RENDERED: NOVEMBER 16, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002097-MR

JESSIE C. JORDAN — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 10-CR-00003

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellant, Jessie C. Jordan, was convicted of receiving stolen property and of being a persistent felony offender in the second degree, for which he was sentenced to five years' imprisonment. On appeal, Jordan asserts that under the facts of this case, a directed verdict of acquittal was warranted, and that highly prejudicial evidence of an alleged "bribe" made by

Jordan should not have been presented to the jury. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Jordan was indicated by a Scott County grand jury on January 8, 2010, on one count of receiving stolen property over $500.00 and of being a second-degree persistent felony offender. At his arraignment, Jordan entered a plea of not guilty to the charges in the indictment, and a jury trial was held on September 22 and 23, 2010.

During the course of the trial below, Dean Strong testified that on September 9, 2009, he lived at 861 Bayers Chapel Road in Sadieville, Kentucky, with his fourteen-year-old son. At that time, Strong owned a Manco Talon All-Terrain Vehicle (ATV). Strong stated that he bought the ATV for $2,999.98. According to Strong, the ATV ran perfectly from the time he bought it until the end of August 2009, when it began to have problems with engine revving and shifting to the proper gear.

Strong stated that he planned to take the ATV to a repair shop, and therefore, had loaded it into the back of his pickup truck on September 6 or September 7, 2009. Strong stated that the ATV was secured to the truck with nylon straps, and that the truck was parked right next to his house. Strong stated that he last saw the ATV in the back of his truck at about 9:00 or 10:00 p.m. on September 8, 2009.

On September 9, 2009, Strong got out of bed around 4:30 a.m., got himself ready for work, and then woke his son. Strong then went outside to get

into his truck and noticed that the ATV was missing from the truck bed. Strong stated that he looked in the bed of the truck and saw remnants of the nylon straps that had been cut. Strong looked around for the ATV and then called the sheriff's office and reported the ATV stolen. Strong said the police told him they believed they had recovered his ATV, and he could claim it at A & Z Towing.

Michael Northcutt, who resides at 2292 Bayers Chapel Road, testified that at around midnight on September 8, 2009, he was called by David Norton asking if Northcutt could assist in rounding up horses that had gotten loose. Northcutt and his cousin met Norton and rounded up the horses which Northcutt believed took about forty-five minutes. After rounding up the horses, Northcutt was going to go look at some other farms for hunting opportunities. Norton decided to go along. Northcutt and his cousin went back to Northcutt's house first, and Norton followed Northcutt in his own vehicle. While the men were at Northcutt's house, another friend showed up, and all four left together in Northcutt's vehicle around 1:30 or 2:00 a.m. on September 9, 2009.

Northcutt stated that, as he was driving down Bayers Chapel Road toward Sadieville, he came through a curve, saw a truck sitting in the road, and stopped. Northcutt thought the truck had problems because the tailgate was down and an ATV was sitting in the road. Northcutt thought that perhaps the ATV had fallen out of the back of the truck, and seeing only one person trying to get the ATV back in the truck, stopped to offer help. Northcutt said he started to help the person lift the ATV into the truck and realized things did not feel right. Northcutt

said that at that point, the person ran and jumped into the truck and took off at a high speed.

Northcutt then got back into his vehicle and followed the truck toward Sadieville because he believed that the ATV looked like his dad's, and because there had been recent barn break-ins in the area. Northcutt followed the truck into Sadieville until the truck turned the wrong way down a one-way street and Northcutt did not follow it. Northcutt then drove around Sadieville until he discovered the truck sitting in the front yard of Norton's house.

Northcutt said that after finding the truck, Norton got out of his truck, got the keys from the ignition of the truck parked in his front yard, and that the driver of that truck exited and stated that he had a knife. The driver of the truck proceeded to walk up the street before Norton and Northcutt tackled him. The driver was then released and ran from the scene as the police were arriving. Northcutt identified Jordan as being the person he saw with the ATV on Bayers Chapel Road and at David Norton's house on September 9, 2009.

Norton testified that he lived at 116 Gano in Sadieville on September 9, 2009. Norton stated that he had first seen Jordan at the school bus stop early in the day on September 8, 2009, and then saw Jordan again later that day at Brian Rutledge's house. Rutledge lived near Norton. Norton stated that he did not know Jordan at that time. Norton testified that late that evening, his father called and asked him if he could round up horses that had escaped. Norton stated that he called Northcutt for help with the horses and Northcutt met Norton at Norton's

father's farm. Norton stated that after rounding up the horses, Northcutt wanted to go check some other property for deer, and Norton followed Northcutt back to Northcutt's house. Norton stated that he left his vehicle at Northcutt's and got into Northcutt's vehicle along with two other people.

Norton stated that as the men were driving down Bayers Chapel Road, they came around a curve and saw a truck sitting in the road. Norton stated that he saw Jordan standing at the back of the truck, and saw an ATV sitting in the bed of the truck. Norton saw the passenger door of the truck close when Northcutt pulled up to the truck, and stated that Jordan got into the driver's side of the truck and took off. Norton stated that the ATV fell out of the truck, and Jordan kept on driving.

Northcutt then followed the truck because Norton believed it looked like it was his father's. According to Norton, they followed the truck into Sadieville, until the truck turned the wrong way on a one-way street. The two went to Main Street in an attempt to head the truck off. Norton stated that he then saw the truck parked in the front yard of his house. Norton stated that there was a second individual in the truck when the chase began, but that the other individual was not there when Norton subsequently apprehended Jordan. Norton said he approached the truck and took the keys from the ignition and told Jordan that he had called 911. Norton said that Jordan began running, and he and the other men present chased Jordan and took him down. Norton stated that he then released Jordan, and Jordan ran from the scene.

Scott County Deputy Sheriff Nelson Muldrow then arrived on the scene and Norton provided a written statement. The next day, Norton went to the sheriff's office and viewed a photo line-up. Norton identified Jordan as the person he saw on Bayers Chapel Road with the ATV, and also in his front yard. Deputy Muldrow testified that in the early morning hours of September 9, 2009, he received a dispatch to Sadieville. Deputy Muldrow was advised that a person was pursuing a truck with an ATV in the roadway. When Deputy Muldrow arrived in Sadieville, he said he found a group of people outside yelling and excited, and a pickup truck was parked in front of a residence on Gano Avenue. The people advised Deputy Muldrow that the driver of the truck had run from the scene and Deputy Muldrow went searching for him on foot. Unable to find anyone, Deputy Muldrow returned to the scene. He stated that he was dispatched at 1:40 a.m. and arrived on the scene at 1:58 a.m.

Deputy Muldrow was then told that there was an ATV in the roadway on Bayers Chapel Road, and asked dispatch to send another deputy to that location. In the meantime, Deputy Muldrow ran the license on the truck in the yard. The truck was not reported stolen, and Jordan was listed as the owner of the vehicle. It was stipulated that Deputy Gibson was dispatched to Jordan's residence in Georgetown at 2:17 a.m. on September 9, 2009, and no one answered the door. A tow truck was then called for the ATV and the pickup truck, and the vehicles were impounded. Deputy Muldrow cleared the scene in Sadieville at 3:11 a.m., and returned to the sheriff's office until his shift was to end at 7:00 a.m.

Deputy Muldrow then stated that at around 6:05 a.m., the sheriff's office received a call from Strong reporting that his ATV was missing from his house. Deputy Muldrow said that Strong described the ATV, and it matched the description of the ATV recovered from Bayers Chapel Road. Deputy Muldrow told Strong that the ATV was currently impounded.

Deputy Muldrow also stated that when he returned to work at 11:00 p.m. on September 9, 2009, Jordan called and spoke to him. According to Deputy Muldrow, Jordan claimed that he had been driving down Bayers Chapel Road when he came across a person named "Josh" with an ATV. Jordan said that he stopped to help "Josh" and was loading the ATV into his truck when he saw headlights coming toward him. "Josh" told Jordan that men in the vehicle coming toward them had guns and wanted to kill "Josh." Jordan stated that he told "Josh" that he was leaving, and not taking "Josh" with him, but that Jordan and "Josh" both nevertheless got into the vehicle and departed.

Jordan then told Deputy Muldrow that he hit "Josh" as they were driving and that "Josh's" head hit the rear window of the truck and broke it. According to Jordan, "Josh" then jumped from the vehicle. Jordan claimed that he was on Bayers Chapel Road that night because he was going to Sadieville to visit a friend named "Mike." Jordan maintained his explanation of how he came into possession of the ATV at trial.

Below, Jordan testified that he finished working around midnight on September 8, 2009, and headed to a friend's house in Sadieville. Jordan was

driving a regular-sized pickup truck with a camper top on it. Jordan stated that it was shortly after midnight when he was flagged down on Bayers Chapel Road by an individual who said his name was "Josh," and who was in possession of an ATV. "Josh" told Jordan that it would not start because he assumed it was out of gas. Jordan offered to help him, and told "Josh" that he would be back in a few minutes because he was going to go to his friend Brian Rutledge's home to borrow a socket wrench to remove the camper top. Jordan stated that he did not take "Josh" with him because he did not need help, and only needed to remove four bolts.

Jordan stated that after removing the camper top, he returned to pick Josh and the ATV up with the intent of taking it to Josh's house. Jordan assumed that the ATV belonged to Josh, because Josh had the key. Jordan attempted to start the ATV to no avail, but stated that he shook it and discovered that it did have gas in it. He assumed that there was something wrong with it, and helped Josh to load it into the back of the truck. Jordan stated that they did not have ramps, so they backed the truck to the side of an embankment where they then rolled the ATV into the back of the truck.

Jordan stated that he then proceeded to drive off and that the ATV fell out of the back of the truck. Jordan stated that he and Josh exited the truck and were attempting to reload it when headlights came into view. Jordan states that at that point, Josh told Jordan that the ATV was stolen and that armed men inside the car were after Josh. Jordan stated that he could not believe Josh had placed him in

this predicament, and that he was scared of meeting the men with guns. Jordan got into the truck on the driver's side, and Josh entered the passenger's side. Jordan stated that he told Josh to get out but he did not. Jordan then took off, and hit Josh about four to five times with his right hand, because he was extremely upset with the situation.

While attempting to flee, Jordan called his girlfriend, Jennifer Moore, on his cell phone. Jennifer testified that Jordan was very mad when he called her, and that he told her that he had stopped to help a guy get gas for his four-wheeler, at which time the individual told him that he had stolen it and that there were guys with guns chasing him. Jennifer stated that she told Jordan to get the man out of his truck because she did not want him in trouble for something he had not done. She also told Jordan to come to her mother's house in Sadieville, where she was staying at the time, and to come up the one-way street that led to the house.

Jordan testified that at some point Josh jumped out of the truck, close to Angle Avenue in Sadieville. Jordan went up the one-way street going in the wrong direction, hoping the car would not follow him. Jordan stated that he was worried about leading the men with guns to Jennifer's mother's home, so he parked in the yard of David Norton, who lived across the street from an acquaintance, Santos. Jordan stated that he lay down in the truck, hoping he had not been followed.

Jordan claims it was an unfortunate coincidence that Norton was one of the men in the car that had been chasing him. Jordan stated that Norton grabbed

the keys to Jordan's truck out of the ignition. Jordan states that he exited the truck and repeatedly asked for his keys back. According to Jordan, Norton refused, and he was simultaneously being surrounded by three other men. Jordan feared that the men would beat him up, and asserts that Norton informed him that the "cops were coming," to which he replied, "good." Jordan states that Norton eventually grabbed him and put him in a chokehold, at which time Moore saw what was happening and pushed Norton away. Jordan asserts that rather than wait for the police, he walked away and left the truck because he was on probation and did not think the police would believe him if he tried to explain that he had not stolen the ATV.

Jordan called the police department at about 3 p.m. later the same day, September 9, 2009. He was told to call back when Deputy Muldrow would be in, sometime after 11 p.m. Jordan called Deputy Muldrow at 11:39 p.m. and asked about the truck. Muldrow spoke with Jordan concerning what had happened and asked him to come in at 8:00 the next morning to give a statement. When Jordan did not arrive by 8 a.m., Deputy Muldrow became suspicious and began the process of obtaining a warrant for Jordan's arrest. Jordan arrived shortly after 9 a.m., and gave a verbal and written statement to Deputy Muldrow. Deputy Muldrow testified at trial that there were no differences between Jordan's story on the phone and that given in his written statement.

On October 1, 20009, Jordan was arrested and charged with receiving stolen property. He was released on surety bond shortly thereafter. During that

time, Jordan worked several jobs and had custody of his son. A couple of weeks prior to trial, Jordan was living at the home of Adrian Sexton. Sexton, her husband, and her cousin, Karen Smith, had been speaking to Jordan about the upcoming trial. Jordan learned that Smith lived across the street from Norton at the time the events at issue occurred, and that Sexton was living with her at the time. Jordan now claims that he jokingly said that he wished Sexton and Smith had come out of the house or looked through a window that night, and could say that Norton had come out of his home that evening.[1] Jordan states that at the time this conversation occurred, everyone was smiling and laughing. Smith, however, alleged that Jordan offered her $2,000 if she would testify accordingly. Jordan disputes that assertion. Sexton and Jason Walker, Sexton's husband, testified that they never heard an offer of money. The Commonwealth was ultimately permitted, over defense objection, to put forth evidence of an alleged "bribe" to the jury. Jordan now asserts that the jury should not have heard this evidence.

After hearing all of the evidence, the jury found Jordan guilty of receiving stolen property, and recommended that he be sentenced to three years in prison. The jury also found Jordan guilty of being a second-degree persistent felony offender, and recommended that his sentence be enhanced to five years in prison. On November 5, 2010, the trial court entered a sentence in accordance with the jury's recommendation. It is from that conviction and sentence that Jordan now appeals to this Court.

[1] The implication, Jordan asserts, was that Norton would not have seen everything he alleged.

As his first basis for appeal, Jordan argues that the failure to grant a directed verdict of acquittal as to the charge of receiving stolen property was reversible error. He supports this argument with three assertions: (1) his conviction cannot stand because there is only a possibility that Jordan had knowledge the ATV was stolen and intent to keep it from its owner; (2) his conviction cannot stand because it is built upon insubstantial inferences; and (3) his conviction cannot stand because it is based on circumstantial evidence that could also support innocence.

First, Jordan asserts that his conviction cannot stand because there is only a possibility that he had knowledge that the ATV was stolen and intent to keep it from its owner. He argues that the evidence against him is no more than a scintilla, because it only presents the mere possibility that he received stolen property. Jordan argues that the bare fact that he was present at the scene and in possession of the ATV was not evidence of knowledge or intent to keep the property. He argues that there is no evidence that he intended to keep the ATV, and that the only witness statements corroborate his own statements. Jordan asserts that there was no confession, no admission, and ultimately no evidence.

Secondly, Jordan argues that his conviction cannot stand because it is built on insubstantial inferences.[2] He argues that a conviction that is based on

[2] These inferences include: (1) the inference that Jordan did not take "Josh" to help get his camper top off so that they could load the ATV in Jordan's truck when Jordan was taking it to Brian Rutledge's house, where Rutledge had a socket wrench and did not need "Josh"; the jury had to infer that Jordan was involved in stealing the ATV, even though witnesses saw "Josh" with Jordan at the scene; (2) from the inference that Jordan did not wait for the police after being accosted by Norton and the other men, the jury had to infer that Jordan knew the ATV was stolen

insufficient evidence as to even a single element violates due process, and that inferences lacking a strong connection to basic underlying facts are invalid.

As his final basis for asserting that his conviction for receiving stolen property cannot stand, Jordan argues that it is based upon circumstantial evidence that could also support innocence. Jordan argues that when the evidence is circumstantial, all circumstances must point unerringly toward guilt and not innocence, and do not do so in this case. Jordan argues that after viewing the evidence in the light most favorable to the prosecution, no rational jury could have found him guilty of receiving stolen property.

In response, the Commonwealth argues that the trial court properly denied Jordan's motion for a directed verdict as to the charge of receiving stolen property. It points out that there is no dispute that Jordan was in possession of the stolen ATV, and that it was for the jury to consider the evidence and weigh the credibility of the witnesses. The Commonwealth asserts that the evidence was clearly sufficient to withstand Jordan's motion for directed verdict, and that the trial court properly denied the motion.

In addressing the arguments of the parties on this issue, we note first that a trial court may direct a verdict for the defendant if the prosecution produces no more than a scintilla of evidence. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). Thus, the relevant question is whether, after viewing the evidence in

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and intended to keep it; (3) from the inference that Jordan was present with the stolen ATV, the jury had to infer that he knew it was stolen; and (4) from the inference that Jordan allegedly "bribed" a witness for the Commonwealth, the jury had to infer that Jordan must have stolen or known the ATV was stolen.

the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The standard for determining whether a directed verdict should be granted under Kentucky law is well-settled:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Further, we note that Kentucky Revised Statutes (KRS) 514.100(1) sets forth the offense of receiving stolen property as follows:

> A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

Additionally, KRS 514.110(2) provides that, "The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen." Below, there was no question that the ATV was

"recently stolen moveable property." There is also no question that Jordan was found on Bayers Chapel Road with the ATV in the road directly behind his truck. Northcutt testified that he attempted to help Jordan place the ATV into the truck before Jordan fled the scene, and Norton testified that when he and Northcutt approached the truck, Jordan was standing at the back of the truck, and the ATV was in the truck bed.

The Commonwealth directs the attention of this Court to the holding in *Brown v. Commonwealth*, 914 S.W.2d 355 (Ky.App. 1996), the holding of which we find pertinent to this matter. In finding that the trial court had properly denied a directed verdict as to a charge of receiving stolen property, this Court held that:

> Ross insists there was no proof that he knew the property was stolen. However, direct proof of knowledge is not required by our statute. KRS 514.110(2) states: "The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen." The owner testified that his bicycle was stolen on the same date it was found in Ross's possession. Furthermore, Ross fled and abandoned the bicycle when the police stopped to speak to him. This was sufficient to submit the charge of receiving stolen property to the jury. *Jackson v. Commonwealth*, 670 S.W.2d 828 (Ky. 1984) *cert. denied* 469 U.S. 1111, 105 S.Ct. 791, 83 L.Ed.2d 784 (1985).

Brown v. Commonwealth, 914 S.W.2d at 357.

At trial the testimony varied but it was for the jury to consider the evidence and to weigh the credibility of the witnesses. Contrary to Jordan's assertions, and in line with the reasoning of our holding in *Brown*, the jury was not

required to pile inference upon inference in reaching an opinion on this matter, but rather, to choose between conflicting testimony and decide which it found most credible. This the jury did, and we find no error, particularly in light of the prima facie evidence submitted by the Commonwealth below. Accordingly, we affirm, and turn now to Jordan's second basis for appeal.

As his second basis for appeal, Jordan argues that admission of testimony that he allegedly "bribed" a witness was irrelevant and more prejudicial than probative, and should have been excluded. As previously noted herein, while out on bond preceding the trial in this case, Jordan visited his friend, Adrian Sexton, at her home and discussed his case with those present. This included Jordan, Sexton, Jason Walker, and Sexton's cousin, Karen Smith.

Specifically, the parties discussed that Smith lived across the street from Norton, who identified Jordan in a photo lineup and was the only witness to give a written statement to police. Sexton had lived with Smith when the crime at issue in this matter was committed. Both Sexton and Smith testified that they had no personal knowledge of the events surrounding the alleged crime. Jordan asserts that, jokingly, he told Smith and Sexton that he wished they had looked out their window or come out on their front porch to say that they saw Norton come out of his house that night, and not from a car as the evidence submitted below indicated. Smith, however, testified that Jordan offered her $2,000 to say that Norton had come out of his home that evening, and that when she declined, he told her to think about it and that he would "do whatever it takes." Although Smith stated that

Jordan was smiling, she nevertheless took him seriously. Smith also testified that, after she received a subpoena from the Commonwealth to testify at trial, she received a call from Jordan, who had gotten her phone number from Sexton. Smith stated that Jordan told her he was joking during the prior encounter and that "they" would not let Smith testify because of her mental problems.

Below, both Sexton and Walker testified that the conversation was conducted in a joking manner and that everyone was smiling and laughing. Neither Sexton nor Walker heard any money offered. They testified that they knew Jordan was not being serious and that it was just "wishful thinking."

Nine days prior to trial, after the Commonwealth became aware of the alleged statement, it notified counsel and the trial court that it intended to introduce Smith's testimony as Kentucky Rules of Evidence (KRE) 404(b) evidence. Counsel for Jordan objected, arguing that the testimony did not pass the relevancy test of KRE 403, and that even if it did, it was more prejudicial than probative. The court nevertheless granted the Commonwealth's motion and allowed Smith to testify as to the alleged "bribe." The Commonwealth also mentioned Smith's testimony in its closing arguments during both phases of the trial. Jordan now argues that this was error, arguing both that it was not relevant, and that it was more prejudicial than probative. Jordan argues that the trial court simply admitted the evidence, and allowed mention of it multiple times, without conducting any balancing test concerning probative versus prejudicial value. Accordingly, he urges this Court to reverse.

In response, the Commonwealth argues that the trial court properly admitted evidence of Jordan's alleged attempt to bribe Smith as evidence of Jordan's consciousness of guilt. The Commonwealth argues that the evidence was admissible against Jordan pursuant to KRE 404(b) because it was relevant to show Jordan's consciousness of guilt, and because the probative value outweighed the prejudicial effect. The Commonwealth asserts that under Kentucky law, evidence of a party's attempt to bribe, threaten, or intimidate a witness has always been admissible in trial against that party. The Commonwealth argues that the trial court properly admitted evidence of Jordan's offer of money to Smith to offer false testimony, as well as of his attempt to persuade her not to testify against him after she was subpoenaed as a witness in this matter. The Commonwealth argues that this was properly admitted as evidence of guilt, and that the relevance of Smith's testimony in this matter is clear. The Commonwealth acknowledges Jordan's right to attack the weight and credibility of the evidence by calling Sexton and Walker as rebuttal witnesses, but asserts that it was then for the jury to consider the evidence and assign the weight it believed appropriate.

In addressing the arguments of the parties on this issue, we note first that appellate courts review a trial court's ruling regarding the admission or exclusion of evidence for abuse of discretion. We review this matter with that standard in mind. *Mary Breckenridge Healthcare, Inc. v. Eldridge*, 275 S.W.3d 739 (Ky.App. 2008).

Further, we note that in *O'Bryan v. Commonwealth*, 634 S.W.2d 153 (Ky. 1982), our Supreme Court affirmed the basic rule that evidence of uncharged misconduct is inadmissible stating,

> Evidence of the commission of crimes other than the one charged is admissible if, (1) it is offered to prove motive, intent, knowledge, identity, plan or scheme, or absence of mistake or accident; (2) such evidence is relevant to the issues other than proof of a general criminal disposition, and (3) the possibility of prejudice to accused is outweighed by the probative worth and need for the evidence.

O'Bryan at 156. Certainly, the burden was on the Commonwealth to establish a "proper basis before admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its inflammatory effect." *Daniel v. Commonwealth*, 905 S.W.2d 76 (Ky. 1995).

Having reviewed the record *sub judice*, and the applicable law, we are ultimately in agreement with the Commonwealth and the court below that evidence of the attempted bribe was properly admitted. Repeatedly, our courts have held that evidence that a witness has been threatened or otherwise influenced in an attempt to suppress his testimony is admissible in a criminal prosecution only where the threat was made by, or on behalf of, the accused. *Campbell v. Commonwealth,* 564 S.W.2d 528, 531 (Ky. 1978). Indeed, our courts have held that any attempt to suppress a witness' testimony by the accused, whether by persuasion, bribery, or threat, or to induce a witness not to appear at the trial or to swear falsely, or to interfere with the processes of the court is evidence tending to

show guilt. *Foley v. Commonwealth,* 942 S.W.2d 876, 887 (Ky. 1996), citing *Collier v. Commonwealth,* 339 S.W.2d 167 (Ky. 1960).

In *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998), our Kentucky Supreme Court held that evidence of an accused's attempt to bribe, threaten, or persuade a witness has "routinely" been found to be more probative than prejudicial. *Id.* at 29, 30. We believe that the trial court was within its discretion in admitting the evidence. Smith's testimony is relevant, and its probative value appears to outweigh the prejudicial effect just as similar evidence has in prior cases.[3] Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the November 5, 2010, judgment of the Scott Circuit Court, the Honorable Paul Isaacs, presiding.

ALL CONCUR.

[3] *See, e.g. Graves v. Commonwealth*, 17 S.W.3d 858, 865-66 (Ky. 2000), and *Tamme, Collier,* and *Foley*, *supra.* However, we do note that, although the court did not abuse its discretion in this case, our holding is not intended to ignore the fact that there may certainly be other reasons for a defendant to attempt to dissuade a witness from testifying. Consider the time and money necessary for defending an action, an inappropriate comment made without the benefit of hindsight concerning how it might be interpreted by others or by our courts, or a facetious comment not meant to be taken sincerely by others, as a few of many potential examples. Certainly a court must weigh many factors before finding that such a comment is more probative than prejudicial and not merely rubberstamp its admission without learned thought and analysis. The gatekeeping function of our judiciary is necessary to keep a jury from placing undue weight on a possible inference when other inferences are just as probable. Failure of our courts to guard the gate may allow a jury to assign undue weight to inferences, thereby causing great prejudice to the defendant.

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