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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000928-MR

WILLIE WILLIAMS, III — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 11-CR-00643

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Willie Williams, III, has appealed from the judgment of the Kenton Circuit Court convicting him of second-degree burglary and for being a second-degree Persistent Felony Offender (PFO II), and sentencing him to an enhanced sentence of fifteen years' imprisonment. On appeal, Williams raises two evidentiary issues in arguing that his conviction should be reversed. Finding no error or abuse of discretion, we affirm the judgment of conviction.

On September 22, 2011, the Kenton County grand jury indicted Williams on one count of second-degree burglary in relation to an offense on July 1, 2011, in Fort Mitchell, Kentucky, when he knowingly entered or remained unlawfully in a dwelling in violation of Kentucky Revised Statutes (KRS) 511.030. Pursuant to the Uniform Citation, Detective Tim Berwanger of the Fort Mitchell Police Department indicated that security cameras captured the crime, and Williams was identified as the person who committed the burglary of the residence where jewelry had been taken. Detective Berwanger also stated that Williams had been identified as the individual who had attempted a burglary in the Fort Thomas area a few hours later. Williams was arrested on July 7, 2011. On December 1, 2011, Williams was indicted on a second charge for being a first-degree Persistent Felony Offender (PFO I). Williams entered not guilty pleas to both charges.

In January 2012, prior to trial, the Commonwealth filed a notice pursuant to Kentucky Rules of Evidence (KRE) 404(b) to introduce evidence and testimony of other crimes, wrongs, or acts as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The evidence the Commonwealth sought to introduce was related to Williams' attempt to break into a residence in Fort Thomas, Kentucky, in Campbell County, on the same day as the Fort Mitchell burglary in Kenton County. In the Fort Thomas incident, the homeowner stated that Williams knocked at the front door, and when he received no answer, went to the back door to try to force it open. In the Fort Mitchell incident, the home security cameras captured Williams knocking

on the front door, then showed him at the rear of the residence where he disabled another security camera. He gained entry by breaking open a side door. The security camera showed him wearing an Urban Active uniform with an Urban Active lanyard and holding a clipboard, just as he had been wearing at the Fort Thomas home when he was confronted by the homeowner. The homeowner provided his description to the police and said Williams claimed he was soliciting business for Urban Active. This information led Fort Mitchell police to identify Williams as the perpetrator in the Fort Mitchell burglary.

The matter proceeded to trial on March 28 and 29, 2012. At the beginning of the first day of trial, the parties discussed the Commonwealth's notice to introduce KRE 404(b) evidence. Williams objected to this, noting that no charges had been filed in the Fort Thomas incident. The Commonwealth stated that Campbell County was waiting for the outcome of this case before pursuing misdemeanor charges against Williams for the Fort Thomas incident. Williams stated that the Commonwealth could have explained that he was identified through police work. Using the Fort Thomas incident would make it look like Williams was looking for places to burglarize. He also suggested that the jury would be confused if the Commonwealth tried to explain the identification as the Commonwealth requested. The Commonwealth stated that Williams' objection was untimely, as the motion has been filed months earlier.

The Commonwealth then discussed the merits of its notice, addressing the facts of both incidents and how similar both were in terms of going to the front

door and then to the back door, using the same method to try to force his way into the homes, his clothing, and the cover he provided that he was soliciting for Urban Active memberships. A neighbor had written down the license plate as Williams was leaving the Fort Thomas neighborhood, which police identified as belonging to Williams' father-in-law. Officers from the two police departments then determined that they were looking for the same person. To exclude the Fort Thomas information would make it appear as if police identified Williams out of nowhere. Rather, he perpetrated or attempted to perpetrate the same act twice on the same day in the same clothing. Williams admitted to being the person in the Fort Thomas incident, but he claimed he was not there to commit a burglary but was forcing his way in to open a gym membership. He also admitted that he was the person in the Fort Mitchell security video, but stated that he never entered the residence, even though he was recorded exiting. The Commonwealth went on to describe Williams' statements the day of his arrest. He stated that he had been at work at the time of the Fort Mitchell incident. When police checked with Urban Active, they found out that he had left work early due to family problems. When confronted with this, Williams stated he was soliciting gym memberships. The judge overruled Williams' objection, stating that there was a connection between how the police identified Williams and whether he was working at Urban Active that day.

The first witness to testify was Officer Shane Best of the Fort Mitchell Police Department. He was called to the Huffs' residence at 10 Cambridge in Fort

Mitchell on July 3, 2011. He found the homeowner, Bertha Huff, in the driveway; she had come home from vacation early, found a safe on the stairway in her garage, and called the police. Officer Best inspected the safe and found it to be damaged. Officers went through the house to ensure no one was inside, and they had Mrs. Huff show them where the safe was supposed to be, in a room off of the hallway. Officer Best saw drag marks on the hardwood floor where the safe had been dragged across. He found a hammer, screwdriver, and crowbar in the hallway, which all belonged to the homeowners and which appeared to have been used to attempt to open the safe. Pieces of the safe were lying on the floor in the closet in the room where the safe had been. Drawers and jewelry boxes in the closet had been searched, and jewelry was hanging out of the boxes. Officer Best later became aware that two watches were missing from the home.

During the course of the burglary, Officer Best determined that the perpetrator gained access by throwing a paving stone through the glass in the garage door area. Therefore, he concluded that entry had been forced. Officer Best also determined that the home had a security camera system installed and retrieved the video from the cameras. The Commonwealth introduced and played the security video for the jury. Officer Best testified while the video was playing, which showed multiple views of the house. In the early afternoon, views from the cameras showed a person appearing and walking around the front of the house, and then to the back of the house. The security video also showed the car the suspect appeared to be driving. The person appeared to have the same things in his hands

when he was recorded at the doors. At the back door, the person was shown attempting to push open the door with his backside. The timeline of the security camera videos showed that Williams was in the Huffs' residence two separate times for a total of approximately 40 minutes. He first drove by at 12:10 p.m. and returned almost two minutes later. He went behind a neighbor's house, then returned to the Huffs' property. He left at 12:22 p.m. Williams returned at 12:38 p.m., left, and returned on foot at 12:43 p.m. He went to the back door, then to the front door where he attempted to break in, and finally to the side door at 12:53 p.m., where he broke in to the residence. Williams exited from the front door of the residence at 1:02 p.m. At 1:20 p.m., Williams returned to the Huffs' residence. The garage door opened at 1:48 p.m., after which the security camera was disabled and removed from the entrance to the garage. The security camera was found in the hallway. Williams did not object to the admission of the security system video.

On cross-examination, Officer Best testified that based upon Williams' size (he is a former football player), he could have moved the heavy safe to the location where it was found. He said the camera would not necessarily have picked up the view of the suspect walking around the house based upon the angle of the camera. The watches stolen were valued in excess of $1,000.00 each.

The next witness to testify was Susan Buecker. She lives on Stardust Pointe in Fort Thomas, Kentucky. During the afternoon of July 1, 2011, a person attempted to break into her house while she was at home. She heard loud banging on the front door. A few minutes later, she heard louder banging on the back door.

She could see the person at the back door from her position on a balcony, but the person outside could not see her. She watched the person step back, run, and slam his body into the door; this went on for several minutes. He also kicked the door with his feet. After watching him for a few minutes, Ms. Buecker went downstairs, opened the back door, and asked him why he was trying to break into her house. The person at the door responded that he was on the street doing work for Urban Active. He had a clipboard to sign people up for memberships, and he was wearing a blue Urban Active lanyard. After speaking with him, she told him to go away and not come back again. The person left the back yard at that point. Ms. Buecker called the police. She stated that the person caused damage to the door, noting that the paint was chipped and heel marks were visible on the door. The Commonwealth introduced photographs of the damage to the door. Ms. Buecker testified that she had never seen this man before, and she described him as an African-American man with an athletic build, muscular, tall, in his mid-20s, with black hair. He was wearing a blue shirt. On cross-examination, she said she opened the back door to confront him because she was angry.

During Ms. Buecker's testimony, the court directed the Commonwealth to be careful in questioning this witness pursuant to the earlier discussion regarding the KRE 404(b) evidence, as it appeared that the questions might go beyond the limit the parties had discussed.

The next witness to testify was Faye Wendell. She also lives on Stardust Pointe. On July 1, 2011, Ms. Wendell came home from work about 5:00

p.m. and left a few minutes later. She saw a car parked in front of a vacant lot, which she thought was unusual. She saw a large African-American man walking towards her house. She thought he was going to try to sell her something, so she quickly got into her car to leave. As she was driving down the driveway, he seemed to be in a hurry to leave as well. She was behind him at a stop sign and recorded his license plate number. Ms. Wendell returned from the grocery at 6:00 p.m. and noticed an unmarked police car down the street. She went to the car to ask the officer if anything had happened. She explained to the officer that she was a neighbor and had seen an unusual car and person on the street earlier. The officer told her about the attempted break in, and Ms. Wendell told him she thought she had seen the person and gave the officer his license plate number. On cross-examination, Ms. Wendell explained why she was suspicious of the car on her street. She stated that the Fort Thomas police had warned everyone in the neighborhood to be aware of their surroundings. There were reports arising from door-to-door sales; if there was no answer, the person would try to break in the back door.

The next witness to testify was Mark Palazzo, who lives in Edgewood, Kentucky, in Kenton County. He owned the grey Nissan that Ms. Wendell saw Williams driving. He testified that his daughter, Leah Palazzo, had bought the car from him and was driving it. Leah was living with Williams at that time, and Williams had access to the car. Mr. Palazzo identified photographs of a car as being the car he sold to his daughter.

The next witness to testify was Gerald Dixon III. On July 1, 2011, he was the general manager in sales for Urban Active in Erlanger, Kentucky, and was at work that day. He was Williams' boss. Williams worked as a sales consultant and sold gym memberships. As a part of his job, Williams prospected in a three-mile radius to drum up business. Sales consultants would visit local businesses within that radius, but it was against company policy to go door-to-door in residential neighborhoods. Williams' normal work apparel was a long-sleeved blue shirt, black pants, and black shoes. Williams was at work on July 1, 2011; he came in late around 11:00 a.m. and left around 12:00 p.m. because he found out his wife was pregnant. Mr. Dixon identified Williams' lanyard as one that employees would wear every day. On cross-examination, Mr. Dixon stated that Williams worked on commission, so the more memberships he sold, the more money he earned. He had never received any complaints about Williams prospecting in area neighborhoods. But he testified that Fort Thomas would have been outside of Williams' area for prospecting.

Shannon Williams was the next witness to testify.[1] In July of 2011, she worked at Urban Active, and she and Williams would make telephone calls in the office and prospect at area businesses. They would put flyers in parking lots, visit businesses, and talk with people who were out. She never prospected in residential neighborhoods, although she stated that they never discussed any rules precluding this. On July 1, 2011, she recalled Williams arrived at work between

[1] Ms. Williams is not related to the appellant in this case.

11:30 a.m. and 12:00 p.m. and stayed for only fifteen to thirty minutes. He was wearing a blue button down shirt and black slacks. She identified the lanyard and tag as the same one they all wore. However, Ms. Williams testified that she did not go prospecting with Williams that day, nor did she talk with him. She talked to him sometime after July 1, 2011, when she congratulated Williams on his wife's pregnancy, which he had found out about on July 1, 2011. Ms. Williams stated that Williams drove a gold or tan Nissan Maxima, but she identified the photograph of the grey Nissan as the one Williams drove. On cross-examination, Ms. Williams did not recall that any employees ever violated company policy by prospecting in residential neighborhoods.

Mrs. Huff testified next. She and her husband live in the house that was burglarized on 10 Cambridge in Fort Mitchell. She testified that she returned home early, by herself, on July 3, 2011, from a family vacation. They had left for vacation on June 30, 2011, and no one was living at her house while they were gone. When she arrived home on July 3, 2011, she opened the garage door and noticed that the door from the garage to the kitchen was open and the safe was in the doorway, half in and half out of the door. She immediately called 911 from her driveway. She did not know if anyone was inside. After the police arrived and determined that no one was inside, Mrs. Huff inspected her house. The closet where the safe had been was in disarray, and the floors were marred between the closet and the garage where the safe was found. The floors and closet had not been in this condition when they left on vacation. She did not notice anything else out

of place, but determined that two watches were missing; her husband's watch had been on his nightstand in the bedroom and hers had been in the jewelry drawer in the closet. Mrs. Huff did notice that the guns in the cases had been taken down from the shelf in her closet, but the guns were not stolen. None of the valuables was taken from the safe, which she estimated weighed between 200 and 300 pounds.

Mrs. Huff testified that they had a security system that would run on a continuous basis for a seven-day period. All of the cameras were mounted and functioning when she and her husband left for vacation. The alarm system had not been set because they had been having problems with the smoke detectors, which caused the security system to keep calling the fire department. They did not want to have that happen while they were on vacation. Her cleaning lady for the past fifteen years was the only other person who had access to the house while they were gone. She had never seen Williams before, and he did not have permission to legally be in her house.

Detective Brad Adams, an officer with the City of Fort Thomas, was the next witness to testify. He previously worked for the City of Fort Mitchell. He investigated the incident on Stardust Pointe in Campbell County. The call came in at about 5:00 p.m. on July 1, 2011, and the incident was investigated by patrol officers. Detective Adams began working the case on July 6, 2011. He talked to the witness who described what the suspect looked like and what he was wearing, including Urban Active attire. He also obtained the license plate number from the

report and determined that the car was registered to Mr. Palazzo. Detective Adams and another officer went to the Edgewood address where the vehicle was registered, but no one answered the door.

The officers went to the Fort Mitchell police office at lunchtime because Detective Adams used to work there. He saw Detective Berwanger, with whom he had worked for a number of years, and told him about the burglary case he was working. Detective Berwanger said he, too, was working on a burglary case. Detective Adams saw the photo of the man on Detective Berwanger's computer screen who looked like the person he was looking for. Detective Berwanger played the security camera video from the residence in Fort Mitchell, and Detective Adams saw a person ramming into the door with his backside, which was the same way Mrs. Buecker described the incident in Fort Thomas.[2]

At that point, Detective Adams and Detective Berwanger began working the cases together. They first went to find Mr. Palazzo's daughter, Leah, who lived in Lakeside Park in Kenton County. The detectives learned that her current address was in Newport in Campbell County. The detectives went to that address, but no one answered the door. Based upon a call from a neighbor, the detectives went back to Leah's address the next day, and Williams answered the door. They found Mr. Palazzo's Nissan a block away from the residence in Newport with an Urban Active lanyard hanging from the rearview mirror. The detectives obtained consent to search the residence and found clothing matching

[2] The court called the attorneys to the bench to ensure the Commonwealth did not cross the limit for the entry of the KRE 404(b) evidence.

the description of a blue shirt, black pants, and a black belt, which were introduced into evidence.

Detective Adams and Detective Berwanger took Williams to an interview room at the Fort Thomas police department. His interview was recorded and an edited version was played for the jury. The detectives first questioned him about the break-in attempt at Stardust Pointe in Fort Thomas on July 1, 2011, and told him that a witness had identified him and written down his license plate number. While he first claimed that he had been working at Urban Active from 10:00 a.m. to 8:00 p.m., Williams changed his story when confronted with information the detectives received from his boss at Urban Active that he had left early that day. He stated that he had been prospecting in Fort Thomas and in Fort Mitchell that day, and admitted that at one house, he knocked on the front door and the side door before a lady answered the door and told him there was no soliciting in the area. He said he knocked hard three times before she answered the door. He left after she said no soliciting was allowed, but did not run away. He said that he thought the front door was a display and went to the side door to knock when he saw a package there. He denied that he backed into the door. Williams said that he prospected in a Fort Mitchell neighborhood as well, where he visited fifteen to twenty houses. He was driving Leah's car. Williams denied that he had entered any of the houses. When the detectives then told him about security cameras, he admitted that he appeared in the still photos from the security camera videos the detectives showed him. He claimed he had been prospecting at that time.

Williams continued to deny breaking into the house, breaking the window with a rock, or trying to steal anything, including the safe.

The Commonwealth closed its case, and Williams did not call any witnesses to testify. During the course of the trial, counsel for Williams had requested a limiting instruction to advise the jury that it could consider the Fort Thomas acts for the limited purpose for which the evidence was admitted. The court indicated that it was letting the evidence in as it related to Williams' identification and the link between the two incidents, noting that the evidence of the Fort Thomas incident also showed plan, knowledge, identity, and absence of mistake or accident. At the conclusion of the trial testimony, the court read the stipulated admonition related to the Fort Thomas incident to the jury, as written by counsel for Williams:

> You should convict Mr. Williams for the crime for which he is on trial if you believe beyond a reasonable doubt that he is guilty. You should consider the testimony of activities in Fort Thomas, Kentucky, for the limited purpose of identity, motive, or plan.

As he argued in closing, Williams' defense to the burglary charge was that he was innocent, even though he had been at the Huffs' residence. Related to the introduction KRE 404(b) evidence, counsel cautioned the jury to follow the judge's instruction to not use the Fort Thomas testimony as proof to convict in the Fort Mitchell case.

Following the trial, the jury found Williams guilty of second-degree burglary as charged in the indictment. Following the penalty phase, the jury found

Williams guilty of the PFO II charge and enhanced his five-year sentence on the burglary conviction to fifteen years. On May 21, 2012, the trial court entered its final judgment and sentence adjudging Williams guilty of second-degree burglary and of being a PFO II, and sentenced him to fifteen years' imprisonment pursuant to the jury's verdict. This appeal follows.

On appeal, Williams raises two arguments: 1) that the trial court abused its discretion in permitting the Commonwealth to introduce evidence under KRE 404(b) of the Fort Thomas incident through Ms. Buecker's testimony, and 2) that the trial court erred in allowing Officer Best to narrate and interpret the security camera video while it was playing for the jury. The second argument is unpreserved, and Williams has requested that this Court review the purported error for palpable error pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

I. ADMISSION OF KRE 404(B) EVIDENCE

Williams contends that the trial court should not have permitted the Commonwealth to introduce KRE 404(b) evidence of other crimes, wrongs, or acts related to the Fort Thomas incident to show identity or *modus operandi*. The decision by a trial court to admit or exclude evidence is reviewed only for an abuse of discretion.

> Trial courts must apply the rules of evidence to control the trial and to avoid the injection of collateral and overly prejudicial matters. To this end, the trial courts are given the power to determine the admissibility of all evidence and are given substantial leeway—sound

> discretion—in making those determinations. For this reason, an appellate court will review a trial court's evidentiary rulings for an abuse of discretion, and will determine that a trial court acted within that discretion absent a showing that its decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Commonwealth v. Bell, 400 S.W.3d 278, 283 (Ky. 2013).

KRE 404 governs the introduction of character evidence and evidence of other crimes. KRE 404(b) specifically addresses evidence of other crimes, wrongs, or actions, providing:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> > (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
> >
> > (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The Supreme Court recently cautioned that:

> KRE 404(b) is "exclusionary in nature," and "any exceptions to the general rule that evidence of prior bad acts is inadmissible should be 'closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.' " *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007) (quoting *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982)).

Graves v. Commonwealth, 384 S.W.3d 144, 147-48 (Ky. 2012). This rule must be applied "cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." *Daniel v. Commonwealth*, 905 S.W.2d 76, 78 (Ky. 1995), quoting *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994).

The Commonwealth has the burden "to establish a 'proper basis before admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its inflammatory effect.'" *Id*. quoting *Drumm v. Commonwealth*, 783 S.W.2d 380, 381 (Ky. 1990), *superseded by rule as stated in Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001). The *Daniel* Court went on to state:

> In addition, defense counsel "should delineate what evidence is being objected to and why." *Id*. Inquiries into relevance, probativeness, and prejudice provide a useful framework for determining the admissibility of other crimes, wrongs, or acts. *Id*. Accordingly, the trial judge should consider the following:
>
> > One—Is the evidence relevant for some purpose other than to prove criminal predisposition of the accused?
> >
> > ....
> >
> > Two—Is proof of the other crime sufficiently probative of its commission to warrant introduction of the evidence against the accused?
> >
> > ....
> >
> > Three—Does the probative value of the evidence outweigh its potential for prejudice to the accused?

> *Id*. (quoting Robert Lawson, *The Kentucky Evidence Law Handbook* § 2.20 at 42–43 (2d ed. 1984)). The trial court must scrutinize the Commonwealth's basis for admitting the evidence utilizing the *Drumm* inquiry. "A ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that a trial court has abused its discretion." *Bell*, 875 S.W.2d at 890.

Daniel, 905 S.W.2d at 78. "Showing the evidence comes within KRE 404(b) is only the first step in deciding the admissibility of the evidence. Additionally, the trial court must weigh the evidence's probativeness against the danger of undue prejudice." *Commonwealth v. Bell*, 400 S.W.3d 278, 283 (Ky. 2013), citing *Bell v. Commonwealth*, 875 S.W.2d 882, 889–90 (Ky. 1994). However, the Court found that "[t]he trial court did so in this case, albeit without stating so explicitly, and found that the additional evidence should not be admitted." *Id*.

Williams argues that the details of the Fort Thomas incident were not so strikingly similar to qualify under the identity or *modus operandi* exception of KRE 404(b)(1).

> While evidence of prior crimes, wrongs, or acts is inadmissible to prove the propensity of an accused, such evidence may be admissible to prove the identity of a perpetrator when the evidence of other crimes indicates a *modus operandi*. *Woodlee v. Commonwealth*, 306 S.W.3d 461, 463 (Ky. 2010); *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992). "To indicate *modus operandi*, the two acts must show 'striking similarity' in factual details, such that 'if the act occurred, then the defendant almost certainly was the perpetrator[.]' That is, the facts underlying the prior bad act and the current offense must be 'simultaneously similar and so peculiar or distinct,' that they almost assuredly were committed

> by the same person." *Woodlee*, 306 S.W.3d at 464 (quoting *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007)).

Graves, 384 S.W.3d at 149. The *Graves* Court went on to describe the relevance of *modus operandi* evidence:

> The relevance of *modus operandi* evidence is based upon the simple logical precept that begins with this premise: One can reasonably infer that two strikingly similar crimes were probably committed by the same person. That means that the identity of an unknown perpetrator can be inferred by the striking similarity between his crime and a different crime committed by a known perpetrator. Therefore, if we know the identity of the person who committed one of the crimes, we can infer that *that* person committed the other strikingly similar crime. [Emphasis in original.]

Id. at 150. The *Graves* Court held that the evidence should have been excluded: "Multiple accusations by the same witness against an individual, generated under the same circumstances, do not establish a *modus operandi* that is relevant to prove that one of the accusations is true." *Id*.

Here, Williams contends that the two incidents were not similar enough to meet this exception, arguing that there was no evidence the person used the same solicitation excuse at both locations because no one testified that the person in Fort Mitchell was attempting to sell Urban Active memberships as was the case in Fort Thomas. Furthermore, the evidence in both incidents of the person using his backside to try to force the door open did not rise to the level of a signature for a *modus operandi* because it is an intuitively common method to force open a door. And the person did not attempt a forced entry by means of a

brick at the Fort Thomas residence, as was the case at the Fort Mitchell residence, despite the presence of decorative bricks near the door at the Fort Thomas residence.[3]

The Commonwealth, on the other hand, argues that there was enough commonality between the two incidents for evidence of the Fort Thomas incident to be introduced as *modus operandi* evidence to establish Williams' identity, citing *Dickerson v. Commonwealth*, 174 S.W.3d 451, 470 (Ky. 2005) ("the facts need not be identical in all respects[.]"). We agree that there was sufficient commonality between the two incidents to warrant admission of the evidence of the Fort Thomas incident pursuant to KRE 404(b)(1). In both incidents, Williams banged on the front door and then went to the back of the house when he received no answer and continued banging on the door. In both incidents, Williams attempted to gain entry by slamming his backside into the back door. In both incidents, Williams was wearing his work outfit from Urban Active and appeared with a tablet or booklet in his hands. And in both incidents, Williams claimed to have been prospecting for Urban Active. As the Commonwealth points out, the only difference between the two incidents was that Ms. Buecker was at home during the Fort Thomas incident and confronted him at the back door. No one was home during the Fort Mitchell incident, when the break-in was successful. We agree with the Commonwealth

[3] Williams also argued that the fact that the incidents occurred on the same day was irrelevant for purposes of the KRE 404(b) analysis, citing *Woodlee v. Commonwealth*, 306 S.W.3d 461, 465 (Ky. 2010) (emphasis in original). The Commonwealth did not rely upon temporal closeness in its appellate brief.

that these details were similar enough to be introduced as evidence of *modus operandi*.

Williams also argues that the incidents in Fort Thomas and Fort Mitchell were not inextricably intertwined pursuant to KRE 404(b)(2). Just as his counsel did during the trial, Williams posits that the Commonwealth could have introduced testimony that Williams was identified through police work rather than the way it actually happened. However, the Commonwealth reminds us that "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 Clark v. Commonwealth*, 267 S.W.3d 668, 681 (Ky. 2008) ("under KRE 404(b)(2), the Commonwealth is allowed to present a complete and unfragmented picture of the circumstances surrounding how the crime was discovered."). We agree with the Commonwealth that had the trial court not permitted evidence of the Fort Thomas incident, the Commonwealth would not have been able to establish the context of the investigation and the jury would have been left to wonder how Williams had been identified as a suspect in the Fort Mitchell case.

Williams also argues that the trial court failed to consider whether the evidence of the Fort Thomas incident was unduly prejudicial. As we recognized earlier in this opinion, a trial court does not have to explicitly state this. *See Bell*, 400 S.W.3d at 283 (Ky. 2013). Furthermore, the Commonwealth points out that

the case law interpreting KRE 404(b)(2) – the evidence is so "inextricably intertwined with other evidence essential to the case" that it could not be separated "without serious adverse effect on the offering party" – does not require a separate finding of prejudice. Rather, this consideration is incorporated in the language of the rule:

> As further pointed out by Lawson, the case law from which the language utilized in KRE 404(b)(2) is extracted suggests "that the rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective." *See also*, *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112 (1990), citing both Lawson and *Smith v. Commonwealth*, Ky., 366 S.W.2d 902 (1962), in which it was stated:
>
> > ... [T]he rule [is] that all evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also approve or tend to prove the commission of other crimes by him or to establish collateral facts.
>
> *Id*. at 906.

Norton v. Commonwealth, 890 S.W.2d 632, 638 (Ky. App. 1994). We agree with the Commonwealth that the introduction of evidence concerning the Fort Thomas incident was not unduly prejudicial.

Finally, the Commonwealth argues that the admonition related to the use of the testimony concerning the Fort Thomas incident – drafted by Williams' counsel – cures any error there might be. We agree. "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error."

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003), citing *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999).

> While it is certainly true, as Jacobsen notes, that our evidence rules generally preclude mention of a defendant's uncharged bad acts with no relevance beyond their tendency to cast a bad light on the defendant's character, KRE 404(b), it is no less true that breaches of those rules are generally subject to admonitory cures and so, generally, do not provide grounds for a mistrial. *Bray v. Commonwealth*, 177 S.W.3d 741 (Ky. 2005) (since admonition, had it been requested, would have cured improper reference to defendant's prior bad act, that reference did not necessitate a mistrial); *Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003) (admonition cured improper reference to defendant's guilty plea to an unrelated offense). We have recognized two sets of circumstances in which an admonition will not be presumed to have cured an improper reference to uncharged bad acts:
>
> > (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant ... or (2) when the question was asked without a factual basis and was "inflammatory" or "highly prejudicial."

Jacobsen v. Commonwealth, 376 S.W.3d 600, 609-10 (Ky. 2012), as corrected (Sept. 11, 2012) citing *Johnson*, 105 S.W.3d at 441 (citations omitted).

In the present case, the trial court read the following admonishment to the jury prior to its deliberation:

> You should convict Mr. Williams for the crime for which he is on trial if you believe beyond a reasonable doubt that he is guilty. You should consider the testimony of activities in Fort Thomas, Kentucky, for the limited purpose of identity, motive, or plan.

We do not believe that either exception as set forth in *Johnson*, *supra*, and *Jacobsen*, *supra*, applies to render the admonition ineffective. Furthermore, counsel for Williams drafted the admonition, and he cannot now dispute its efficacy.

Therefore, we hold that the trial court did not abuse its discretion in permitting the introduction of testimony and evidence related to the Fort Thomas incident.

II. NARRATION OF SURVEILLANCE VIDEO

Williams' second argument addresses whether Officer Best should have been permitted to testify about the security camera video from the Fort Mitchell incident played during the trial. Williams concedes that this issue was not preserved and requests this Court to review the alleged error for palpable error pursuant to RCr 10.26.

RCr 10.26 defines a palpable error as an "error which affects the substantial rights of a party [that] may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." In *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006), the Supreme Court of Kentucky described the palpable error standard of review: "This Court reviews unpreserved claims of

error on direct appeal only for palpable error. To prevail, one must show that the error resulted in "manifest injustice."

> While the language of RCr 10.26 and Federal Rule of Criminal Procedure 52(b) differ substantially, and recognizing that this Court is not obligated to follow [*United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)], we nevertheless believe it to be a valuable guide in the application of our palpable error rule. To discover manifest injustice, a reviewing court must plumb the depths of the proceeding, as was done in *Cotton*, to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.

Martin, 207 S.W.3d at 4. *See also Jones v. Commonwealth*, 283 S.W.3d 665, 668 (Ky. 2009) (holding that palpable error relief is not available unless three conditions are present: 1) the error was clear or plain under existing law; 2) it was more likely than ordinary error to have affected the judgment; and 3) it so seriously affected the fairness, integrity, or public reputation of the proceeding to have been jurisprudentially intolerable). With this standard in mind, we shall address Williams' unpreserved argument.

In *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009), the Supreme Court of Kentucky addressed the issue of narrative testimony:

> In *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999), we addressed the issue of whether a police officer's narrative testimony during the playing of a crime scene video was improper lay testimony. We determined, in *Mills*, that the proper query for such narrative testimony was whether it complied with KRE 701 and KRE 602. KRE 701 limits testimony by a witness not testifying as an expert to matters "(a) [r]ationally based on the perception of the witness," and "(b) [h]elpful to a clear understanding of the witness'

> testimony or the determination of a fact in issue." Moreover, KRE 602 further refines the scope of permissible lay opinion testimony, limiting it to matters of which the witness has personal knowledge. Thus, reading these two requirements in conjunction, we determined that the narration of the video was proper because it "comprised opinions and inferences that were rationally based on [the officer's] own perceptions of which he had personal knowledge" and "was helpful to the jury in evaluating the images displayed on the videotape." *Mills*, 996 S.W.2d at 488.

The Court concluded that the issue turned on "whether the witness has testified from personal knowledge and rational observation of events perceived and whether such information is helpful to the jury. In short, does the testimony comply with the rules of evidence?" *Id*. Finally, the Court recognized its prior holdings that "he may not 'interpret' audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence." *Id*. at 265-66, citing *Gordon v. Commonwealth*, 916 S.W.2d 176, 180 (Ky. 1995).

Williams argues that Officer Best's narration went beyond the limits imposed by KRE 701 and KRE 602 as well as the associated case law because some of the observations he made were conclusory in nature, such as agreeing with the Commonwealth's question that the man who left was the same man who appeared later, what the person shown in the video was wearing and carrying, and what he was doing, all of which should have been determined by the jury. Williams claims that the narration was unduly prejudicial.

The Commonwealth, on the other hand, contends that most of Officer Best's testimony was based upon his personal perception and knowledge because he had viewed the crime scene, spoken with Mrs. Huff, and viewed the security camera video. His testimony was also used to orient the jury to the location of the security cameras in relation to the crime scene or to explain why the Commonwealth was skipping ahead in the video. Furthermore, the Commonwealth argues that even if any palpable error resulted, that error was harmless because there was never any dispute that Williams was the person shown in the security video. During his interrogation with police, Williams admitted he had been at the Huffs' residence prospecting, but denied that he had committed the burglary.

Based upon our review of Officer Best's testimony during the playback of the security camera videos, we cannot hold that the claimed defect was shocking or jurisprudentially intolerable to establish any manifest injustice in the proceedings. Furthermore, we agree with the Commonwealth that even if we were to find palpable error, it would be harmless because Williams did not deny he was the person in the security camera video. *Elery v. Commonwealth*, 368 S.W.3d 78, 85 (Ky. 2012), explains the harmless error rule as follows:

> Criminal Rule 9.24 states that "no error in either the admission or the exclusion of evidence" will warrant reversal unless the "denial of such relief would be inconsistent with substantial justice." The harmless error inquiry "is not simply 'whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the

> error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' " *Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)) (alteration in original). [Footnote omitted.]

Accordingly, we do not find any palpable error related to Officer Best's narration of the security camera video from the Huffs' residence in Fort Thomas.

For the foregoing reasons, the Kenton Circuit Court's judgment of conviction is affirmed.

ALL CONCUR.

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