RENDERED: NOVEMBER 18, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001092-MR

JAMES SHELTON — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE THOMAS L. JENSEN, JUDGE
ACTION NO. 14-CR-00006

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Shelton appeals from the final judgment of conviction and sentences after a jury trial. Shelton argues the trial court erred by: (1) wrongfully excusing a juror; (2) failing to grant a mistrial after a Commonwealth witness offered unduly prejudicial and irrelevant prior bad acts testimony; (3) failing to grant an instruction on facilitation to manufacturing

methamphetamine as a lesser-included offense; and (4) imposing a public defender fee when Shelton was indigent.

On November 26, 2013, Knox County Sheriff's Department Deputies Claude Hudson and Joe Napier approached Shelton's rental residence to question him about a pending burglary investigation. They planned to arrest him for violating a domestic violence order (DVO)[1] if they found him at the residence.

Shelton's wife answered the door. After speaking with Shelton, the Deputies arrested Shelton for violating the DVO, read him his *Miranda* rights, questioned him about the burglary and then put him in their cruiser.

After Shelton's arrest, Shelton's wife consented to a search of their home. Inside a bedroom, Deputy Hudson found a grow light, a marijuana plant on the ground and a pot with dirt.

Deputy Hudson also searched the area surrounding the home. At several outdoor locations, Deputy Hudson discovered evidence consistent with the manufacturing of methamphetamine, including various precursors.

Shelton was indicted for manufacturing methamphetamine, first offense; three counts of controlled substance endangerment to a child, fourth degree; cultivating marijuana, less than five plants, first offense; possession of drug paraphernalia; and receiving stolen property of the value of less than $500. On

[1] It is unclear whether Shelton violated a DVO or an Emergency Protective Order (EPO). During the trial, Deputy Hudson used the terms EPO and DVO interchangeably and seemed to be uncertain as to which justified Shelton's arrest. The parties' briefs are also unclear as whether violation of a DVO or EPO justified his arrest. To prevent confusion, we consistently use the term DVO.

January 24, 2014, the trial court found Shelton was indigent, appointed the Department of Public Advocacy to represent him, and determined a partial fee for representation may be reserved for a later date.

On the day of trial, the trial court considered Shelton's motion to exclude evidence. Shelton argued references to an uncharged burglary should be excluded. Both Shelton and the Commonwealth agreed it would be appropriate for the officers to say they were at Shelton's home to investigate a complaint. The Commonwealth dismissed the child endangerment counts and severed the receiving stolen property charge (evidence was found during the search relating to the burglary the officers were investigating), which was dismissed at the conclusion of the trial.

At trial, Deputy Hudson testified about the items he found outside Shelton's home and the photographs he took of each item were admitted into evidence.

After following a path, about fifty feet from the home, Deputy Hudson found a bucket with a lid which contained two baby bottles, a pipe, a jug, Coleman fuel, Drano and salt. Farther away in a shed, Deputy Hudson found a gallon of water, a 32 ounce Hawaiian Punch bottle and a silver container. Near the path, he found two soda bottles, one with white residue and one with liquid and black specks, and an empty Coleman fuel can. Based on what he discovered, Deputy Hudson contacted social services and the Drug Enforcement Special Investigations (DESI) clean-up team. According to Deputy Hudson, Shelton

claimed ownership of all the items and said they were not his wife's. While Deputy Hudson was waiting for DESI to arrive, he continued to search outside. In front of the cruiser, he discovered a closed cardboard box that contained a bottle with a hose and white residue, which he believed to be half of an HCl generator. On the west side of the house, he found liquid fire in a plastic bag, salt in a cardboard container and a Mountain Dew bottle with white residue.

According to Deputy Hudson, when he questioned Shelton again, Shelton recanted his earlier confession and stated "I haven't cooked since June 2014." Deputy Hudson testified Shelton told him the police would "never get that generator [in the box] to stick" despite Deputy Hudson never telling him about it or removing it from the box.

Shelton testified he only claimed ownership of the marijuana and related items in the house. Shelton testified he only admitted to last using methamphetamine in June 2010. He testified the items found outside must have been left by relatives that had stayed with him.

Detective Jim Whittaker of the Kentucky State Police, who conducted the DESI clean-up, testified he identified four containers found on the property as being HCl generators: a plastic Gatorade bottle with tubing, a Mountain Dew bottle, a Coca-Cola bottle and another bottle. The DESI team destroyed the items found without testing them for methamphetamine.

The jury was instructed on manufacturing methamphetamine, cultivating marijuana and its lesser-included offense of possession of marijuana,

and possession of drug paraphernalia. The jury convicted Shelton of manufacturing methamphetamine, possession of marijuana and possession of drug paraphernalia and recommended a sentence of ten years for manufacturing methamphetamine and one day each for possession of marijuana and possession of drug paraphernalia to be served concurrently. Shelton was sentenced in accordance with that recommendation. The trial court waived imposition of court costs, but ordered Shelton to pay fees of $250 to the Department of Public Advocacy within sixty days of his release from custody.

Shelton argues the trial court erred by excusing a juror for cause after the juror expressed his belief that small quantities of marijuana should be legal but stated he could follow the law despite his personal views.

Although the right to an impartial jury is protected by the Sixth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution, there is no right to a partial jury. "A defendant does not have a constitutional right to have a particular person sit as a juror. He merely has the right to have a particular class of persons on the jury and the right to exclude certain individuals." *Hodge v. Commonwealth*, 17 S.W.3d 824, 841 (Ky. 2000) (quoting *McQueen v. Scroggy*, 99 F.3d 1302, 1327 (6th Cir. 1996) overruled on other grounds by *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004)).

Kentucky Rules of Criminal Procedure (RCr) 9.36(1) provides: "When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified."

The trial court must consider the totality of the circumstances in making a decision about a prospective juror's likely bias or prejudice, which includes evaluating the prospective juror's responses and demeanor in context to understand his or her state of mind rather than relying a response to any one "magic" question. *Ordway v. Commonwealth*, 391 S.W.3d 762, 781 (Ky. 2013); *McDaniel v. Commonwealth*, 341 S.W.3d 89, 92–93 (Ky. 2011). "Reasonable grounds to excuse a prospective juror exist whenever the juror expresses or shows an inability or unwillingness to act with entire impartiality." *Rankin v. Commonwealth*, 327 S.W.3d 492, 496 (Ky. 2010).

The appellate court will not disturb the trial court's ruling on whether or not to excuse a prospective juror for cause unless there is a clear abuse of discretion. *Grider v. Commonwealth*, 404 S.W.3d 859, 860 (Ky. 2013).

> [W]here the decision is a classic "close call," the trial judge is given sound discretion to choose among those multiple permissible options, guided by his own experience, the law, and the facts of the case before him. The abuse-of-discretion standard defers to the trial court's choice among those possibilities, even where the appellate court might have chosen differently.

Elery v. Commonwealth, 368 S.W.3d 78, 96 (Ky. 2012). While "a hunch or suspicion" is not a sufficient basis for excusing a juror for cause, a trial court acts appropriately in making a decision after intentional deliberation. *Id.* "[W]hen there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken." *Ordway*, 391 S.W.3d at 780.

The potential juror who was excused stated that he believed everyone should be allowed to grow marijuana for their personal use. His belief was based upon his cousin's experience with medical marijuana and his experience of having formerly grown marijuana for his personal use. While the juror stated he could follow the law, he indicated he would be uncomfortable with finding a defendant guilty of cultivation if it was just little seedlings, but would be able to do so if it was a large quantity. The trial court noted it was unknown prior to trial whether the evidence would put the juror in the difficult position of having to ignore his personal feelings on the matter. We hold the trial court acted properly within its discretion in erring on the side of caution by excusing the juror under these circumstances because it was uncertain whether he could be impartial.

Shelton argues the trial court erred by denying his motion for a mistrial because Deputy Hudson's testimony regarding unrelated bad acts was irrelevant and unduly prejudicial by showing that Shelton had a criminal predisposition, especially where his defense was that the items found outside his home did not belong to him. The Commonwealth argues Deputy Hudson's testimony was relevant and properly admissible under Kentucky Rules of Evidence (KRE) 404(b)(2) to provide context as to why police were at Shelton's house and why he was arrested before the incriminating items were found. Additionally, it argues any error was harmless based on the overwhelming evidence against Shelton.

We recount the specific testimony of Deputy Hudson, the objections made to it and the trial court's resolution of these matters to examine whether a mistrial should have been granted. Deputy Hudson testified that prior to going to Shelton's home to investigate a complaint, he performed reconnaissance and knew if Shelton was present at the home he was in violation of a DVO and planned to take him to jail regardless of the outcome of his investigation. No objection was made to this testimony.

Deputy Hudson then testified after he read Shelton his *Miranda* rights, he discussed with him the other investigation, locked him into a story, "tore that story down" and proved he was lying. Shelton objected.

During a bench conference, Shelton requested a mistrial arguing Deputy Hudson was talking about the burglary investigation which had been excluded. The trial court instructed the Commonwealth to talk to Deputy Hudson about staying on point and offered to provide an admonition, instructing the jury to disregard any evidence of other possible crimes.

The Commonwealth opined that an admonition would do more harm than good because Deputy Hudson had not talked about other crimes. Shelton then noted Deputy Hudson testified Shelton violated a DVO and was going to jail.

The trial court stated it would allow the Commonwealth a chance to clarify but would otherwise offer an admonition. The Commonwealth argued it needed to be allowed to ask why Shelton was taken into custody and the violation of the DVO provided a reason for his arrest and presence in the police cruiser.

The trial court instructed the Commonwealth to proceed cautiously, noting this could lead to an issue on appeal. Shelton never requested an admonition.

The subsequent testimony about the evidence found did not delve into either the burglary investigation or the DVO. The issue of the DVO was raised one more time when Deputy Hudson recounted a claim Shelton made about why he had not manufactured methamphetamine recently. Shelton claimed his wife obtained the DVO against him in June 2010 because she was upset he was manufacturing methamphetamine and, as a result, he stopped manufacturing it at that time.

Shelton objected to improper character evidence and the objection was sustained. Shelton did not request an admonition or explain why an admonition would not be sufficient, and did not renew his request for a mistrial.

We consider whether the trial court was correct in admitting Deputy Hudson's challenged statements pursuant to KRE 404(b)(2) under the abuse of discretion standard. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

KRE 404(b) provides in part as follows:

> 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:
>
> . . .

> (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.

To determine whether prior bad acts evidence should be properly admitted under KRE 404, we apply a three-part inquiry as to whether "the evidence is relevant, probative, and not overly prejudicial." *King v. Commonwealth*, 276 S.W.3d 270, 275 (Ky. 2009). *See* KRE 403.

> When dealing with evidence of a litigant's prior misconduct, where such evidence is debatably or remotely relevant, the trial court must decide whether the *probative* value of the evidence outweighs its *inflammatory* nature. If it does, the evidence is admissible. Otherwise it is not.

Funk v. Commonwealth, 842 S.W.2d 476, 481 (Ky. 1992) (quoting *Commonwealth v. Morrison*, 661 S.W.2d 471, 473 (Ky. 1983)).

"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). *See St. Clair v. Commonwealth*, 455 S.W.3d 869, 885 (Ky. 2015). "The key to understanding [the KRE 404(b)(2)] 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*, 842 S.W.2d at 480 (quoting Lawson, *The Kentucky Evidence Law Handbook,* 2d Ed., Sec. 2.20, p. 37 (1984)). A prior offense should be excluded from the evidence unless "it would be necessary to

suppress facts and circumstances relevant to the commission of the offense charged in order to exclude evidence of the prior offense." *Id.*

In *Kerr v. Commonwealth*, 400 S.W.3d 250, 259–60 (Ky. 2013), the court determined the trial court's decision to admit testimony that the police had arrest warrants for the defendant for unrelated crimes was not an abuse of discretion because this information was relevant and set the context for the crime:

> Here, the arrest-warrant evidence was relevant to the context of the investigation—why the police were observing Kerr's guest room—and how the crime came to be discovered. . . .
>
> Knowledge of the arrest warrants was necessary for the jury to understand why the police set up the extensive surveillance and then arrested Kerr with only highly circumstantial proof of criminal activity. Without knowing of the arrest warrants, the jury would have been left to wonder about the legitimacy of the officers' actions in placing Kerr on the floor and arresting him with such scant evidence of wrongdoing. So we hold that the trial court did not abuse its discretion in ruling that the arrest warrants were necessary to an adequate understanding of the context of the officers' conduct.

Id. at 260 (footnote omitted). *See Adkins*, 96 S.W.3d at 793 (permitting evidence about defendant's suspended license under KRE 404(b)(2) as "inextricably intertwined with [his] explanation of his presence on Roberts's property on the night of the murder[,]" that he had gone there to evade a police cruiser because his license was suspended); *Bratcher v. Commonwealth*, 151 S.W.3d 332, 350 (Ky. 2004) (evidence of marital infidelity not improper character evidence where elicited to create context for events leading to victim's death).

The testimony provided about Shelton's violation of a DVO and the unrelated investigation was relevant and properly admissible as inextricably intertwined with the circumstances in which Shelton's charged offenses were discovered and was not unduly prejudicial. Testimony about these matters was properly limited to solely providing context for how the charged crimes were discovered. This context was necessary to explain why the police came to Shelton's residence, arrested him and questioned him before the deputies had any knowledge of the offenses with which he would later be charged, and why consent to search was obtained from Shelton's wife rather than him. If the violation of the DVO was not disclosed, the jury could have assumed Shelton's arrest was the result of involvement in a serious or drug-related crime, rather than a civil dispute that would not bear on his propensity to be involved with drugs. To the extent Deputy Hudson's testimony went beyond this by testifying Shelton lied, this testimony was non-specific and not deliberately elicited by the Commonwealth. The second mention of the DVO, while not needed at that time to explain Shelton's arrest, was not deliberately elicited and did not provide any additional details that could harm Shelton.

While it would have been best for the trial court to provide admonitions under these circumstances, Shelton declined the trial court's offer to provide one after the disclosure about the investigation and first mention of the DVO and failed to request an admonition after objecting to the second mention of the DVO.

Because this evidence was properly admissible under KRE 404(b)(2), the trial court did not err in denying Shelton's request for a mistrial.

Shelton argues the trial court erred by refusing to instruct the jury on facilitation to manufacturing methamphetamine as a lesser-included offense to the charge of manufacturing methamphetamine, where the jury could have believed that Shelton only facilitated another in manufacturing methamphetamine. This exact contention has been addressed and rejected by the Kentucky Supreme Court in *Houston v. Commonwealth*, 975 S.W.2d 925, 929-31 (Ky. 1998), and this holding was reaffirmed in *Roberts v. Commonwealth*, 410 S.W.3d 606, 608–10 (Ky. 2013).

"The fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser-included offense of the charged offense." *Houston*, 975 S.W.2d at 929.

> The offenses of trafficking in or possession of a controlled substance require proof that the defendant, himself, knowingly and unlawfully committed the charged offense. KRS 218A.1412; KRS 218A.1415. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with the means or opportunity to do so. KRS 506.080(1). Thus, criminal facilitation requires proof not of the same or less than all the facts required to prove the charged offenses of trafficking in or possession of a controlled substance, but proof of additional and completely different facts. *A fortiori,* it is not a lesser included offense when the defendant is charged with committing either of the object offenses.

Id. at 930. Therefore, because Shelton "was not entitled to an instruction on criminal facilitation as a lesser-included offense of the object offenses of trafficking in or possession of a controlled substance, there was no error in the trial court's ruling." *Id.* at 931.

Shelton argues, although this error is unpreserved, we should reverse the imposition of the public defender fee because the trial court earlier found Shelton qualified for *in forma pauperis* status. The Commonwealth agrees that because the trial court previously waived court costs based on Shelton being a "poor person" it erred by imposing a public defender fee.

In *Sevier v. Commonwealth*, 434 S.W.3d 443, 471 (Ky. 2014) (quoting *Maynes v. Commonwealth,* 361 S.W.3d 922, 930 (Ky. 2012)), the Kentucky Supreme Court determined "in waiving the otherwise mandatory assessment of costs against [the defendant], the trial court must have undertaken an analysis of [the defendant's] finances and determined there was no 'reasonable basis for believing that the defendant can or will soon be able to pay' court costs." Therefore, it held "the trial court's waiver of court costs precludes the assessment of a partial public defender fee because the finding necessary to waive costs evinces the most serious form of financial hardship contemplated in our judicial-fee framework." *Id.* Because court costs were also waived here, it was improper for the trial court to assess a partial public defender fee and the portion of the final judgment imposing such fee must be reversed.

Accordingly, we affirm the judgment and sentence except in regards to the portion of the judgment imposing a partial public defender fee, which we reverse.

ALL CONCUR

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Dept. of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Taylor Payne
Assistant Attorney General
Frankfort, Kentucky