

RENDERED: JANUARY 7, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001878-MR

TORRIANO GEROME MILLER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 08-CR-01556

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: Torriano Miller appeals his conviction in the Fayette Circuit Court for one count of burglary in the third degree and persistent felony offender in the second degree. He received a one-year sentence enhanced to five years based on the persistent felony offender charge. For the reasons set forth herein, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Miller and his co-defendant, Charles Calvin Wells, were jointly indicted by the Fayette Grand Jury on December 9, 2008. Both were charged with one count of third-degree burglary and one count of possession of burglary tools, and separately charged with a count of second-degree persistent felony offender. Miller had a prior conviction for first-degree manslaughter.

On October 8, 2008, Miller and Wells entered an apartment building in Lexington, Kentucky, with the intent to take appliances and sell them for scrap metal. Wells entered a guilty plea and Miller had a jury trial. At the trial, Miller was allowed to question witnesses. Prior to the trial, Miller, pro se, had moved the court to allow him to also ask questions and present arguments. The court permitted him to do so. Thus, Miller's attorney would question the witnesses and then Miller would also do so.

The facts presented at the trial were as follows: Officer Ricky Lynn was on patrol the morning of October 8, 2008, when he saw a pickup truck parked between two vacant apartment buildings. Previously, Officer Lynn received information that break-ins had occurred at these locations. He noticed two men near the pickup truck as he drove by the location. The men saw him and walked out to the sidewalk to determine whether he drove away. Officer Lynn then called for backup and went back to the apartment buildings.

Next, Officer Lynn approached the men and asked if they had permission to be in the building. While walking toward the men he observed a

piece of plywood, used to board up the apartment complex door, which had been removed and was lying on the ground. Wells told Officer Lynn that the men had permission from the owner, "Mark," to be at the building. Officer Lynn was suspicious because he knew that was not the owner's name. Wells, subsequently, changed the name to "Steve Martin." Officer Lynn then separated the men.

After reading Wells his Miranda rights, he questioned him. Once he informed Wells that he knew who the owners were, Wells admitted that he did not know the owner and did not have permission to remove the items. He also informed Lynn that this load was the second of the day and that they had already taken one load to Baker's Metals. Officer Lynn then spoke with appellant, Miller. According to Officer Lynn, Miller also stated that they did not have permission to take the items and that this was their second load. Later at the jail, Miller, as well as Wells, acknowledged that they had been going to vacant buildings, taking items, and selling them for scrap metal.

Wells, who had known Miller for roughly three months prior to their arrests, testified at the trial. He stated that they usually rode around looking for junk in dumpsters but that on occasion they took items from places without permission. On the day of the arrest, they had gone to the apartment complex, loaded the truck with junk metal, taken a load to Baker's Metals and returned to the complex for a second load. At that time, Officer Lynn apprehended them. In addition, Wells disclosed that they took items that did not belong to them, they did not have permission to be at the complex, and a "no trespassing" sign was clearly

visible in front of the apartment complex. During cross examination, Wells said that he and Miller had planned the evening before to go to the apartment complex and, further, that he never told Miller they had permission to be there.

At trial, Simon Sayid, the owner of the apartment, testified that following notification by the police, he went to the property on the day of the incident. He said that he had never seen Wells or Miller before and that they did not have permission to be on his property. Moreover, Sayid stated that the appliances in the apartment building were old but in working condition. He estimated the total damage to the apartment complex was between \$100,000 and \$150,000. Because Sayid only had liability insurance, he could make no claim for property loss.

Before the Commonwealth closed its case, the parties stipulated to the admission of photographs and receipts from Baker's Metals. Baker's Metals customarily took photographs of customers' trucks with the junk metal before issuing funds and receipts for the loads. These pictures and receipts showed that on September 29, October 1, October 2, October 3, October 6, October 7, and October 8, Miller had been paid for the delivery of loads of shred appliances.

Miller had one witness besides himself testify at the trial, Opal Clark, a friend. She stated that since Miller had gotten his truck in the summer of 2008, he would regularly go out on trash nights and scavenge for scrap metal. She went with him on many of these runs. Then, Miller testified. He claimed that he went over to Wells's residence to help get a tire off a wheel and, while there, Wells told

him about the apartment building and gave Miller the impression that they had permission to be at the apartment building. Although during the investigation Miller had never told Officer Lynn that Wells and he had permission to be at the apartment complex, he claimed this at trial. Besides claiming the parties had permission to be at the apartment complex, he said that he had no intention to steal items. Furthermore, Miller denied that he ever told Officer Lynn that Wells and he had previously stolen items from other locations or that he knew they did not have permission to be at the apartment complex.

Moreover, Miller stated that on the day before the October 8<sup>th</sup> incident, he had been at Lincoln Terrace Apartments where he had permission to take their old water heaters and junk them. The photographs from Baker's Metals, however, disputed this statement because, in the photographs, it appears that the truck holds refrigerators, water heaters, and air heaters. At the close of the case, the jury acquitted Miller of the possession of burglary tools charge but found him guilty on both the third-degree burglary count and being a second-degree persistent felony offender. On September 11, 2009, he was sentenced by the trial court, which followed the jury recommendation and gave him a five-year sentence. Miller now appeals.

#### ISSUE

Based on the trial court's admission of Miller's statement to Officer Lynn that he had previously taken items from other locations without permission, he argues that the trial court abused its discretion. Miller maintains that the prior

bad acts introduced against him were not relevant or probative and that any probative value the acts might have is substantially outweighed by the undue prejudice against him. To counter, the Commonwealth contends that the trial court did not abuse its discretion because the Kentucky Rules of Evidence (KRE) 404(b) permits evidence of other crimes, wrongs, or acts under certain exceptions. And, under the exceptions in KRE 404(b), the evidence was admissible because Miller intended to introduce evidence that he frequently and lawfully took items from other properties and scrapped them for metal. And the Commonwealth maintains that the statements were admissible under the knowledge, plan, preparation, and absence of mistake or accident exceptions of this rule. Finally, the Commonwealth proposes that even if the trial court abused its discretion by admitting the evidence, the error was harmless.

#### STANDARD OF REVIEW

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With regard specifically to review for admissibility of other crimes or “bad acts,” the basic rule is that evidence of uncharged misconduct is inadmissible, subject to the exceptions set forth in KRE 404(b). *O'Bryan v. Com.*, 634 S.W.2d 153, 156 (Ky. 1982). Under KRE 404(b), generally, evidence of other crimes or wrongs is inadmissible but can be admitted

if it is “for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake[.]” KRE 404(b)(1).

Additionally, the list of permissible uses under KRE 404(b) is not exhaustive.

*Tamme v. Com.*, 973 S.W.2d 13, 29 (Ky. 1998). Keeping this standard in mind, we will now address the case at hand.

## ANALYSIS

Generally, evidence of crimes or other acts, other than those charged, are excluded as evidence at trial and are not admissible to prove the character of a person in order to show action in conformity therewith. KRE 404(b). But evidence of other crimes or wrongful acts may be introduced as an exception to the rule. KRE 404(b)(1). Specifically, the Kentucky Supreme Court has held that evidence of other crimes, wrongs, or acts are admissible if it tended to show “motive, identity, absence of mistake or accident, intent, or knowledge, or common scheme or plan.” *Pendleton v. Com.*, 685 S.W.2d 549, 552 (Ky. 1985).

In *Bell v. Com.*, 875 S.W.2d 882 (Ky. 1994), the Supreme Court enumerated a three-part test for determining the admissibility of KRE 404(b) evidence. The test requires the trial court to examine the relevance of the evidence, its probative value, and the prejudice that it may create against the defendant. *Id.* at 889-91. To be admissible under any of these exceptions, the acts must be relevant for some purpose other than to prove criminal predisposition; sufficiently probative to warrant introduction; and, the probative value must outweigh the potential for undue prejudice to the accused. *Clark v. Com.*, 833

S.W.2d 793, 795 (Ky. 1991). We structure our review in accordance with this three-part test.

With respect to the first prong of the *Bell* test, relevance of the evidence, we note that the evidence was relevant for some other purpose than to prove the criminal disposition of Miller. The evidence established that Miller initially admitted to Officer Lynn that he did not have permission to take items from the apartment complex and that he had done so. His later assertion at trial, that he had permission, was rebutted by the admission of his original statement, as well as the statement of other witnesses. Therefore, the evidence in question was relevant as it demonstrated the material fact that Miller had knowledge, one of the exceptions to the admission of prior bad acts. In addition, this issue is an issue of material fact.

The second part of the analysis is whether the admitted statement in question is probative. Miller's statements to Officer Lynn that he had previously taken items from other locations without permission were probative in that they demonstrated knowledge, plan, and preparation. And Miller also connected the numerous receipts in his possession to the previous thefts of items that he had taken to Baker's Metals. Knowledge, plan, and preparation are exceptions under KRE 404(b). The admitted statements were probative of his mental state and showed a plan, preparation, and lack of accident or mistake in taking items from the apartment complex.



Finally, we address whether the admission of these statements was unduly prejudicial to Miller. Before the trial in a motion in limine, Miller stated that he planned on introducing the fact that he legally junked items for a living. Miller's intention to introduce such a defense mitigates any prejudice that might occur from the introduction of this evidence. Since he intended to defend the charges by placing his prior acts into evidence, Miller cannot now claim prejudice when the Commonwealth chooses to introduce these statement to show Miller's mental state, i.e., he knew his actions were illegal.

Besides the exceptions contained in KRE 404(b)(1), "KRE 404(b)(2) allows the Commonwealth to present a complete, unbroken picture of the crime and investigation." *Adkins v. Com.*, 96 S.W.3d 779, 793 (Ky. 2003), citing Robert G. Lawson, *Kentucky Evidence Law Handbook* § 2.25 at 96 (3d ed. Michie 1993). In the case at hand, Miller planned to present the aforementioned receipts to show that he was not acting illegally because he kept them and, hence, lacked the requisite intent. Here, for the Commonwealth to present its entire case, it is also necessary to allow Miller's earlier admissions of previous illegal scrapping and a lack of permission to be on the property of the apartment complex to be admitted under KRE 404(b)(2). So, we conclude that the admission of Miller's statements regarding prior illegal action was appropriately allowed in by the trial court under the Kentucky Rules of Evidence.

But even if we were to ascertain that the trial court was incorrect in allowing in the prior act statements, our analysis would not be complete because

we would need to decide whether the error was harmless. Kentucky Rules of Criminal Procedure (RCr) 9.24 provides that

No error in either the admission or the exclusion of evidence . . . is ground for . . . disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

In the matter at hand, any possible error would have been harmless. First, even if the trial court had excluded the evidence, it would have eventually come in as rebuttal evidence because Miller acknowledged prior to voir dire that a defense theory was that he routinely and lawfully went looking for junk. Second, the alleged improper evidence did not substantially influence the verdict because the other evidence, taken as a whole, was sufficient to establish Miller's guilt. In contravention to Miller's testimony that he had permission to take the items from the apartment complex, Officer Lynn, Sayid, and Wells gave evidence that the parties did not have permission to be on the property and to take scrap metal. It was the exclusive province of the jury to decide the credibility of these witnesses. The jury did so when it found Miller guilty of burglary.

#### CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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