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RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2009-SC-000344-MR



LARRY LEE DAVENPORT, II — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
NO. 08-CR-00157

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Larry Lee Davenport, II, appeals as a matter of right from a May 6, 2009 Judgment of the Daviess Circuit Court convicting him of three counts of robbery in the first degree and one count of assault in the second degree. The court sentenced Davenport to twenty-five years imprisonment. Davenport was accused of robbing two convenience stores in Owensboro on January 22, 2008 and of criminal attempt to commit murder. On appeal, Davenport contends that the trial court committed reversible error when it denied his motion for a mistrial and instead admonished the jury after a witness referenced Davenport's prior "trouble" with the law and jail time. Finding no reversible error, we affirm.

## RELEVANT FACTS

Two convenience stores in Owensboro were robbed on January 22, 2008. The first robbery occurred at 6:15 p.m. at a store located at the intersection of Eighteenth Street and Leitchfield Road. An armed man entered the store, demanded money, fired a shot that hit the wall, and fled with $500.00 cash. The second robbery occurred at 11:45 p.m. at a store located at the intersection of Fifth Street and Crabtree Road. Two men entered the store and the taller and thinner of the two, armed with a gun, demanded money. He fired a shot into the ceiling and then shot Robert Ashby, a clerk who was getting off his shift when the robbery occurred, in the leg when Ashby refused to give up his wallet. The robbers fled the store with $50.00 cash.

Owensboro Police Lieutenant Tim Clothier testified that early in the morning on January 23, 2008 he observed a vehicle that appeared to be occupied by two black men. After following the vehicle for several blocks and seeing it swerve back and forth, Lt. Clothier made a traffic stop. It turned out there were five people in the car; Davenport was sitting in the middle of the back seat. After discovering that the driver's license was suspended, Lt. Clothier arrested the driver and searched the vehicle. During the search, an officer discovered a black .22 revolver under the seat where Davenport had been sitting. Davenport told the police he found the gun behind the convenience store at Fifth Street and Crabtree Road on the night of January 22, 2008 and denied any involvement in the robberies. Owensboro Police officer Steve Smith testified that two officers and a trained police dog conducted

a thorough search of the premises immediately after the robbery and did not find a gun, or anything else, behind the store.

This gun and the bullets recovered from the scene and from Ashby's leg were sent to the Kentucky State Forensic Laboratory, but the firearms expert could not definitively match the bullets to the gun. The expert testified that, while the bullets from the robberies had similar physical characteristics to "test" bullets fired from the gun, a conclusive match could not be made because the gun did not leave unique marks on any bullets.

The video surveillance tapes of the robberies played to the jury showed one of the robbers wearing a black coat with a large Nike "swoosh" mark on the back and a smaller "swoosh" mark on the hood. The police recovered a jacket with a large Nike "swoosh" on the back and a smaller "swoosh" on the hood from the apartment of Kelsey Dixon and Anthony Higgs, friends of Davenport. Davenport told the police the coat belonged to him. Dixon and Higgs also testified that the coat belonged to Davenport, but noted that a few other people had worn the jacket on occasion; however, Dixon stated she had not seen anyone other than Davenport wear the coat since December, 2007.

Anthony Higgs testified that on the day of the robberies Davenport told Higgs he was going to "hit a lick"[1] later that day and showed Higgs a gun he was carrying. Later that same day, Davenport told Higgs he had indeed "hit a lick." Higgs also testified that, on January 23, 2008, he, Davenport and a few

[1] Owensboro Police Lieutenant Tim Clothier testified that to "hit a lick" means to commit a crime.

other people were watching television when a story about the robberies came on the news. Higgs stated that, after the news ended, Davenport bragged about having committed the robberies.

Owensboro Police Detective Mike Walker interviewed Davenport at the police station after Davenport was arrested. Det. Walker testified that throughout the interview Davenport asked hypothetical questions, such as "If I was the person who did this, could I get ten years? I think ten years is fair" and "How can they charge anybody with attempted murder because the person shot down like this (made a hand motion with a gun pointing downwards) instead of like this (made a hand motion with a gun pointing straight ahead)?" Det. Walker testified that such information had not been released to the public.

Donta Johnson, a longtime friend of Davenport's, was charged with robbing the second store and pled guilty to two counts of armed robbery in the second degree. At his plea hearing, Johnson told the judge under oath that Larry Davenport was his accomplice in the robbery. At trial, Johnson's testimony was convoluted and he made several contradictory statements. First, when asked by the Commonwealth who was with him when he robbed the store, Johnson was quiet for a long time before finally saying that he could not remember because he was under the influence of drugs and alcohol at the time of the robbery. However, Johnson was able to remember other details from the night of the robbery, such as the coat he wore, that he covered his mouth with a white bandana, and that his accomplice shot someone in the leg when the man would not turn over his wallet. Second, when Johnson's earlier

statement from the plea hearing, identifying Davenport as his accomplice, was read back to him at trial, Johnson testified that the statement was true when he made it. However, Johnson later testified that the statement was not true and he had lied to the police and the judge.

Kelsey Dixon testified on the first day of the trial regarding her relationship with Davenport. Her testimony is the crux of Davenport's appeal. When asked to characterize her relationship with Davenport, Dixon testified that she cared for Davenport because he did not have anyone since he was "always in trouble," but that "out of jail" they did not have a much of a relationship. When asked how often she had seen Davenport around the time of the robberies, Dixon stated, "[H]e comes to our house every single day because we were, he, uh, basically, I mean, he's been locked up his whole life . . . ." Defense counsel made no objection to the first two statements but objected to the third statement as impermissible KRE 404(b) evidence and moved for a mistrial. The Commonwealth's attorney said this information had never come up in prior conversations with Dixon and thus the statements were totally unexpected. The judge denied the motion for a mistrial and admonished the jury that it was not to consider Dixon's last statement.

On appeal, Davenport argues that Dixon's testimony was so prejudicial that it prevented him from receiving a fair trial and, thus, a mistrial was required. Dixon's final statement, that Davenport was "locked up his whole life," is the only issue preserved for appeal. Any error in the other two statements made by Dixon was not preserved and those statements are

reviewed under the palpable error standard pursuant to RCr 10.26. We first address the issue of whether the court erred in denying Davenport's motion for a mistrial after Dixon stated that Davenport was "locked up his whole life."

## ANALYSIS

### I. The Court's Denial of Davenport's Motion For a Mistrial Was Not Reversible Error.

On appeal, Davenport argues extensively that Kelsey Dixon's statement that Davenport had been "locked up his whole life" was impermissible KRE 404(b) evidence. Under KRE 404(b), evidence of other crimes, wrongs, or acts may not be admitted to prove a person's character and that he or she acted in conformity with that character on a particular occasion. However, such evidence may be admitted as either (1) proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or (2) if the evidence is "inextricably intertwined" with other evidence essential to the case so that the two can not be separated without serious adverse effects. KRE 404(b).

We agree with Davenport that Dixon's statement was impermissible KRE 404(b) evidence because Dixon's statement does not fall under either KRE 404(b) exception. However, this particular argument is misplaced because the trial court did not rule that Dixon's statement was admissible. The Commonwealth did not intend to solicit such a response nor did it expect Dixon to discuss Davenport's prior crimes or bad acts. The defense promptly objected to Dixon's statement and, while the court denied the motion for a mistrial, it agreed that the evidence was impermissible and admonished the

jury accordingly. The issue, then, is not whether the evidence was admissible, as it clearly was not admissible, but instead whether the admonition cured the erroneous testimony so that a mistrial is not warranted.

A mistrial is an extreme remedy that is warranted only when the record reveals "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Commonwealth,* 694 S.W.2d 672, 678 (Ky. 1985) (*quoting Wiley v. Commonwealth,* 575 S.W.2d 166 (Ky. App. 1978)); *see also Sherroan v. Commonwealth,* 142 S.W.3d 7, 17 (Ky. 2004). The occurrence complained of must be of such magnitude that the litigant would be denied "a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould v. Charlton Co.,* 929 S.W.2d 734, 738 (Ky. 1996). There is a well-established presumption that the jury will follow the trial court's admonition, which usually cures any harm caused by the occurrence. *Sherroan, supra* (*quoting Alexander v. Commonwealth,* 862 S.W.2d 856, 859 (Ky. 1993)); *Graves v. Commonwealth,* 17 S.W.3d 858, 865 (Ky. 2000). This presumption is overcome in only two situations: (1) when an overwhelming probability exists that the jury is incapable of following the admonition *and* a strong likelihood exists that the impermissible evidence would be devastating to the defendant; or (2) when the question was not premised on a factual basis *and* was "inflammatory" or "highly prejudicial." *Johnson v. Commonwealth,* 105 S.W.3d 430, 441 (Ky. 2003). When evidence of prior crimes or bad acts is "introduced into evidence through the non-responsive answer of a witness, this [C]ourt must look at all of the evidence and determine whether the defendant has been

unduly prejudiced by that isolated statement." *Phillips v. Commonwealth*, 679 S.W.2d 235, 237-38 (Ky. 1984). The trial court has broad discretion to determine whether to grant a mistrial, *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005), and that court's decision should not be disturbed on appeal absent an abuse of discretion. *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005).

Davenport does not argue that the admonition was insufficient or that the jury should not be presumed to have followed the admonition. Instead, Davenport argues that Dixon's statement is analogous to either the jury being shown booking photographs of him or of him being seen by the jury in handcuffs and shackles. We do not agree that the situations are analogous, but find the situation before us is as it appears to be: namely, inadmissible KRE 404(b) evidence was inadvertently introduced at trial and was dealt with by the trial court through an admonition. Having reviewed the record, we find that the trial court did not abuse its discretion in denying the motion for a mistrial and choosing to instead give an admonition to the jury. Given the totality of the evidence, which overwhelmingly pointed to Davenport as being involved in both robberies and as the person who shot the clerk in the second, Davenport was not unduly prejudiced by Dixon's statement. Any harm caused by Dixon's statement was cured by the trial court's admonition to the jury.

The presumption that an admonition cures any harm has not been overcome because neither *Johnson* exception is met in this case. Applying the first *Johnson* exception, there is no reason to think that the jury could not

follow the admonition or that Dixon's remarks would be "devastating" to Davenport. 105 S.W.3d at 441. There is nothing in the record to rebut the presumption that the jury would heed the admonition to disregard Dixon's remarks and, given the evidence presented by the Commonwealth, it cannot be said that there is a strong likelihood that Dixon's brief and undetailed remarks were devastating to Davenport. *See, e.g., Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006) (finding the admonition sufficient to cure any harm caused when the Commonwealth played the defendant's taped statement, in which he mentioned being in jail and on probation); *Matthews,* 163 S.W.3d at 17 (holding that the trial court did not abuse its discretion in denying the motion for a mistrial after a witness testified that she had not long known the defendant because, "he hadn't been out of prison that long."); *Bray, supra,* (holding that prejudicial effect was not sufficient to warrant a mistrial when the prosecutor pointedly asked the defendant on cross-examination, "Didn't you call [the victim's boyfriend] on the phone and threaten him?").

Nor does the second *Johnson* exception apply. Not only did the question have a factual basis, but Dixon's remarks were not responsive to the question. *See Sherroan,* 142 S.W.3d at 17 ("Both remarks were unsolicited . . . so the requirement that the impermissible testimony originate from a question lacking a factual basis is unmet"). Nor do we find the remarks inflammatory or highly prejudicial. Dixon's comments were made in passing, not in response to a question alluding to Davenport's criminal history, and the comments were vague and unspecific, not referring to any particular crime or bad act. *Id.*

("[T]he testimony was not "inflammatory;" both references to Appellant's probation lacked any description of the underlying offense.") Any prejudice caused by Dixon's statement was cured by the trial court's admonition to the jury.

Davenport relies on *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992), and the unpublished opinion in *Byrd v. Commonwealth*, 2007-SC-000923-MR, 2009 WL 2706747 (Ky. Aug. 27, 2009), to support his argument that the broad statement that he had been "locked up his whole life" created a manifest necessity for a mistrial. In *Funk*, we held that the evidence of prior misconduct was unduly prejudicial. 842 S.W.2d at 480-81. In that case, the defendant was convicted of involuntary manslaughter of a young girl and argued on appeal that the trial court erred in admitting evidence of a prior offense through the testimony of a police officer, the examining physician in the prior crime, and the mother of the victim in that prior crime. *Id.* The court admitted extensive and detailed testimony by all three witnesses, much of which was irrelevant and hearsay. *Id.* In *Byrd*, we held that the cumulative effect of the KRE 404(b) testimony from three of the Commonwealth's witnesses warranted a mistrial. *Byrd, supra.* During Byrd's trial for drug trafficking, two detectives and a key witness made specific statements, on four separate occasions throughout the trial, about Byrd's general criminal history and his history of drug trafficking. *Id.* The trial court rejected the defense's motions for a mistrial and instead admonished the jury in two of the instances. *Id.*

Davenport argues that his case is similar to *Byrd* and *Funk* because in his trial there were also multiple references to his prior crimes and bad acts and, specifically, the statement that he had been "locked up his whole life" was overkill. We are not persuaded by Davenport's argument and find *Byrd* and *Funk* distinguishable from the case *sub judice*. In *Funk*, unlike in Davenport's case, the trial court actually admitted the testimony, which was deliberately solicited, extensive, detailed, and made by three separate witnesses. The court in *Funk* found the testimony to be overkill because the purpose of the testimony was to establish identity under KRE 404(b)(1) and the testimony given was far more than what was necessary to establish such identity. In *Byrd*, unlike in Davenport's case, the statements were made by three separate witnesses throughout the prosecutor's case; were more than passing, unresponsive comments; and were specifically about drug trafficking, the crime with which Byrd was charged. Moreover, the trial court failed to give an admonition in two of the instances to remedy the harm caused by the statements. In *Byrd*, we stated, "Had there been only an isolated reference to other drug deals by Byrd, we agree that the admonition would have been sufficient to cure any resulting prejudice." *Byrd, supra*, (citing *Matthews, supra*. Here, the admonition was sufficient.

**II. Dixon's Two Other Statements About Davenport's Prior Crimes And Bad Acts Do Not Constitute Palpable Error.**

Dixon's two other statements about Davenport's prior crimes and bad

acts – he was "always in trouble" and "out of jail we didn't have much of a relationship" – do not warrant a reversal. Any error in admission of these statements was unpreserved and so we review them under the palpable error standard of RCr 10.26. Under that rule, we may only grant relief for an unpreserved error when the error is (1) palpable; (2) affects the substantial rights of a party; and (3) has caused a manifest injustice. *Commonwealth v. Jones,* 283 S.W.3d 665, 668 (Ky. 2009). The standard is not met in the present case because, even assuming the statements were subject to KRE 404(b), they were not so prejudicial as to bear upon Davenport's substantial rights, and they came nowhere near rendering Davenport's trial manifestly unjust.

**CONCLUSION**

In sum, the trial court did not abuse its discretion in refusing to grant a mistrial. The trial court's admonition to the jury cured any harm caused by Dixon's statements about Davenport's prior crimes and bad acts. There is simply no evidence suggesting that the jury could not or did not heed the admonition. Finally, given the totality of the evidence, Davenport was not unduly prejudiced by the statements and there was no manifest or real necessity for a mistrial. Accordingly, we affirm the May 6, 2009 Judgment of the Daviess Circuit Court.

All sitting. All concur.

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