

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2006-CA-002080-MR

BILLY SHEPHERD

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN D. CAUDILL, JUDGE  
ACTION NO. 05-CR-00093

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND VANMETER, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Billy Shepherd appeals from a judgment of the Floyd Circuit Court that sentenced him to five years' imprisonment after being convicted of fleeing or evading police in the first degree, wanton endangerment in the first degree, assault in the third degree, operating a motor vehicle while license revoked or suspended, resisting arrest, reckless driving, disregarding a traffic light, and no tail lamps. For the reasons stated below, we affirm.

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

The facts are as follows. On December 24, 2004, around 3:00 a.m., Shepherd led Martin City police officers on a high-speed chase that ended when Shepherd lost control of the truck he was driving. After the truck came to a stop in a drainage ditch, Shepherd fled from the vehicle on foot and one of the officers pursued him. At some point during the pursuit, Shepherd began to assault the officer and then escaped. The officer recognized Shepherd and ran a check on both the truck and Shepherd's license. The truck was registered to Shepherd's grandfather, and Shepherd's license was currently suspended. Shepherd was arrested some time later pursuant to a valid warrant.

A Floyd County grand jury indicted Shepherd on eight counts: fleeing or evading police in the first degree, wanton endangerment in the first degree, assault in the third degree, operating a motor vehicle while license revoked or suspended, resisting arrest, reckless driving, disregarding a traffic light, and no tail lamps. Shepherd was convicted by a jury on all charges and was sentenced to twelve months on each count of operating a motor vehicle while license revoked or suspended and reckless driving. He was sentenced to five years for each count of fleeing or evading police in the first degree, wanton endangerment in the first degree and assault in the third degree. All counts were to run concurrently for a total sentence of five years' imprisonment. This appeal followed.

Shepherd argues that the trial court committed reversible error by allowing the Commonwealth to introduce evidence of his prior conviction of fleeing from police. The Commonwealth introduced this prior bad act under KRE 404(b). Generally,

evidence of prior bad acts, unrelated to the charged offense, is inadmissible pursuant to KRE 404(b), which states:

Other crimes, wrongs, or acts. 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 Commonwealth argues that the prior bad act fits within the language of KRE 404(b) because it proves Shepherd's intent and knowledge to commit the crime.

The Commonwealth also argues that the evidence of the prior police chase was properly admitted to prove that the two police chases were committed with the same *modus operandi*. The rule for use of a prior crime to establish intent and knowledge by *modus operandi* has traditionally been stated as:

In order to prove the elements of a subsequent offense by evidence of *modus operandi*, the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*. If not, the evidence of prior misconduct proves only a criminal disposition and is inadmissible.

*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

However, the Kentucky Supreme Court further refined this long standing rule regarding the *modus operandi* exception to prior bad acts.

[A]s a prerequisite to the admissibility of prior bad acts evidence, we now require the proponent of the evidence to “demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual.”

*Clark v. Commonwealth*, 223 S.W.3d 90, 97 (Ky. 2007)(citing *Commonwealth v. Buford*, 197 S.W.3d 66, 71 (Ky. 2006)).

We are not persuaded by the Commonwealth’s arguments. The two police chases were not “identical in all respects” as the Commonwealth concedes. The chases are similar because of the very nature of the offense itself. The Commonwealth alleges a “distinctive pattern” common to both of the police chases because in each, Shepherd was driving a pickup truck in Floyd County and was stopped for no tail lights. Shepherd also abandoned his vehicle both times. Many police chases have a similar pattern in which a driver flees police after being stopped for a traffic violation and continues on foot once the vehicle is stopped again. The “distinctive pattern” the Commonwealth alleges between the two police chases is not “simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual” to be considered a signature crime. *See Clark*, 223 S.W.3d at 96. The introduction of the previous fleeing from police charge did not meet the requirements for a *modus operandi* exception under KRE 404(b).

It was error for the lower court to allow the introduction of Shepherd’s prior conviction for fleeing police. However, the error is harmless when considering the overwhelming evidence of Shepherd’s guilt and the other evidence presented at trial. Multiple police officers testified to the events the night of the car chase. One officer

testified that he recognized the fleeing suspect as Shepherd because he knew him personally. The truck involved in the police chase was registered to Shepherd's grandfather, and Shepherd had access to the vehicle. The witnesses who provided alibis for Shepherd had conflicting testimony regarding which night Shepherd was with them and subsequently changed their testimony at trial. In light of the overwhelming evidence of Shepherd's participation in the police chase, the trial court's error was harmless and will not be grounds for reversal. RCr 9.24. And further, introduction of the contested evidence does not appear to have been so prejudicial as to deprive Shepherd of a fair trial.

The judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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