

RENDERED: DECEMBER 4, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2014-CA-000831-MR

JORGE ENRIQUE GARCIA-HERNANDEZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 14-CR-00248

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, Jorge Enrique Garcia-Hernandez, brings this direct appeal as a matter of right to challenge his conviction and sentence as entered by Fayette Circuit Court. Appellant argues that the trial court abused its discretion when it overruled his motion in limine seeking to exclude testimony and related commentary concerning his having previously shot at intruders trying to

break into a certain duplex unit. Upon review, for the reasons more fully explained below, we AFFIRM.

### **I. Factual & Procedural Background**

On June 13, 2013, the Lexington Police Department, received a report that gun shots had been fired at 918 Ward Drive, Lexington, Kentucky. Police were dispatched to the scene. Upon arrival, police determined that 918 Ward Drive is one unit of a two-unit duplex with the other unit being 920 Ward Drive. Police knocked on the door of 918 Ward Drive, but no one answered. They also yelled inside the home through open windows to no avail. Needing to investigate further, the police knocked on the door of the adjoining unit, 920 Ward Drive. Appellant answered the door and spoke with police. He told police that he did not live at 918 Ward Drive, but he provided the landlord's name and address.

When the landlord arrived on the scene, he told police that he believed Appellant lived at 918 Ward Drive and that Appellant paid the rent for that unit on a month-to-month basis. Appellant then gave police permission to search the unit. Inside 918 Ward Drive, police discovered one-hundred nineteen pounds of marijuana, two firearms, and one air rifle. Appellant was subsequently indicted with trafficking in marijuana greater than five pounds with a firearm.

Appellant's primary defense at trial was that he was not the occupant of 918 Ward Drive. He contended that he lived at 920 Ward Drive and only occasionally delivered the rent for 918 Ward Drive as a favor to the tenants of that unit. In an effort to prove that Appellant did live at 918 Ward Drive, the

Commonwealth sought to introduce testimony from the landlord that Appellant told him earlier that spring that intruders tried to break in 918 Ward Drive on or about May 13th and Appellant shot at them. The Commonwealth further sought to introduce evidence that shell casings had been found outside of 918 Ward Drive, which matched a gun located inside. The trial court ultimately overruled Appellant's motion and allowed the evidence to be introduced.

Ultimately, the jury found Appellant guilty of the crime of trafficking in marijuana greater than five pounds while in possession of a firearm and recommended a sentence of fifteen years. The trial court entered a final judgment and sentence of imprisonment consistent with the jury's recommended sentence. This appeal followed.

## **II. Analysis**

Kentucky Rule of Evidence ("KRE") 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." *Id.* "This rule 'gives the trial judge substantial discretion to balance probative worth against harmful effects. The trial court is the most familiar with the facts of the case, and thus in the best position to make the determination of admissibility.'" *Kerr v. Commonwealth*, 400 S.W.3d 250, 263 (Ky. 2013) (quoting *Webb v. Commonwealth*, 387 S.W.3d 319, 325 (Ky. 2012)).

The

standard of review for a trial court's evidentiary ruling is abuse of discretion. *Id.* at 261. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004)

Our first assessment is whether the trial court correctly concluded that the evidence was relevant. "'Relevant evidence' means 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." KRE 401. "[R]elevance is established by any showing of probativeness, however slight." *Webb v. Commonwealth*, 387 S.W.3d 319, 325 (Ky. 2012) (quoting *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky.1999)).

Appellant's primary defense at trial was that he did not reside at 918 Ward Drive and only paid rent occasionally as a favor to the actual residents. The fact that Appellant told the landlord that he had shot at intruders trying to break into 918 Ward Drive coupled with the fact that shell casings were found outside the unit, and a gun matching those casings were found inside 918 Ward Drive, would tend to indicate that Appellant actually resided at that unit and had a vested interest in preventing the contents of that unit from being stolen. Thus, we do not believe that the trial court abused its discretion in determining that this evidence was relevant.

Likewise, we do not believe that the trial court abused its discretion in finding this evidence more probative than prejudicial. Appellant was certainly free

to argue that police had no way of knowing when the shell casing found outside the unit had been discharged and no affirmative proof that Appellant had fired them. The fact that the Commonwealth had only circumstantial evidence to support Appellant having fired shots to keep intruders out of 918 Ward Drive, however, does not make the evidence so unreliable as to be prejudicial. Likewise, the fact that Appellant had fired a shot at the residence to keep intruders from breaking into it is not evidence of a crime or prior bad act as such defensive conduct is lawful. *See* KRS<sup>1</sup> 503.070 .

Having reviewed the record, we find no abuse of discretion in this instance. Considering Appellant's defense, it was necessary for the Commonwealth to adduce evidence to prove that Appellant was the owner of the drugs and weapons found inside 918 Ward Drive. Testimony that Appellant had previously attempted to defend that unit against intrusion and evidence corroborating that testimony was probative of a fact of ultimate consequence. Moreover, the evidence adduced was not overly prejudicial to Appellant as it did not implicate him in any criminal activity, but if true, would suggest only that he used force in accordance with Kentucky's laws.

### **III. Conclusion**

For the reasons set forth above, we affirm the Fayette Circuit Court.

ALL CONCUR.

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<sup>1</sup> Kentucky Revised Statute.

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