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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001339-MR

WILEY A. DAVIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 09-CR-003417

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Wiley A. Davis has appealed from a judgment entered upon a jury verdict by the Jefferson Circuit Court convicting him of fleeing or evading police in the first degree,[1] finding him guilty but mentally ill (GBMI) of assault in

[1] Kentucky Revised Statutes (KRS) 520.095, a Class D felony.

the second degree[2] and criminal trespass in the second degree,[3] and adjudging him to be a persistent felony offender in the second degree (PFO II).[4] The jury did not convict him on a charge of robbery in the first degree.[5] He raises three allegations of error in seeking reversal of his convictions and sentence of ten years' imprisonment. Following a careful review of the record, the briefs, and the law, we affirm.

It is undisputed that Davis suffers from mental illness. He exhibits delusional and paranoid behaviors, generally believing himself to be an extremely wealthy business owner and investor,[6] being one of the smartest people on the planet, and having many enemies[7] who try to kill him because of these traits. He has been the subject of numerous mental inquest warrants and has been evaluated and treated multiple times at Kentucky Correctional Psychiatric Center (KCPC) and Central State Hospital since his 2006 release from serving a twenty-year prison term.

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[2] KRS 508.020, a Class C felony. Davis had been indicted on a charge of assault in the first degree, KRS 508.010, a Class B felony.

[3] KRS 511.070, a Class B misdemeanor.

[4] KRS 532.080.

[5] KRS 515.020, a Class B felony.

[6] At various times, Davis stated he was the owner of Ralph Lauren, Rally's, Papa John's, Long John Silver's and other nationally recognized businesses. He indicated he had been the subject of numerous magazine and newspaper articles based on his wealth, and earned $16 million per quarter.

[7] His enemies include, among many others, First Lady Michelle Obama, Senator Mitch McConnell, and former President Bill Clinton.

On September 16, 2009, after refusing to take his regular injection of medication for his mental issues, Davis left his appointment at Seven Counties Services and walked approximately twenty minutes before reaching the Bashford Manor Chase Bank. Davis entered the bank and demanded all of *his* money from Sarah Pollidor, one of the tellers. Another teller, Erin Helsenrad, recognized Davis from a previous incident wherein Davis had violently assaulted the bank's manager and broken one of his teeth, and activated the bank's silent alarm. Other employees recognized Davis and fled the area, locking doors behind them. Helsenrad reminded Davis he did not have an account with the bank and she would, therefore, be unable to give him any money. Davis became highly agitated. He menacingly asked Helsenrad why she had "pressed the button." Insisting she give him *his* money, Davis reminded her he had "already been here and arrested for punching the manager." When Helsenrad would not give him any money, Davis threatened to kill her before grabbing a glass candy dish off the counter and hurling it at her head. The dish shattered upon striking Helsenrad's head, causing minor injuries. Davis turned and walked out of the bank.

Corporate security for the bank contacted the Louisville Metro Police Department upon Helsenrad's activation of the silent alarm. Officer Kenneth Betts responded to a dispatch regarding a holdup in progress and observed Davis exiting the bank. Ofc. Betts activated his emergency equipment and began pursuit of Davis. Davis ignored Ofc. Betts' order to stop and began to run. A short foot chase ensued with Ofc. Betts chasing Davis through stopped traffic within the

shopping complex. Ofc. Betts was able to subdue and place Davis under arrest. Davis stated, "I didn't rob that bank," but admitted he had thrown a bowl at the teller because he was upset with her. Ofc. Betts indicated Davis was speaking "normally and rationally" during the encounter.

Davis was subsequently indicted on the charges outlined above. Early in the proceedings, issues surrounding Davis's competency to stand trial were raised by his counsel. In response, the trial court ordered Davis admitted to KCPC for a competency evaluation pursuant to the mandates of KRS 504.100. On October 16, 2009, Dr. Amy Trivette, a psychiatrist from KCPC, had found Davis incompetent to stand trial in a prior case. During his brief stay at KCPC, Davis did not regain competency. A competency hearing was conducted on February 12, 2010, after which the trial court found Davis incompetent to stand trial and ordered him returned to KCPC for sixty days for purposes of determining whether his competency could be regained. The trial court authorized implementation of forced medication during the stay.

Dr. Trivette again examined Davis between February 23, 2010, and April 26, 2010. After he had been medicated, Dr. Trivette noted Davis remained delusional and paranoid, but nonetheless concluded he was competent to stand trial in the instant matter. A second competency hearing was convened on June 11, 2010. During that hearing, Dr. Trivette testified that with continued medication, Davis was competent to stand trial and opined "with ongoing psychiatric treatment, Mr. Davis does have the capacity to appreciate the nature and consequences of the

proceedings against him and that he does have the ability to rationally participate in his defense." Dr. Trivette informed the trial court of the results of her psychological testing and findings from her interviews and interactions with Davis. At the conclusion of the hearing, the trial court entered an order on June 15, 2010, finding Davis had gained competency to stand trial. Defense counsel subsequently moved the trial court for funds to retain expert witnesses to assist in Davis's defense, and the motion was granted on September 20, 2010.

Davis proceeded to trial on April 23, 2012. Counsel unsuccessfully moved for another competency evaluation based on Davis's continued paranoia, delusional thoughts and bizarre behavior. Counsel alleged Davis was unable to rationally participate in his defense. During the trial, the defense expert on criminal responsibility, Dr. Dennis Wagner, testified he had examined Davis in November of 2010 and found him to be actively psychotic, irrational and largely incoherent. Although he agreed with Dr. Trivette's assessment that Davis was competent to stand trial, he opined Davis was not criminally responsible for his actions due to his severe mental illness.

The jury returned its verdict finding Davis guilty of fleeing and evading, GBMI of assault and criminal trespass, being a PFO II, and not guilty of robbery. Before the penalty phase began, the Commonwealth offered to recommend ten years' imprisonment on all counts, dismissal of the PFO II, and a wrap-up of a subsequent indictment. Davis indicated his belief that because the jury had convicted him, it must set his punishment and no "deals" could be struck.

After a lengthy explanation by counsel and the trial court that his beliefs were mistaken, Davis rejected the offer and insisted on proceeding with the penalty phase. At the conclusion of the penalty phase, the jury recommended enhanced sentences of ten years for the assault and five years for the fleeing and evading. The jury was not asked to recommend concurrent or consecutive sentencing. The trial court sentenced Davis to ten years' imprisonment. This appeal followed.

Davis raises three allegations of error in seeking reversal of his convictions and sentence. First, he contends the trial court erred in refusing to grant an additional competency hearing after observing his irrational and delusional behavior and demeanor. He next argues the trial court should have granted his motion for a directed verdict on fleeing and evading in the first degree, alleging insufficiency of the Commonwealth's evidence adduced at trial. Finally, Davis contends the trial court erred in refusing his motion for a mistrial following introduction by the Commonwealth of evidence he characterizes as prejudicial and which had been previously excluded by the trial court under KRE[8] 403 and 404(b).

Davis first contends the trial court erred in refusing to return him to KCPC for a competency evaluation. He contends the display of questionable behavior throughout the trial, including during his own testimony, was sufficient to give the trial court "reasonable grounds" to believe he lacked the capacity to stand trial. Davis contends that although the trial court found him competent in 2010—some twenty-two months prior to trial—the passage of time and his continued

[8] Kentucky Rules of Evidence.

delusional behavior was sufficient to require the trial court to *sua sponte* order another competency evaluation.

It is undisputed the trial court was presented with the issue of competency early in the proceedings against Davis based largely on his bizarre behavior and delusional beliefs. Pursuant to the mandates of RCr[9] 8.06 and KRS 504.100, the trial court properly stayed the proceedings, ordered Davis to be evaluated at KCPC, and conducted a competency hearing upon receipt of Dr. Trivette's report. The trial court determined Davis was incompetent to stand trial at that time and ordered additional treatment to determine if competency could be regained.

Following the additional treatment, the trial court convened a second competency hearing and took additional testimony and evidence. Notably, Dr. Trivette testified she had concluded Davis was competent to stand trial even though he still exhibited signs of paranoia and delusional thought processes. She opined Davis was able to appreciate the nature and consequences of the proceedings and to participate in his own defense. She noted Davis understood the functions of court personnel, the seriousness of the offenses for which he stood charged, and the differences in guilty and not guilty pleas. His objective test scores were consistent with persons generally found competent to stand trial. In light of this uncontroverted expert testimony, the trial court concluded Davis had gained competency to stand trial on the instant offenses. No challenge was

[9] Kentucky Rules of Criminal Procedure.

launched against this finding. In fact, during trial, Dr. Wagner—the psychologist expert called by the defense—agreed with Dr. Trivette's competency assessment, challenging only her opinion that Davis was criminally responsible for his actions.

Our review of the record bears out both psychologists' assessments that Davis is actively delusional and notably suffers from a mental defect. At the time of trial—some twenty-two months after he had been found competent—Davis continued to exhibit the same or substantially similar actions and demeanor as he had throughout the proceedings. His affect was slightly more subdued than at the early stages of the process, and no signs of new or different symptomology were evident. Davis does not indicate how or why the trial court should have inferred a change in his competence had occurred when, by all outward appearances, his mental status had remained unchanged since the June 2010 competency hearing. Nevertheless, Davis now argues the trial court should have ordered a *third* competency evaluation and hearing because of his "demeanor and irrationality at trial." We disagree.

Davis has simply failed to show the trial court should have *sua sponte* ordered yet another competency evaluation absent any discernible changes in his behavior. The trial court was well aware of the previous findings of the mental health professionals and the results of the psychological testing performed upon Davis and had personally observed his demeanor and affect throughout the course of the proceedings. The trial court appropriately followed the statutorily mandated procedure for determining Davis's competency to stand trial, its rulings were

clearly based on substantial evidence, no adequate challenge was raised to those findings, and we believe the trial court's decision was correct.

Davis has not pointed to any changes sufficient to cause the trial court to doubt its earlier ruling regarding his competency. No new diagnosis of mental disease or defect was presented and none of the testimony supported a finding of incompetence, especially in light of the consistent opinions on the matter by Drs. Trivette and Wagner. His extensive arguments regarding incompetency and insanity issues assume the presence of both. This clearly flows from a partisan view of the evidence.

"The burden is on the defense to prove a defendant incompetent by a preponderance of the evidence." *Alley v. Commonwealth*, 169 S.W.3d 736, 739 (Ky. 2005) (citing *Gabbard v. Commonwealth*, 887 S.W.2d 547 (Ky. 1994)). Davis did not carry this burden. The record is simply devoid of sufficient evidence to support a reasonable inference that the trial court's ruling on competency should have been revisited. Although we are sympathetic to Davis's plight and his underlying mental defects, we must be mindful not to confuse incompetency with insanity, or mental illness with criminal responsibility, as these are vastly different concepts with wholly different consequences for the criminally accused. Davis is not entitled to the relief he seeks.

Next, Davis contends the trial court erred in refusing to grant a directed verdict of acquittal on the charge of fleeing or evading police in the first degree. He alleges the Commonwealth failed to present sufficient evidence that his

act of fleeing or eluding "caused or created a substantial risk of serious physical injury or death to any person" as required under the statutory provisions necessary to sustain a conviction. Again, we disagree.

> 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.
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> 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) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Davis believes the Commonwealth failed in its burden of proving his actions of fleeing from Ofc. Betts created the substantial risk of harm required to sustain a conviction and that he was, therefore, entitled to a directed verdict. While "[a] substantial risk is a risk that is ample, considerable in degree or extent, and true or real, not imaginary. . . [and] not every hypothetical scenario of 'what might have happened' represents a substantial risk," *Bell v. Commonwealth,* 122 S.W.3d 490, 497 (Ky. 2003) (citations omitted), there is little question that, when taken in a light most favorable to the Commonwealth, a jury could conclude Davis's actions created a substantial risk of death or serious injury.

According to Ofc. Betts, during nearly a quarter-mile foot pursuit before being apprehended, Davis ran "through several businesses," crossed an access road within the neighboring shopping complex, and "zig zagged" between cars waiting at a traffic signal to exit the parking lot. Ofc. Betts stated he feared the traffic control light could change from red to green at any second during the chase and the vehicles would begin moving and strike himself or Davis. Contrary to Davis's assertion, the Commonwealth contended this evidence was sufficient to withstand a directed verdict motion because a "substantial risk" of being struck by a moving vehicle was created by Davis's actions. It further argued that being struck by a moving vehicle could—and likely would—cause serious physical injury or death. The trial court agreed and denied the motion. Based on the testimony, we believe the trial court was correct. The risk of being struck by a moving vehicle in the parking lot of a shopping complex or by an inattentive and/or impatient driver attempting to exit the complex is "ample, considerable in degree or extent, and true or real, not imaginary." *Bell*, 122 S.W.3d at 497 (citations and quotations omitted). By fleeing Ofc. Betts, Davis clearly increased this risk, placing himself, the pursuing officer, and the travelling public in harm's way. Taken in the light most favorable to the Commonwealth, the evidence presented was sufficient to overcome the motion for directed verdict and send the matter to the jury for its determination.

Finally, Davis argues the trial court erred in failing to grant a mistrial following introduction by the Commonwealth of testimony regarding the previous

bank incident wherein Davis had assaulted the bank manager. He contends eliciting this testimony directly contravened the trial court's prior ruling excluding such testimony under KRE 403 and 404(b) and its introduction was *per se* prejudicial and deprived him of a fair trial.

The trial court granted Davis's motion *in limine* to exclude evidence related to his prior criminal acts in the Chase Bank specifically including an incident in which Davis struck the bank manager and broke his tooth. Later, the trial court precluded Helsenrad from testifying about a statement Davis had made to her on September 16, 2009, referencing the prior incident. A defense motion to preclude the Commonwealth from questioning Davis about other times he had been in the bank was likewise granted. The Commonwealth was allowed to question Davis regarding the threats he made to Helsenrad during this episode, an allegation he categorically denied from the witness stand. To rebut Davis's denial of threatening Helsenrad, she was recalled to the stand and alluded to a previous incident between her manager and Davis. Davis moved for a mistrial based on the trial court's prior exclusion of such testimony. The trial court denied the motion and Davis, by counsel, rejected the court's offer to admonish the jury, insisting a mistrial was required and an admonition would not cure the alleged error. Helsenrad subsequently testified to the precise language Davis used when threatening her, including the fact that he had previously been arrested for punching her manager. *After* the jury retired, Davis renewed his motion for a

mistrial on the same grounds as previously raised. No ruling on this motion appears in the record.

Davis now contends the admission of the offending testimony "was *per se* prejudicial, allowing the jury to speculate on uncharged acts that supported and bolstered the Commonwealth's theory of the case." He argues the introduction of Helsenrad's testimony served only to inflame the jury and rendered his trial unfair. He claims this alleged error cannot be harmless and an admonition would not have cured the defect in testimony as it was so inflammatory and highly prejudicial that a reasonable probability exists the outcome of his trial was affected by its admission.

However, the Commonwealth argues the testimony elicited from Helsenrad served only to rebut Davis's claims that he had not threatened anyone while he was in the bank on September 16, 2009, and that the threatening statement—made during the commission of the crime—was inextricably intertwined with other evidence. Further, the Commonwealth avers Davis's statements were not introduced to show conformity with his prior acts and the testimony was at least partially cumulative of previously admitted evidence. Finally, it is posited Davis's refusal of an admonition constituted a waiver of any alleged error, thereby prohibiting him from complaining of any error on appeal.

"A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Bray v. Commonwealth,* 68 S.W.3d 375, 383 (Ky. 2002) (internal

citation and quotation marks omitted). "The standard for reviewing the denial of a mistrial is abuse of discretion." *Id*. "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) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)). We discern no abuse of discretion by the trial court because there was no manifest necessity to grant a mistrial.

"If an admonition is offered in response to a timely objection but rejected by the aggrieved party as insufficient, the only question on appeal is whether the admonition would have cured the alleged error." *Sherroan v. Commonwealth*, 142 S.W.3d 7, 17 (Ky. 2004).

> While it is certainly true . . . that our evidence rules generally preclude mention of a defendant's uncharged bad acts with no relevance beyond their tendency to cast a bad light on the defendant's character, KRE 404(b), it is no less true that breaches of those rules are generally subject to admonitory cures and so, generally, do not provide grounds for a mistrial. *Bray v. Commonwealth,* 177 S.W.3d 741 (Ky. 2005) (since admonition, had it been requested, would have cured improper reference to defendant's prior bad act, that reference did not necessitate a mistrial); *Johnson v. Commonwealth,* 105 S.W.3d 430 (Ky. 2003) (admonition cured improper reference to defendant's guilty plea to an unrelated offense). We have recognized two sets of circumstances in which an admonition will not be presumed to have cured an improper reference to uncharged bad acts:
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> > (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, 105 S.W.3d at 441 (citations omitted).

Jacobsen v. Commonwealth, 376 S.W.3d 600, 609-10 (Ky. 2012), as corrected (Sept. 11, 2012).

Neither of the two exceptions is applicable to the issue at bar. Even if improper, the Commonwealth's questioning of Helsenrad concerning Davis's threatening statement can in no way be seen as devastating, inflammatory, nor highly prejudicial. In a robbery prosecution, the burden is on the Commonwealth to prove a defendant used or threatened the immediate use of physical force to accomplish the charged crime. Davis's statement to Helsenrad regarding the previous incident was elicited to rebut his trial testimony that he threatened no one while in the bank. It was not introduced for an improper purpose. Further, there is every reason to believe the jury, had it been admonished to do so, would have disregarded the suggestion of a prior incident at the bank. This result conforms to the general rule that, "absent flagrant misconduct, an error by the prosecutor will warrant relief only if an admonition was requested and either denied or inadequately provided, and then only if the error was not otherwise harmless." *Id.* We discern no flagrant conduct and no indication that an admonition would not have easily cured the alleged defect. Thus, we conclude the trial court did not abuse its discretion when it denied the defense motion for a mistrial.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS, AND JOINS IN THE SEPARATE CONCURRENCE.

COMBS, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING SEPARATELY: This case is a troubling example of mental illness caught up in the criminal context. The only real hope is that appellant may receive mental health treatment during the course of his incarceration with which he very likely should not be encumbered.

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