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**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-000708-MR

DANNY R. DUTY

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NOS. 06-CR-00149 & 07-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,<sup>1</sup> SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: Danny R. Duty appeals the March 28, 2007, final judgment of the Pulaski Circuit Court, sentencing him to ten (10) years

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<sup>1</sup> Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

imprisonment for theft by unlawful taking over \$300.00 and persistent felony offender, second degree. We affirm.

On May 24, 2006, Duty was indicted by a Pulaski County grand jury on one (1) count of burglary in the second degree and one (1) count of theft by unlawful taking over \$300. The indictment was based on allegations that on March 28, 2006, Duty had stolen jewelry from the home of Imogene Hacker. After a jury trial, Duty was found guilty of one (1) count of theft by unlawful taking over \$300 and being a persistent felony offender in the second-degree. He was then sentenced to a total of ten (10) years imprisonment by the court's final judgment on trial verdict, entered March 28, 2007. This appeal followed. On appeal, Duty argues improper introduction of KRE<sup>2</sup> 404(b) evidence, prosecutorial misconduct, and improper jury instruction.

The first argument Duty makes is that the trial court erred by allowing the introduction of certain KRE 404(b) evidence. In support of its case against Duty, the Commonwealth sought to call Janet Mosley to testify "after the incident charged, [Duty] entered her home and made statements to her that he intended to take her property." Duty objected to the testimony and moved to have the testimony excluded. His motion was denied. KRE 404(b) reads as follows:

[o]ther 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:

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<sup>2</sup> Kentucky Rules of Evidence.

(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.

Typically, abuse of discretion is the proper standard of review of a trial court's decision regarding the admissibility of evidence. *See, e.g., Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky.1996). The Kentucky Supreme Court has set out a three-part test for determining the admissibility of KRE 404(b). *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994). That 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.

The relevancy inquiry relates to whether the evidence is admissible for a "proper purpose" under KRE 404(b)(1), i.e., some purpose other than to prove bad character or propensity. This is a mixed issue of fact and law. Whether the purpose for which the evidence is offered is a "proper purpose" is a question of law that is reviewed de novo. If the evidence falls within one of the "other purpose" exceptions expressly listed in KRE 404(b)(1), i.e., motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident, the resolution is obvious. However, the listed "other purpose" exceptions are illustrative, not exhaustive. For example, . . . evidence strongly suggesting that the defendant had suborned perjury was admissible as evidence tending to prove "consciousness of guilt." And . . . evidence of the defendant's voluntary participation in a three-person sexual encounter was relevant to rebut her claim that her husband had forced her to engage in such acts. Whether the evidence tends

to prove a valid “other purpose” is a question of fact reviewed for “clear error.”

Having determined that the other act actually occurred and that evidence of that act is admissible for a proper purpose, the trial court must then make a KRE 403 determination of whether the probative value of the evidence of the other act is substantially outweighed by its prejudicial effect. The resolution of that issue, which is essentially a balancing process, is reviewed for abuse of discretion.

*Matthews, supra*, at 33-34 (internal citations omitted).

During the trial, and after Mosley’s testimony, the trial court gave the following limiting admonition to the jury:

[L]adies and gentlemen, you’ve heard some evidence that I’ve been dealing with through the testimony of this witness. I’ve decided that the evidence has relevance to another act that I don’t want to go to showing the propensity to do the act that . . . the defendant is being charged with.

In other words, I do not want you to consider this evidence for any other purpose, *except insofar as it shows an absence of mistake or a general course of conduct on this defendant’s part*. Do you understand what I’m trying to tell you? The evidence that’s been presented by this witness should not be used by you or considered by you in determining that . . . he had the propensity to do the act that he’s being charged with. It’s only to be used to show that there was no mistake or that it was . . . a continuing conduct on that evening. Everyone with me on that?

(Emphasis added).

We are satisfied, after reviewing this admonition, that the evidence was offered for a valid purpose. Furthermore, we fail to find clear error in the trial

court's determination that the purpose for which it was offered was other than those prohibited by KRE 404(b). The trial court clearly stated in its admonition that it was to be considered on as evidence of an absence of mistake or *modus operandi*. As stated above, the list of proper purposes, as determined by KRS 404(b), is not exhaustive. Lastly, we do not believe the trial court abused its discretion when, in allowing the evidence with the admonition, it determined that the probative value of the evidence outweighed its prejudicial effect.

A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error. . . . There are only two circumstances in which the presumptive efficacy of an admonition falters: (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.'

*Johnson v. Commonwealth*, 105 S.W.3d 430,441 (Ky. 2003) (internal citation omitted). Duty has failed to show that either of these circumstances existed in the case *sub judice* and therefore, we must assume that the jury followed the admonition that was given to them.

Duty further argues that Mosley's testimony should have been excluded because, contrary to KRE 404(c), the three day notice was not reasonable. We do not agree. Duty admits that he objected to the introduction of Mosley's testimony through a motion that was heard in limine and overruled.

The intent of KRE 404(c) is to provide the accused with an opportunity to challenge the admissibility of this

evidence through a motion in limine and to deal with reliability and prejudice problems at trial. Obviously, no prejudice occurred, because Appellant had actual notice and did raise the 404(b) issue in his in limine motion.

*Bowling v. Commonwealth*, 942 S.W.2d 293,300 (Ky. 1997) (internal citations omitted).

Duty next argues that prosecutorial misconduct resulted in reversible error. Specifically, Duty claims that the prosecutor told the jury that this was not Duty's "first rodeo;" repeatedly and aggressively approached Duty during closing arguments; made improper statements of personal opinion regarding Duty's credibility; told the jury that defense counsel was interrupting him; and referred to his own military record during closing arguments. By admission of Duty, this issue is not preserved. Therefore, we will review this issue under the palpable error standard of RCr<sup>3</sup> 10.26, which states:

[a] palpable error which affects the substantial rights of a party 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.

The trial court admonished the jury after the prosecutor's comment that this was not Duty's "first rodeo." The trial court stated: "the reference to this not being (Duty's) first rodeo is irrelevant and should not be considered." Again, we note that "a jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson, supra*, at 441. Duty has failed to

<sup>3</sup> Kentucky Rules of Criminal Procedure.

show us a reason to believe otherwise. Accordingly, we fail to hold that the court's admonition was palpable error resulting in manifest injustice.

Duty fails to include any citation to the record in support of his argument that the prosecutor made improper statements of personal opinion and improper comments regarding his military record. CR 76.12(4)(c)(v). Consequently, we view this argument to be without merit and therefore will not address it. Lastly, Duty's contentions that the Commonwealth's attorney repeatedly approached Duty in an aggressive manner, and reported to the jury that defense counsel kept interrupting him, do not constitute palpable error.

Duty's final argument is that the trial court erred by failing to instruct the jury on criminal trespass first-degree, a lesser included offense to burglary second-degree. "Alleged errors regarding jury instructions are considered questions of law that we examine under a de novo standard of review." *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky.App. 2006) (citation omitted). The trial court judge is generally required to instruct the jury on any and all offenses that can be supported by the evidence. *See, e.g., Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky.1999). However, instruction on lesser-included offenses is not required when there is no evidentiary foundation for the instruction. *Houston v. Commonwealth*, 975 S.W.2d 925 (Ky. 1988). Rather, lesser-included offense instruction must be given "only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty

of the lesser offense.” *Id.* Here, Duty was acquitted of his burglary charge altogether, making such an argument moot.

For the foregoing reasons the March 28, 2007, judgment of the Pulaski Circuit Court is affirmed.



ALL CONCUR.

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