IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2002-SC-0420-MR

DATE 7-8-04 [illegible], D.C.

JAMES HARVEY BABER, JR. APPELLANT

V.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
INDICTMENT NO. 99-CR-0085

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A McCracken Circuit Court jury convicted Appellant, James Baber, of two counts of theft by deception over $300.00, and of being a persistent felony offender in the first degree. Appellant received a total of twenty years imprisonment and therefore appeals to this Court as a matter of right. Ky. Const. §110(2)(b).

Appellant was indicted for writing two separate checks to Computer Renaissance in exchange for computer equipment, which were later dishonored by his bank due to insufficient funds. Appellant raises numerous issues on appeal, specifically that: (1) the trial court erred by not striking a juror for cause; (2) he should have received a directed verdict on one count of theft by deception over $300.00; (3) evidence of a previously dismissed indictment was erroneously admitted into evidence as a prior bad act; (4) evidence of the prior bad act was allowed into the jury room without proper foundation;

(5) the prosecutor committed misconduct by using information pertaining to a previously dismissed indictment as impeachment evidence; (6) the prosecutor, in effect, gave unsworn testimony as to Appellant's failure to appear for a previous trial; and (7) the trial court lost jurisdiction over the case when it dismissed the wrong indictment prior to trial. For the reasons set forth below, we affirm.

CHALLENGE FOR CAUSE

Appellant argues that the trial court should have struck Juror Moore for cause due to his comments regarding a defendant's right to remain silent. Specifically, when asked if the defendant's failure to take the stand would influence feelings on guilt or innocence, Juror Moore stated that he "wouldn't be very happy with it" and that he "didn't approve of it." Juror Moore also responded that his "gut feeling is they're hiding something," when defense counsel asked if he understood that there may be various reasons for a defendant to not testify. After defense counsel moved to strike Juror Moore for cause, the trial judge stated that if he were to strike Juror Moore, he would have to strike the entire panel. The court then addressed the members of the venire panel as follows:

> Ladies and Gentlemen, I don't, you know, I never know what's going to happen in one of these cases. And, I don't know, this questioning may lend itself to the idea that, that Mr. Baber may not testify. And, then again, he may testify, but the issue is this: in the event, in any criminal case where a defendant does not testify you get an instruction at the end of the trial that says, essentially, the fact that the person has exercised their right to remain silent under the Fifth Amendment is not to be used by you in any way as an inference of guilt. Is there, is there any of you who would not follow that instruction? I mean, I suppose, probably, one of the more famous cases where someone did not take the stand that we're aware of is the People of California versus Orenthal James Simpson and the jury was able to reach a verdict in that case of, of not guilty. And that's the way our system works. So surely everybody knows what the Fifth

> Amendment is with this Enron thing going on right now, I mean, I think everybody has a clue as to what that's about. But, I mean, specifically, Mr. Moore, would you follow that instruction of law even regardless of what your gut feeling may be? Would you be able to follow the law?

Juror Moore answered "yes." Appellant ultimately used a peremptory challenge to strike Juror Moore and took the stand in his own defense.

RCr 9.36(1) provides that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." It is well established that a trial court is vested with broad discretion in ruling on challenges for cause. Humble v. Commonwealth, Ky. App., 887 S.W.2d 567, 569 (1994). However, the trial court's decision of whether a prospective juror possessed a "mental attitude of appropriate indifference" must be reviewed based on the totality of the circumstances. Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 718 (1991). A juror who expresses certain views that would otherwise disqualify him, may not be "rehabilitated" by an appropriate response to the "magic question." Id.

In the present situation, Juror Moore initially indicated that he felt that a defendant who chose not to testify would be doing so because he was trying to hide something. However, after the trial court addressed the entire venire panel, Juror Moore stated that he would be able to follow the law, regardless of what his gut feeling was as to the reason behind a defendant's decision of whether to testify on his own behalf.

Appellant refers this Court to Humble v. Commonwealth, where the Court of Appeals found reversible error in the trial court's failure to excuse for cause a juror who exhibited a problem with accepting the concept of a defendant's right to remain silent.

887 S.W.2d 567. There, the juror indicated that the defendant's failure to take the stand would interfere with his judgment, and even after listening to the trial court's admonition, again stated that he "still fe[lt] this way." Id. at 569. The trial court again explained the law and asked if he could nonetheless render a not guilty verdict even if the defendant did not testify. The juror eventually stated that "[u]nder the circumstances, I believe I could . . . but it would be tough." Id. The Court of Appeals reasoned that "[the juror's] response to the court's question served only to emphasize his inability to sit impartially, disregard his opinion and apply the appropriate legal standard." Id. at 571.

Juror Moore's views on the concept of a defendant's right to remain silent are not as biased and unequivocal as those at issue in Humble. The trial court's colloquy with Juror Moore served merely to clarify "any misunderstanding without falling into the forbidden arena of using 'magic' questions to rehabilitate." Foley v. Commonwealth, Ky., 953 S.W.2d 924, 931 (1997). We are unable to say in the present case that "[t]his juror had indicated a bias so strong that the [court's] questions did not serve to remove the disqualification." Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 373 (2002) (quoting Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 255 (1993)). Accordingly, we do not believe that the trial court abused its discretion when it failed to strike Juror Moore for cause.

DIRECTED VERDICT

Appellant argues that he was entitled to a directed verdict on one count of theft by deception because he had sufficient funds in his bank account to cover a second check in the amount of $429.80 when it was presented for payment, yet the bank chose not to honor the check pursuant to its own internal policy. Appellant contends that the Commonwealth did not prove that he had the requisite intent to deprive Computer

Renaissance of property, as required by KRS 514.040, because the decision not to honor the check was within the unfettered discretion of the bank.

Appellant initially wrote a check for $873.37 to Computer Renaissance on January 29, 1999. Appellant concedes that he knew when he wrote the check that his bank account did not have enough funds to cover payment. Appellant asked the store to hold the check for a few days until he could deposit sufficient funds into his account. The next day, Appellant returned to the store and wrote another check for $429.80, again asking that it be held until February 5, 1999. Appellant made deposits of $163.00, $675.00, and $500.00 on February 1, 2, and 4, respectively. Computer Renaissance presented both checks for payment on February 2, 1999. Appellant argues that there were sufficient funds in his account to pay the $429.80 check when it was presented to the bank on February 2, but that the bank chose not to honor the check due to bank policy of honoring the largest check first. Since there were not sufficient funds to cover the $873.37 check, the bank refused to honor any subsequent smaller checks that could have been covered by funds in the account. Appellant argues that no rational trier of fact could have found him guilty of theft by deception for the second check because the decision of whether or not to honor the check was within the arbitrary discretion of the bank. We disagree.

KRS 514.040 reads in pertinent part:

> (1) A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:
>
> . . .
>
> (e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

> (4) For purposes of subsection (1) of this section, a maker of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid if:
>
> . . .
>
> (b) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after issue, and the maker failed to make good within ten (10) days after receiving notice of that refusal.

This statute creates a rebuttable presumption that the maker of a check is presumed to know that his check will not be honored if payment is refused by the bank for insufficient funds *and* he fails to make good on the check within ten days of receiving notice of the bank's refusal. Patterson v. Commonwealth, Ky. App., 556 S.W.2d 909, 910-911 (1977). This presumed knowledge satisfies the element of intent in KRS 504.040(1). Id. at 911. Accordingly, Appellant's argument that the bank exercised arbitrary discretion as to whether or not a check was honored, and therefore ultimately decided who was charged with a criminal act, must also fail. KRS 514.040 allows for the maker of the dishonored check to avoid criminal prosecution if he or she ultimately makes good on the check. Therefore, the bank's particular policies regarding the manner in which it honors presented checks do not control the initiation of criminal charges, as Appellant contends. Appellant's citation to foreign authorities holding Colorado's bad check statute unconstitutional under a similar theory is unpersuasive, as that statute did not contain a provision that allowed for the maker to honor the check in order to avoid prosecution. See People v. Quinn, 549 P.2d 1332 (Colo. 1976).

Appellant has not alleged that he did not receive notice of the bank's refusal to honor the checks; and the issue of whether or not Appellant ever attempted to make good on the checks is not addressed by either party's brief. Nonetheless, in light of the presumption created by KRS 514.040, the Commonwealth had established enough

proof of Appellant's intent to deprive Computer Renaissance of its property, thus the trial court properly denied Appellant's motion for a directed verdict.

EVIDENCE OF OTHER CRIMES

Appellant alleges that the trial court erred when it admitted evidence of other bad checks on the same bank account, and also evidence concerning a previously dismissed indictment on similar charges.

The Commonwealth offered the testimony of the owner of Centsible Rental Car, to whom Appellant had written a check on a closed bank account thirty days prior to writing the checks at issue now. The Commonwealth dismissed the prior indictment, pursuant to Martin v. Commonwealth, Ky. App., 821 S.W.2d 95 (1991), as the check was written for an antecedent debt. Appellant does not dispute the fact that he wrote the check and also concedes that he knew his bank account was closed when he did so. The Commonwealth contends that it offered evidence of this prior bad act to show intent, knowledge, plan, and absence of mistake or accident. KRE 404(b). Of course, other crimes evidence is admissible only if it is relevant for some purpose other than to show a defendant's propensity to commit a crime. Daniel v. Commonwealth, Ky., 905 S.W.2d 76, 78 (1995).

Appellant, citing to Bell v. Commonwealth, Ky., 875 S.W.2d 882 (1994), argues that the two crimes were not so "strikingly similar" as to warrant the admission of the facts surrounding the dismissed indictment.

> 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.*

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

We believe evidence that Appellant had previously written a bad check on another account was properly admitted for the purposes of proving intent and absence of mistake or accident. The evidence was primarily relevant to show Appellant's intent to deceptively deprive both merchants of their property, and also to show that writing bad checks was not the result of mere negligence or mistake. This was particularly relevant, as Appellant's main defense at trial was that he lacked the requisite intent to steal because he did not know the bank would not honor the checks. "[W]here evidence of prior bad acts is admitted for the purpose of showing intent, the prior acts need not duplicate exactly the instant charge, but need only be sufficiently analogous to support an inference of criminal intent." United States v. Benton, 852 F.2d 1456, 1468 (6th Cir. 1988).

Here, in both instances, Appellant wrote checks on accounts in which there were not sufficient funds – the main difference being that the check to Centsible Rental Car was for a debt Appellant had already procured prior to writing the cold check. We do not believe that the trial court abused its discretion in admitting this evidence for the purpose of proving intent or absence of mistake or accident, as the evidence was relevant to prove these purposes, probative of the fact that Appellant actually wrote the bad check to Centsible Rental Car, and not unduly prejudicial to Appellant. See Bell, 875 S.W.2d at 889-891. Evidence of this nature also tends to establish a pattern, plan, or scheme indicating that writing bad checks to Computer Renaissance was not the result of mere negligence or inadvertence. See United States v. Ausmus, 774 F.2d 722, 727 (6th Cir. 1985).

The Commonwealth also introduced evidence, via testimony of the bank's vice-president, that Appellant had written numerous other bad checks on the same account

subsequent to writing those to Computer Renaissance. Appellant contends that the Commonwealth failed to provide pretrial notice of its intent to introduce this evidence. The Commonwealth responds that this testimony was elicited only after Appellant questioned the witness extensively about the three deposits made in the days after Appellant wrote the checks to Computer Renaissance. Presumably, Appellant was trying to show that the deposits were the best evidence that he did not intend that the checks be dishonored. We agree that Appellant opened the door to this line of questioning when he sought to prove that he lacked the requisite knowledge that the checks would be dishonored. Appellant made much of the fact that he had made deposits sufficient to cover the two outstanding checks to Computer Renaissance. The fact that he continued to write additional checks on the account was relevant to show Appellant's intent and knowledge that the checks would not be honored. The trial court did not abuse its discretion in allowing this testimony. Parker v. Commonwealth, Ky., 952 S.W.2d 209 (1997).

AUTHENTICATION OF EVIDENCE

Appellant claims that the check written to Centsible Rental Car was improperly admitted into evidence because the Commonwealth failed to lay a proper foundation for its admission. However, a review of the record shows that defense counsel at trial objected to the introduction of the check to Centsible Rental Car only on the basis of relevancy. The issue of authentication of the check was not raised before the trial court, and therefore is not properly before this Court on review. "The appellant[] will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). Likewise, we cannot say that error, if any, has resulted in manifest injustice thereby warranting relief under RCr

10.26. Appellant contends that he did not receive the requisite notice required by KRE 902(11)(B), which authorizes self-authentication of certain business records if made available for the other party's inspection in advance. However, the jury had already heard the testimony of the owner of Centsible Rental Car identifying his endorsement on the check, and Appellant himself admitted to writing the check.

There was also no error in allowing the jury to take the check into the jury room during deliberations. RCr 9.72 states that "[u]pon retiring for deliberation the jury may take all papers and other things received as evidence in the case."

ALLEGED PROSECUTORIAL MISCONDUCT

Appellant alleges two instances of misconduct by the Commonwealth. First, Appellant seems to argue that the prosecutor used false evidence, in the form of the previously dismissed indictment, against Appellant by offering it as KRE 404(b) evidence. This argument is completely without merit and we will not address it except to say that Appellant's reliance on case law dealing with false evidence is misplaced. Here, the Commonwealth did not attempt to introduce false evidence against Appellant; it merely properly sought the introduction of prior bad acts evidence pursuant to KRE 404(b), which happened to be the subject of a previously dismissed indictment against Appellant. "Issues involving the admission of evidence or testimony, when ruled upon by the trial court, do not constitute prosecutorial misconduct." Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 806 (2001).

Appellant's second allegation of prosecutorial misconduct concerns the Commonwealth's cross-examination of Appellant. While presumably attempting to impeach Appellant's credibility by showing that he had fled to avoid prosecution, the prosecutor asked Appellant about a conversation the prosecutor had in open court with

Appellant's previous attorney. The Commonwealth initiated this line of questioning after asking Appellant if he had at any time attempted to make good on the checks to Computer Renaissance, to which Appellant replied that he had not on advice of his attorney. The prosecutor asked if this was the same attorney who had previously told the court that he was unaware of Appellant's whereabouts at the time. Appellant concedes that this issue is not preserved for appellate review and asks that we review the error pursuant to RCr 10.26.

We cannot say that the prosecutor's comments as to Appellant's failure to appear for a previous trial date amounted to palpable error affecting Appellant's substantial rights and thereby resulting in manifest injustice. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). "In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." Stopher, 57 S.W.3d at 805. The prosecutor's comments did not deprive Appellant of a fundamentally fair trial.

DISMISSAL OF WRONG INDICTMENT

Lastly, Appellant contends that the trial court lost jurisdiction to proceed against him when it mistakenly dismissed Indictment No. 99-CR-85 (containing the charges relating to the Computer Renaissance checks), rather than Indictment No. 99-CR-88 (containing the Centsible Rental Car charge). Prior to trial, the court realized that it had mistakenly listed the wrong indictment number in the Order of Dismissal. The court made the correction with a pen in open court and two days after the trial entered an Order Setting Aside Order of Dismissal. Appellant concedes that this error is not preserved. Nonetheless, Appellant's argument has no merit.

RCr 10.10 states that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders." The error here was purely a clerical error, and the trial court stated so as he was marking through the wrong indictment number. At no time was Appellant under the impression that the charges regarding the checks written to Computer Renaissance had been dismissed. The discussion accompanying the Motion to Dismiss concerned only the count relating to the Centsible Rental Car check. There was no error.

Accordingly, for the reasons stated above, the judgment of the McCracken Circuit Court is hereby affirmed.

All concur.

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