

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

NO. 2008-CA-002040-MR

TONY L. NOTTINGHAM

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 07-CR-00134

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Tony L. Nottingham appeals from his convictions for fleeing or evading police in the first degree<sup>2</sup> and being a persistent felony

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<sup>1</sup> Senior Judge Joseph E. Lambert 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.

<sup>2</sup> KRS 520.095.

offender in the second degree.<sup>3</sup> The only issue on appeal is whether the trial court erroneously allowed the Commonwealth to present inadmissible “other bad acts” evidence to the jury. Upon review, we conclude that the trial court did not err in this regard. Thus, we affirm.

### **Facts and Procedural History**

The events leading to this appeal occurred on the night of October 25, 2007. Stacy Rogers was at home in her bed when she heard a loud noise outside and saw lights shining through her windows. Ms. Rogers went outside and observed Appellant’s vehicle sitting inches away from the side of her home. Appellant was sitting inside of the vehicle revving the engine, yelling, and blowing the horn. Ms. Rogers also noticed that Appellant had run over her garbage box and had hit her husband’s truck with his vehicle. She called the police. As will be discussed below, the introduction of this evidence at trial is the subject of this appeal.

Responding to Ms. Rogers’ call, Breckinridge County Deputy Sheriff Jim Beauchamp observed Appellant’s vehicle swerving back and forth across Kentucky Highway 86, a narrow and winding road. In his pursuit of Appellant, Deputy Beauchamp engaged the siren and emergency lights on his marked police cruiser. However, Appellant did not stop his vehicle and, instead, accelerated to a speed of up to 80 miles per hour in an apparent attempt to evade Deputy Beauchamp. According to the deputy’s testimony, at one point Appellant, while

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<sup>3</sup> KRS 532.080.

rounding a curve on the wrong side of the road, narrowly avoided a head-on collision with an oncoming passenger car. Appellant eventually turned onto Kentucky Highway 690 and drove towards his residence.

In an attempt to stop Appellant's vehicle, Deputy Sheriff Rick Knight had taken an alternate route and attained a position ahead of the vehicle on Highway 690. There, Deputy Knight deployed "stop sticks," devices that cause a vehicle's tires to deflate. Appellant's vehicle ran over the stop sticks, causing the front tires to go flat. However, although the vehicle's deflating tires slowed its speed, Appellant continued to evade police for six to eight more miles before arriving at his residence and pulling into his driveway.

The deputies then pulled into the driveway alongside Appellant's vehicle, opened the passenger door, and ordered Appellant to exit; however, Appellant restarted his car and drove away, injuring Deputy Beauchamp's thumb in the process. After pulling away from the deputies, Appellant drove into a nearby soybean field, where his vehicle became stuck. Appellant then fled on foot. The deputies pursued Appellant but were unable to apprehend him. The next day, a warrant was issued for Appellant's arrest, and he surrendered to the police.

Appellant was tried on charges of fleeing or evading police in the first degree and being a persistent felony offender in the second degree. At trial, Ms. Rogers was called by the Commonwealth to testify about the events that had prompted her to call the police. Appellant's counsel objected, claiming that any description of the events that took place in Ms. Rogers' yard prior to the arrival of

police was inadmissible evidence of a “prior bad act.” In response, the Commonwealth argued that testimony as to the events that occurred at Ms. Rogers’ home was admissible because those events led directly to Appellant’s encounter with police. Ultimately, the trial judge overruled the objection, stating: “Well, they’ve got to have some starting point. [They have] got to know why he got started in all this.” Accordingly, Ms. Rogers’ testimony as to the events discussed above was permitted by the trial court.

The jury ultimately found Appellant guilty of fleeing or evading police in the first degree. After the penalty phase of trial, the jury also found Appellant guilty of being a persistent felony offender in the second degree and recommended an enhanced sentence of ten years’ imprisonment. The trial court subsequently imposed a judgment and sentence consistent with the jury’s recommendation. This appeal followed.

### **Discussion**

On appeal, Appellant argues that Stacy Rogers’ testimony was inadmissible under Kentucky Rules of Evidence (KRE) 404(b) as evidence of prior bad acts. The Commonwealth counters that the testimony was permissible as “inextricably intertwined” evidence under KRE 404(b)(2) because it allowed for a complete picture of the crime committed by Appellant to be presented. It is well-settled that evidentiary rulings are reviewed for an abuse of discretion. *Anderson*

*v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Therefore, absent an abuse of discretion, this Court will not disturb the trial court’s decision to admit the evidence in question.

The Kentucky Rules of Evidence generally preclude the introduction of evidence of prior bad acts unrelated to the charged offense. *Norton v. Commonwealth*, 890 S.W.2d 632, 637 (Ky. App. 1994). Specifically, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” KRE 404(b). The essence of KRE 404(b) is that “evidence of criminal conduct [or bad acts] other than that being tried, is admissible only if probative of an issue independent of character or criminal disposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character.” *Clark v. Commonwealth*, 267 S.W.3d 668, 680-81 (Ky. 2008), quoting *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). With this said, however, evidence of other bad acts may 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.

KRE 404(b)(1) & (2).

Of particular note here, the Kentucky Supreme Court has held 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). In *Norton v. Commonwealth*, *supra*, this Court similarly recognized that:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘*res gestae*’ ” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .’ [and is thus] part of the *res gestae* of the crime charged.”

*Norton*, 890 S.W.2d at 638, quoting *United States v. Masters*, 622 F.2d 83, 86 (4<sup>th</sup> Cir. 1980). We further noted:

[T]he 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.”

*Id.*, quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.25 (3d ed. 1993); see also *Clark*, 267 S.W.3d at 680-81; *Major v. Commonwealth*, 177 S.W.3d 700, 708 (Ky. 2005).

The Commonwealth contends that the testimony of Stacy Rogers presented necessary context and background to the crime with which Appellant was charged in that it explained why police were contacted and pursued Appellant. Thus, its admission into evidence did not constitute an abuse of discretion. Appellant disagrees and argues that this evidence was inadmissible under the analysis set forth in *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994), which recommends that in deciding whether to allow evidence of other crimes or bad acts, a trial court should make inquiries into the relevance, probativeness, and prejudicial nature of the offered evidence. *Id.* at 889. Specifically, “[t]o be admissible under any of the exceptions [to KRE 404(b)], the other criminal or wrongful acts must be (1) relevant for some purpose other than to prove criminal predisposition, (2) sufficiently probative to warrant introduction, and (3) the probative value of the evidence outweighs its potential for prejudice to the accused.” *Anderson*, 231 S.W.3d at 120-21, quoting *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (Ky. 1991).

Applying such an analysis, Appellant contends that Ms. Rogers’ testimony detailing his running over her trash can and driving into her husband’s truck is not probative of whether he committed the charged crime. Appellant further argues that Ms. Rogers’ testimony added nothing to the charges against him. Finally, Appellant contends that the testimony is unduly prejudicial to his case because it leads the jury to speculate that if Appellant was engaged in erratic driving and destruction of property shortly before the police encountered him, then

he would be more likely to intentionally evade police and, consequently, be guilty of the charged crime. Therefore, because Ms. Rogers' testimony failed to satisfy the factors entailed in the *Bell* analysis, it should not have been admitted at trial.

As an alternative to eliciting this testimony from Ms. Rogers, Appellant argues that the Commonwealth should have initiated its case with Deputy Beauchamp's testimony and suggests that the only background information that should have been sought from such testimony was that "a call came in to the dispatcher regarding Appellant and that [Deputy Beauchamp] drove out to find him."

After considering the parties' arguments and the discretion allowed the trial court, we conclude that there was no error in the trial court's admission of the subject evidence. The setting and context provided by Ms. Rogers' testimony regarding Appellant's destructive behavior on her property were relevant to the overall sequence of events surrounding the charged crime and to the events which led to it being reported to the police. Excluding this testimony would have yielded a fragmented, incomplete account of the events and would have been potentially confusing to the jury. Therefore, this evidence was inextricably intertwined with other evidence critical to the case and was properly admitted by the trial court. *See Fields v. Commonwealth*, 274 S.W.3d 375, 405 (Ky. 2008); *Clark*, 267 S.W.3d at 681. The introduction of this evidence did not constitute an abuse of discretion under *Bell*. Ms. Rogers' testimony was clearly relevant for some purpose other than to prove criminal predisposition, *i.e.*, establishing why police were attempting to apprehend Appellant. Moreover, Ms. Rogers' testimony



regarding the acts in question was sufficiently probative of their commission, and this probative value outweighed any potential prejudice.

However, even if we assumed that the trial court erred in the admission of Ms. Rogers' testimony, any such error would be harmless. Kentucky Rules of Criminal Procedure (RCr) 9.24 provides:

No error in either the admission or the exclusion of evidence . . . is ground for . . . disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

“A non-constitutional evidentiary error may be deemed harmless, the United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error.” *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009). “The 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.’ ” *Id.* at 689, quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); see also *Cohron v. Commonwealth*, 306 S.W.3d 489, 497 (Ky. 2010); *Crossland v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009).

Accordingly, unless this Court concludes that the admission of the evidence in question had a “substantial influence” on the outcome of the trial or allows for “grave doubt” as to whether it substantially influenced the jury’s guilty

verdict, the error is harmless. *Colvard v. Commonwealth*, 309 S.W.3d 239, 249 (Ky. 2010); *Crossland*, 291 S.W.3d at 233. In this case, the witness testimony of the deputies involved in the pursuit of Appellant was uncontroverted and overwhelmingly pointed to Appellant's guilt as to the fleeing-or-evading-police charge – even without Ms. Rogers' testimony. Thus, there is no basis in the record for this Court to conclude that Ms. Rogers' testimony substantially affected the outcome of the trial. Therefore, we hold that any error resulting from the admission of this evidence was harmless.

### Conclusion

For the foregoing reasons, we affirm the judgment of the Breckinridge Circuit Court.

ALL CONCUR.

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