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RENDERED: AUGUST 25, 2005
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2003-SC-000777-MR DATE 9-15-05 E/N A Grau, D.C

MATTHEW M. JACKSON — APPELLANT

V.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
NO. 03-CR-00333

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Matthew M. Jackson, was convicted of first-degree robbery by complicity (three counts) and first-degree burglary by complicity (three counts). Jackson was sentenced to a total of sixty years of imprisonment. He appeals to this court as a matter of right.[1]

Raising two issues, Jackson requests that the judgment of the Warren Circuit Court be reversed and that the case be remanded to that court for a new trial. First, Jackson argues that the trial court committed reversible error in overruling his motions to excuse two prospective jurors for cause. Second, he contends that the trial court committed reversible error by admitting evidence of other crimes in violation of KRE 404(b). We affirm.

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[1] Ky. Const. § 110(2)(b).

The Warren County Grand Jury indicted Jackson on May 14, 2003 for the following charges: (1) first-degree robbery (three counts), (2) first-degree robbery by complicity (three counts), (3) first-degree rape, (4) kidnapping (six counts), (5) kidnapping by complicity (six counts), (6) first-degree burglary (three counts), (7) first-degree burglary by complicity (three counts), and (8) first-degree sexual abuse. The charges stem from three late-night robberies of Blockbuster Video stores in Bowling Green between July 2000 and October 2000. During two of the robberies, two female employees were sexually assaulted.

Jackson had previously pled guilty in the Robertson Circuit Court in Tennessee to the late-night robbery of a Nashville-area Blockbuster store after being apprehended at the scene. Jackson also pled guilty to raping a female employee of that store. The Tennessee robbery/rape occurred on October 9, 2000, five days after the last of the instant robberies. During the investigation of the Tennessee crimes, Jackson confessed to robbing several Nashville-area Blockbuster stores on June 5, 2000, and August 24, 2000. Other Blockbuster stores were also robbed in the Nashville area on July 4, 2000, and August 28, 2000. Jackson also told Tennessee authorities that he was at all three of the Bowling Green robberies, but that other people he was working with carried out the crimes. Nashville, Tennessee, is located approximately seventy miles to the south of Bowing Green, and the five Nashville robberies were similar to the three Bowling Green robberies.

Before Jackson's trial, the Commonwealth declared its intent to introduce evidence of the Nashville robberies against the defendant pursuant to KRE 404(b). Jackson objected, arguing that evidence of these crimes was so prejudicial that it would

violate his right to due process of law. The trial court overruled this objection, finding that the crimes were "signature crimes."

Jackson was tried on August 19 through August 22, 2003. During voir dire, Jackson moved to excuse Jurors 40 and 74 for cause. Both motions for excusal argued that the jurors were biased toward harsher penalties for the rape charge. The trial court overruled the motions, and as a result, Jackson was forced to use peremptory challenges to strike the jurors.

The Commonwealth began its case by introducing evidence of the Nashville robberies. At this time, Jackson asked the trial court to reconsider its KRE 404(b) ruling. When the trial court refused to alter its ruling, Jackson noted his ongoing objection to the admissibility of the evidence for the record. The Commonwealth introduced evidence of four of the five Nashville robberies before presenting any evidence pertaining to the Bowling Green robberies.

Jackson elected not to present any evidence. At the close of all proof, he moved to invoke the kidnapping exemption statute and for a directed verdict. The trial court granted the motion and dismissed the kidnapping and kidnapping by complicity charges.

A jury found Jackson guilty of three counts of complicity to robbery in the first degree and three counts of complicity to burglary in the first degree. He was acquitted of the remaining charges, including the alleged sex crimes. The jury recommended twenty-year terms of imprisonment for each count, with the robbery sentences to run concurrently with the burglary sentences for a total of sixty years imprisonment.

Jackson's first argument is that the trial court abused its discretion in overruling his motions to excuse two prospective jurors for cause. Juror 40 told the trial court that he had a daughter who sometimes worked a late-night job. He said this made him "more sensitive" to the rape charge. Defense counsel asked the juror if he could give equal consideration to lesser and harsher rape penalties. Juror 40 said this would depend on the circumstances and the evidence presented. When asked by defense counsel if he would lean toward the maximum penalty for the rape charge, the juror said "I guess." The trial court then asked Juror 40 if he could consider the full range of penalties, and he replied that he would be reasonable in light of the evidence presented.

Juror 74 has two daughters, and she told the trial court that she remembered mentioning the robberies to her children. When defense counsel asked her about the rape penalty, she said she would probably not lean toward the minimum penalty. The juror said that while she would not be afraid to impose the maximum penalty, she would not necessarily rule out the most lenient, either. The trial court concluded the questioning of Juror 74 by informing her that she should expect the Commonwealth and the defense to introduce evidence supporting harsher and more lenient penalties, respectively. She said that she would be able to consider all of the options.

The determination of whether to excuse a juror for cause is within the sound discretion of the trial court and is reviewed only for a clear abuse of discretion.[2] Jackson's assertion that the jurors indicated they might favor harsher penalties more than lesser penalties for the rape charge is correct. His argument that this preference

[2] Soto v. Commonwealth, 139 S.W.3d 827, 848 (Ky. 2004); Mills v. Commonwealth, 996 S.W.2d 473, 487 (Ky. 1999).

requires the trial court to dismiss jurors 40 and 74,[3] however, is unfounded. A defendant's right to a fair trial does not require the excusal of jurors who favor severe penalties. Rather, it requires only that the juror be willing to consider the full range of penalties.[4] This court has unanimously rejected per se disqualification of jurors "merely because a juror does not instantly embrace every legal concept presented during voir dire examination."[5] In the instant case, both jurors said they would consider the full spectrum of penalties, regardless of their preferences for harsher penalties. This is all we require.[6]

Jackson supports his position that the jurors should have been excused for cause by arguing that they were "rehabilitated."[7] But after carefully reviewing the record, we cannot agree. Neither juror indicated that they had formed opinions as to Jackson's guilt.[8] The trial court did not attempt to cleanse preconceived biases with a "magic question."[9] Instead, the jurors merely stated that they would probably favor more stringent penalties for the rape charge. They did not state that this preference would force them to automatically rule out lesser penalties. Because neither juror indicated that he or she would be unable to entertain the full range of penalties, the trial court was not required to excuse either. As a result, the trial court's questioning of the

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[3] See Shields v. Commonwealth, 812 S.W.2d 152, 153 (Ky. 1991) ("In order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any permissible punishment.").
[4] Soto, 139 S.W.3d at 849; Hodge v. Commonwealth, 17 S.W.3d 824, 837 (Ky. 2000).
[5] Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994).
[6] See Soto, 139 S.W.3d 827, 849-50; Hodge, 17 S.W.3d at 837-38.
[7] See Montgomery v. Commonwealth, 819 S.W.2d 713, 717 (Ky. 1991) (holding that jurors who would otherwise be excused because of their partiality may not be rehabilitated by a "magic question").
[8] See id. (concluding that if a juror indicates she has developed an opinion as to the defendant's guilt based on pre-trial publicity, that juror may not be "rehabilitated" by a "magic question" that asks if she can put aside this opinion).
[9] See, e.g., id.

jurors cannot be termed "rehabilitory". Accordingly, the trial court did not abuse its discretion in overruling Jackson's motions to excuse for cause.

In his second argument for reversal, Jackson submits that the trial court erred in admitting evidence of other crimes in violation of KRE 404(b). Jackson contends that the admissibility of this evidence constitutes a violation of his due process rights guaranteed by state and federal law. This issue is properly preserved by Jackson's pre-trial objection to the KRE 404(b) evidence and his renewed objection to that evidence at trial. As a result, we review for reversible error.

The relevant portion of KRE 404(b) reads:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
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> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accidence; or
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> (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.

This court has long interpreted KRE 404(b) and the preceding rules governing other crimes evidence as exclusionary in nature.[10] This construction is justified by the danger of prejudice to the defendant inherent in evidence of other crimes. Specifically, there is a concern that evidence of other crimes or bad acts may lead the jury to convict a defendant because of poor character or a criminal predisposition.[11] As a result,

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[10] See Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994) ("[T]he thrust of KRE 404(b) has always been interpreted as *exclusionary* in nature."); Jones v. Commonwealth, 303 Ky. 666, 198 S.W.2d 969, 970 (1947) ("[E]vidence that a defendant on trial had committed other offenses is never admissible unless it comes within certain exceptions, which are well-defined in the rule itself.").

[11] See Bell, 875 S.W.2d at 889.

evidence of other crimes or bad acts will only be admissible if there is an applicable exception to the general rule of exclusion and if the evidence's probative value outweighs its prejudicial effect.[12]

The Commonwealth has the burden of showing the applicability of an exception and establishing that the probative qualities of the evidence outweigh any of its inflammatory effects.[13] In the case at bar, the Commonwealth argues that the other crimes evidence is admissible under KRE 404(b) as evidence of "signature crimes." Although KRE 404(b)(1), which is classified as "illustrative rather than exhaustive,"[14] fails to enumerate this exception, Kentucky law allows for the introduction of "evidence of other bad acts to prove a common scheme or plan" if it is "so similar to the charged offense that it constitutes a 'signature crime.'"[15]

In determining whether prior crimes constitute "signature crimes," "this Court has placed emphasis upon common facts, and has held that the facts of the prior bad acts must be so similar as to indicate a reasonable probability that the acts were committed by the same person."[16] In other words, the evidence of the other crimes must be relevant for some purpose other than to prove the criminal disposition of the defendant, and it must be sufficiently probative of the defendant's commission of the other crimes.[17]

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[12] Id.
[13] Daniel v. Commonwealth, 905 S.W.2d 76, 78 (Ky. 1995).
[14] Barth v. Commonwealth, 80 S.W.3d 390, 403 (Ky. 2001) ("It is hardly worth repeating that this list of permissible purposes is illustrative rather than exhaustive.").
[15] Commonwealth v. Maddox, 955 S.W.2d 718, 722 (Ky. 1997) (quoting Rearick v. Commonwealth, 858 S.W.2d 185 (Ky. 1993)).
[16] Id.
[17] See Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994) (outlining a three-pronged inquiry to determine the admissibility of KRE 404(b) evidence).

There are a number of factual similarities between the Tennessee crimes and the charged crimes. Between June 5, 2000, and October 9, 2000, eight Blockbuster Video stores were robbed, five in the Nashville area and three in Bowling Green. Witnesses to each robbery testified that the perpetrator was an African-American male and wore either camouflage or dark clothing, a ski mask and glasses. He surprised the store clerks as they were closing the store at the end of their shifts. The perpetrator used a small chrome or silver gun and ordered the employees to not look at his face. He routinely commanded the employees to turn off the store alarm and refrain from pushing the panic button. The employees were ordered to open the store safe and place its contents in a bag the perpetrator brought with him. The perpetrator asked for the store security tapes at each robbery. After this, the robber ordered the employees into a room and told them not to leave.

Female employees were working at three of the stores. During each of these robberies, two of which occurred in Bowling Green, the perpetrator ordered one of the female employees to take off her clothes and lie down. In each instance, he then inserted the barrel of his gun in each woman's vagina.

These facts show a striking similarity between the Tennessee robberies and the charged crimes. The modus operandi is the same, the target (Blockbuster Video) is the same, and the robberies occurred during the same period of time. Accordingly, the evidence is relevant for some reason other than to show the defendant's criminal disposition. From the evidence that Jackson committed the Tennessee robberies and that the modus operandi for the Tennessee robberies was strikingly similar to the Bowling Green robberies, a juror can draw the inference that Jackson committed the charged crimes.

There can be little question about the probativeness of the evidence. Tennessee law enforcement officials apprehended Jackson at the scene of the eighth and final robbery. He pled guilty to that crime and to raping a female employee during the course of the robbery. During the investigation of that crime, Jackson confessed to two of the other Nashville-area robberies. Although the defendant did not confess to the two other Tennessee robberies, their modus operandi "is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person."[18]

With the relevancy and probativeness tests satisfied, our inquiry is now whether the potential for prejudice from the use of the other crimes evidence substantially outweighs its probative value.[19] The balancing of the probative value of the other crimes evidence against the potential for undue prejudice is reserved to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse.[20]

Jackson attacks the Commonwealth's decision to introduce evidence of five of the six Tennessee robberies before introducing any evidence of the charged crimes. Citing Mack v. Commonwealth, he argues that evidence of the charged crimes should have been presented first and that this order of proof "invites prejudicial error."[21] However, the cited portion of that opinion was merely advisory because the case was

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[18] Adcock v. Commonwealth, 702 S.W.2d 440, 443 (Ky. 1986).
[19] Bell, 875 S.W.2d at 890.
[20] Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).
[21] 860 S.W.2d 275, 278 ("That order of proof invites prejudicial error by precluding the trial court from judging the admissibility of the prior-acts evidence according to its degree of similarity to evidence introduced on the present charge.").

reversed and remanded on other grounds.[22] The opinion is not considered binding on the order of proof for 404(b) evidence.[23]

The issue addressed in the portion of Mack cited in Jackson's brief is the need for the trial court to confirm that a proper foundation has been established for the introduction of prior crimes evidence.[24] One way to do this, of course, is to require the Commonwealth to introduce evidence of the charged crimes first. This requirement is unnecessary, however, if the trial court is satisfied that a proper foundation exists. Such was the scenario in the instant case. The record indicates that the trial court carefully considered evidence of the charged crimes and the Tennessee crimes. At the beginning of the trial, Jackson asked the trial court to reconsider its pre-trial decision to admit the 404(b) evidence. The trial court overruled the objection stating, "In my tenure on the bench, I've never encountered any closer to 'signature crimes' than those described in this set of facts." Accordingly, the trial court's decision to allow the Commonwealth to present evidence of the Tennessee robberies was not an abuse of discretion.

The judgment of the Warren Circuit Court is affirmed.

All concur.

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[22] Id.

[23] R. Lawson, The Kentucky Evidence Law Handbook, § 2.25[3][b], at 128 (4th ed. LexisNexis 2003) ("The Kentucky Supreme Court has not spoken to the issue of when such evidence may be introduced, which means that trial courts must determine if issues are genuinely in dispute without benefit or hindrance of rigid rules . . . .").

[24] Mack, 860 S.W.2d at 278 ("Those portions were fortuitously harmless, but their erroneous admission demonstrates the necessity of providing a proper foundation for such evidence.").

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