there was no evidence of an injury to any of the officers caused by Burgess-Smith and that he merely moved his elbow to avoid being handcuffed. He also denies shoving Officer Muravchick. With this in mind we now turn to our jurisprudence.

We note that, "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal."

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). When confronted with a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that



the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. *Paulley v. Commonwealth*, 323 S.W.3d 715, 722 (Ky. 2010).

Of import, Kentucky Revised Statutes (KRS) 508.025 states in part:

“(1) A person is guilty of assault in the third degree when the actor: (a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to: 1. A state, county, city, or federal peace officer....”

Our review of the record shows that the Commonwealth sustained its burden by providing evidence that Burgess-Smith attempted to cause physical injury to a police officer by either shoving the officer or by thrusting his elbow downward.

While Burgess-Smith claims that such use of his elbow was insufficient to establish that he attempted to cause injury to the officer, we believe that this created a jury question and that the trial court properly overruled Burgess-Smith’s motion for a directed verdict given that the trial court must assume that all evidence presented by the Commonwealth was true. *See Paulley and Benham, supra*. Thus, we find no error in the trial court’s denial of Burgess-Smith’s motion for a directed verdict.

Burgess-Smith next argues that the trial court erred when it refused to instruct the jury on the lesser-included offense of fourth-degree assault. The Commonwealth argues that the trial court properly denied this requested jury

instruction because no evidence was presented to support the giving of a fourth-degree assault instruction.

At the outset, we note that our review of a trial court's rulings with respect to jury instructions is for abuse of discretion. *Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky. 2009) (citing *Ratliff v. Commonwealth*, 194 S.W.3d 258, 274 (Ky. 2006)). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am. Jur. 2d *Appellate Review* § 695 (1995)).

As stated in *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000):

A trial court is required to instruct on every theory of the case reasonably deducible from the evidence. *Ragland v. Commonwealth*, Ky., 421 S.W.2d 79, 81 (1967); *Callison v. Commonwealth*, Ky.App., 706 S.W.2d 434 (1986) (In a criminal case, it is the duty of the court to prepare and give instructions on the whole law. This general rule requires instructions applicable to every state of [the] case covered by the indictment and deducible from or supported to any extent by the testimony.)

*Manning* at 614.

However, the trial court's duty to instruct "does not require an instruction on a theory with no evidentiary foundation." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (citing *Barbour v. Commonwealth*, Ky., 824 S.W.2d 861, 863 (1992), *overruled on other grounds*, *McGinnis v. Commonwealth*, Ky., 875 S.W.2d 518 (1994); *Neal v.*

*Commonwealth, Ky.*, 303 S.W.2d 903 (1957)). With this in mind, we turn to Burgess-Smith's argument.

At issue, KRS 508.025, states in part, "(1) A person is guilty of assault in the third degree when the actor: (a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to: 1. A state, county, city, or federal peace officer . . . ." In comparison, KRS 508.030 states in part, "(1) A person is guilty of assault in the fourth degree when: (a) He intentionally or wantonly causes physical injury to another person; or (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument."

When considering KRS 508.025 and KRS 508.030, we turn to RCr 9.54(1), which provides: "It shall be the duty of the court to instruct the jury in writing on the law of the case . . . ." Under this rule, "[a] defendant is entitled to an instruction on any lawful defense which he has. Although a lesser-included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge." *Slaven v. Commonwealth*, 962 S.W.2d 845, 856 (Ky. 1997) (citations omitted). "Due process requires a lesser-included offense instruction "only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky. 2009) (citing *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998)).

We agree with the Commonwealth that the record does not support a fourth-degree assault instruction. While Burgess-Smith argues that being awoken at 2 a.m. could lead to confusion as to whether Officer Muravchick was a police officer, we disagree based on the evidence presented by the Commonwealth. Only after Officer Muravchick attempted to handcuff Burgess-Smith did the scuffle begin, and this was after Burgess-Smith had been moved from one room to another and some time had passed since he was awakened. There was no evidence presented that Burgess-Smith intentionally or wantonly caused physical injury to another person, or with recklessness caused physical injury to another person by means of a deadly weapon or a dangerous instrument. Instead, the evidence presented by the Commonwealth was that the officers attempted to detain Burgess-Smith and only then did he respond by thrusting his elbow and/or shoving and fleeing from the officers, which ultimately led to the officers chasing and tackling him. Clearly, Burgess-Smith was not entitled to an instruction of fourth-degree assault; accordingly, we find no error in the trial court's refusal to so instruct.<sup>5</sup>

As his last basis of appeal, Burgess-Smith argues that the trial court should have excluded Burgess-Smith's unrelated active arrest warrant; in essence, Burgess-Smith argues that Kentucky Rules of Evidence (KRE) 404(b) should have made such evidence inadmissible. The Commonwealth argues that the trial court did not err since the testimony concerning how Officer Muravchick recognized

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<sup>5</sup> In contrasting the two statutes, KRS 508.025 and KRS 508.030, only when the evidence would support a finding that the conduct was wanton would an instruction be warranted under KRS 508.030. *Sub judice*, there was no evidence presented in support of a wanton mental state.

Burgess-Smith was inextricably intertwined with the charged offenses. Thus, it asserts that the trial court properly limited prejudice to Burgess-Smith by not allowing discussion of what the active arrest warrant was for, i.e., robbery. With these arguments in mind we turn to our applicable jurisprudence.

First, we review an evidentiary matter for an abuse of discretion. *See Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

At issue is KRE 404(b), which makes evidence of other crimes, wrongs, or acts inadmissible to prove the character of a person in order to show conformity. Two exceptions exist within the rule. KRE 404(b)(1) allows admission of the evidence if offered for some other purpose, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(2) allows admission of the evidence if it is so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party. “KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation.” *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003) (citing Robert G. Lawson, *Kentucky Evidence Law Handbook* § 2.25 at 96 (3d ed. Michie 1993): *see also Major v. Commonwealth*, 177 S.W.3d 700, 708 (Ky. 2005)). “[T]he key to understanding this exception is

the word ‘inextricably.’ The exception relates only to evidence that must come in because it is so interwoven with evidence of the crime charged that its introduction is unavoidable.” *Funk v. Commonwealth*, 842 S.W.2d 476, 480 (Ky. 1992). (Internal citation omitted).

We believe that the evidence presented below of Burgess-Smith’s active arrest warrant is inexplicably intertwined with the reasons for the police officers’ actions in patting down Burgess-Smith for weapons and securing him, and offers an explanation why the officers so fervently pursued Burgess-Smith during his repeated attempts to escape. Nevertheless, if evidence is admissible under KRE 404(b), it may still be excluded under the KRE 403 balancing test. *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994). *See also Davis v. Commonwealth*, 147 S.W.3d 709, 725 (Ky. 2004) (“Although relevant and probative, the evidence can still be excluded if its probative value is substantially outweighed by its prejudicial effect. KRE 403”.)

In determining the admissibility of “other acts” evidence, it is useful to analyze the evidence using a three-tier inquiry involving its: (1) relevance, (2) probativeness, and (3) prejudice. *Bell* at 888-891. An appellate court will only reverse the evidentiary ruling if an abuse of discretion has occurred. *Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998).

In applying the *Bell* test, we note that KRE 401 defines relevant evidence as 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

than it would be without the evidence. The next inquiry under *Bell*, probativeness, requires the court to decide whether the evidence of the uncharged crime is sufficiently probative of its commission by the accused to warrant its introduction into evidence. *Bell* at 890. The last inquiry, prejudice, requires a court to determine whether the potential for undue prejudice from the use of other crimes evidence substantially outweighs its probative value. *Id.*

*Sub judice*, we believe that the evidence of Burgess-Smith's active arrest warrant was certainly relevant for some purpose other than to prove criminal disposition of the accused. See Robert G. Lawson, *Kentucky Evidence Law Handbook* § 2.25[3][a] at 126-127 (4th ed. Michie 2003). Indeed, the active arrest warrant was offered to prove material facts that were in actual dispute; namely, the reasons for the police officers actions in patting down Burgess-Smith for weapons and securing him, and Burgess-Smith's knowledge that the officers were in fact police officers. The evidence offers an explanation as to why the officers so fervently pursued Burgess-Smith during his repeated attempts to escape. Such evidence was certainly probative of the actions of both the officers and Burgess-Smith as discussed *supra*.

Lastly, we believe that any undue prejudice was dispelled by the trial court's restriction of not permitting discussion of the crime for which the arrest warrant was issued. The trial court did not run afoul of *Bell* and, accordingly, we find no error. See also *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) ("It merely made mention of the warrants and was used to establish Appellant's

pattern of misrepresenting himself when confronted by police. The trial court did not err in its determination that the probative value substantially outweighed the prejudicial effect.”).

In light of the aforementioned, we find no error and, accordingly, affirm Burgess-Smith’s convictions.

ALL CONCUR.

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