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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: DECEMBER 16, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000082-MR

DERRICK HELM — APPELLANT

V.

ON APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
NO. 08-CR-00064-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Derrick Helm, stands convicted of Complicity to Trafficking in a Controlled Substance, First Degree, First Offense, and Persistent Felony Offender in the Second Degree. For these crimes, Appellant was sentenced to twenty years' imprisonment. He now appeals to this Court as a matter of right pursuant to the Kentucky Constitution. Ky. Const. § 110(2)(b).

I. Background

On March 6, 2008,[1] the Kentucky State Police, with the help of a cooperating witness, Brian Thomas Rice, set up a controlled buy in Lincoln County, Kentucky, so as to collect evidence implicating Appellant in the sale of

[1] There was a previous attempt to conduct a controlled buy between Appellant and the cooperating witness on March 3, 2008. However, Appellant never followed through with the sale.

contraband. At the instruction of the police, Rice contacted Appellant, and informed him that he and a friend wanted to buy a "bill."[2] Appellant told Rice to rendezvous with him in Stanford, Kentucky, near a local motorcycle shop.

Shortly after arriving at the meeting point, a vehicle pulled into the parking lot, but the driver, however, was not Appellant. Recognizing the driver, the cooperating witness immediately approached and inquired "Where's Derrick?" In response, the driver stated "he sent me up here." The cooperating witness then exchanged his one-hundred dollars for a bag of cocaine.

Subsequently, a grand jury indicted Appellant for Complicity to Trafficking in a Controlled Substance, First Degree, First Offense. Appellant pled not guilty, and the matter proceeded to trial on October 26, 2009.

Prior to trial, the Commonwealth moved the trial court to allow the introduction of certain KRE 404(b) testimony from the cooperating witness regarding prior drug transactions between himself and Appellant. Specifically, the Commonwealth asked that the cooperating witness be allowed to testify that he lived with and bought cocaine from Appellant for approximately three months prior to the March 6th transaction. The Commonwealth asserted that these prior acts tended to prove, inter alia, motive, opportunity, intent, knowledge and absence of mistake. The trial court granted the Commonwealth's motion over Appellant's objection.

During trial, the Commonwealth peremptorily struck juror 155—the lone remaining black juror. In response, Appellant challenged the Commonwealth's

---

[2] The term "bill" is slang for one hundred-dollars worth of cocaine.

strike pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), but was overruled after the trial court found that the Commonwealth recited sufficient race-neutral reasons supporting the peremptory strike.

Appellant now contends that the trial court committed reversible error in both its rulings regarding the 404(b) evidence and the *Batson* challenge. Finding no error, we affirm.

II. Analysis

A. KRE 404(b)

Appellant contends that the trial court abused its discretion and violated KRE 404(b) by admitting evidence of prior cocaine purchases between himself and the cooperating witness. Attempting to distinguish our decision in *Walker v. Commonwealth*, Appellant argues that because the cooperating witness testified "very vaguely and generally to occasions that he obtained cocaine from the Defendant," the testimony should have been excluded. *See Walker v. Commonwealth*, 52 S.W.3d 533 (Ky. 2001). He further contends that this evidence "could only have been intended to expose the character of [Appellant] on prior occasions and to show that on [the date in question] he acted in conformity therewith," and thus was in violation of KRE 404(b). Furthermore, Appellant asserts that the testimony's undue prejudice substantially outweighed its probative value.

The Commonwealth responds by noting that Appellant placed his intent directly in issue in his opening statement and thus argues that this case falls

within the confines of our decision in *Walker*. The Commonwealth further avers that the testimony was necessary, inter alia, to explain to the jury that Appellant had knowledge of the transaction—specifically, knowledge regarding the use of the word "bill" to refer to cocaine and that the two used the word in their previous transactions. Thus, as posited by the Commonwealth, because KRE 404(b) permits the introduction of evidence of prior acts to show "knowledge," the previous cocaine transactions were properly admitted. Moreover, the Commonwealth asserts that the prior acts were relevant to prove intent, as Appellant placed the issue in genuine dispute.

KRE 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;

We have long interpreted this rule as "exclusionary in nature," and as such have cautioned trial courts that "any exceptions to the general rule that evidence of prior acts is inadmissible should be 'closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.'" *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007) (*quoting O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky.1982)). However, a trial court applying this rule has the discretion to admit other instances of misconduct so long as (1) the evidence is relevant, (2) the evidence is probative of an issue

other than propensity or conformity (3) the evidence's prejudice does not substantially outweigh its probative value. *Muncy v. Commonwealth*, 132 S.W.3d 845, 847 (Ky. 2004) (*quoting Parker v. Commonwealth*, 952 S.W.2d 209, 213 (Ky. 1997)).

In addition to this three-pronged inquiry, when a party attempts to admit 404(b) evidence for purposes of intent, as here, we require a fourth inquiry and thus question whether the issue of intent is in genuine dispute. *Walker*, 52 S.W.3d at 536 (*citing* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25, p. 98 (3d ed 1993)).

With these four questions in mind, we turn to the case at bar, and address whether the trial court abused its discretion by admitting the testimony.

1. Genuine Issue of Intent

As stated above, before a party may introduce prior acts so as to prove intent, the issue must be in genuine dispute. In *Walker v. Commonwealth*, this Court questioned whether the Commonwealth could introduce a prior drug transaction—which occurred one day before events giving rise to the crimes charged—to prove intent in that case. 52 S.W.3d 533. In answering in the affirmative, we concluded: "[The appellant's] 'mere presence' defense that attacked both the possession and intent to sell elements of the trafficking charge certainly placed the issue of intent to sell in dispute." *Id.*

We based our decision in *Walker* on the notion that

> "When a defendant raises the issue of mental state, whether by a 'mere presence' defense that specifically challenges the mental element of the government's case *or by means of a general denial* that forces the government to prove every element of its case, prior bad acts evidence is admissible because mental state is a material issue."

Id. (*quoting United States v. Thomas*, 58 F.3d 1318 (8th Cir. 1995)) (emphasis added). With this premise in mind, we now address whether Appellant's intent was in genuine dispute in this case so as to merit the introduction of the prior acts.

Here, Appellant specifically asserted in opening statements that he had nothing to do with the transaction, i.e., he asserted a general denial.[3] Moreover, Appellant later testified that he had no idea that the cooperating witness was referring to cocaine when he used the term "bill," and believed the cooperating witness was referring to money Appellant owed for mechanic work. Thus, Appellant testified that he did not intend to sell drugs when he conversed with the cooperating witness, and that he had no knowledge that the conversation encompassed a specific cocaine sale. Under the facts of this case,

---

[3] Although not dispositive, we are mindful that KRS 502.020 required the Commonwealth, much as in *Walker*, to prove Appellant's intent. KRS 502.020 provides, in part,

> 1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense . . . .

we hold that Appellant indeed placed his intent and knowledge in genuine dispute. Thus, we find no error in this regard.

2. Relevancy

Having determined that Appellant placed his intent and knowledge in genuine dispute, we must now determine whether the prior acts were relevant to the issues of intent or knowledge—essentially whether the prior acts are relevant to prove something other than propensity or conformity. KRE 404(b). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

In *Walker*, we held that the prior drug transaction was relevant because it "tended to make it more probable that [the appellant] intended to sell the drugs in his possession." *Walker*, 52 S.W.3d at 537; *see also United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978). We again hold that prior acts such as those in this case, in light of the charges alleged, are relevant as showing "that because the defendant had unlawful intent in the [the first drug sale], it is less likely that he had lawful intent in [this drug sale]." *Walker*, 52 S.W.3d at 537 (*quoting Beechum*, 582 F.2d at 3911). Furthermore, we believe that the prior acts testimony in this case tended to prove that Appellant had knowledge that the cooperating witness wanted to set up a drug buy when he used the term "bill" in the conversation as a result of the prior course of dealings—particularly because the cooperating witness testified that the two

used the word to mean cocaine during their prior transactions. Thus, we conclude that the prior acts testimony was relevant to intent and knowledge—issues outside 404(b)'s prohibition on propensity and conformity.

3. Probative Value and Undue Prejduice

Notwithstanding the above 404(b) analysis, when evidence is properly admitted to prove something other than propensity or conformity and the evidence is relevant to that end, a court still must evaluate the acts and determine whether its admission is so unduly prejudicial such that the probative value is substantially outweighed. KRE 403. Where the undue prejudice substantially outweighs the evidence's probative value, it should be excluded. *Id.*

i. Probative Value

The probative value of evidence "relates to whether there is sufficient evidence that the 'other crime, wrong, or act' actually occurred." *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004). We opined in *Davis* that probativeness "is resolved under KRE 104(b) . . . by admitting the evidence if the jury could reasonably conclude that the act occurred and that the defendant was the actor." *Id.* at 725 (*citing Bell v. Commonwealth*, 875 S.W.2d 882, 889-91 (Ky. 1994)); see also *Huddleston v. United States*, 485 U.S. 681, 689 (1988); *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (1997). *See also* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25, p. 131 (4th ed. 2003) (construing *Parker v. Commonwealth* as standing for the proposition

that "other crimes evidence is sufficiently probative to be admitted if the trial judge believes the jury could reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts."). Thus, in this case, we must answer whether a "jury could reasonably conclude that the act occurred and that the defendant was the actor." *Davis*, 147 S.W.3d at 725.

Here, Appellant argues that the cooperating witness's testimony was vague, general, and without sufficient corroborative evidence so as to be reliable. As a result of the allegedly unreliable nature of the testimony, Appellant avers that there is insufficient evidence to support its probative value.

The Commonwealth responds by noting that this Court has held uncorroborated testimony sufficient to support a conviction. *Hodge v. Commonwealth*, 17 S.W.3d 824, 841 (Ky. 2000). Therefore, as posited by the Commonwealth, since a conviction may be upheld based solely on uncorroborated testimony, "an even stronger argument exists that the jury may reasonably conclude from [the cooperating witness's] testimony that the prior drug sales took place." We agree with the Commonwealth.

Recently, this Court upheld a conviction that largely relied on the eyewitness testimony of a cooperating witness. *Mullins v. Commonwealth*, No. 2009-SC-000566-MR, 2010 WL 4156766 * 5 (Ky. Oct. 21, 2010). There, the appellant argued that because the Commonwealth's evidence included recordings that were indiscernible and because the cooperating witness was

unreliable, the conviction should not stand. *Id.* However, we rejected that argument and held:

> [A]ssuming, arguendo, that the jury may not have been able to convict Appellant solely on the strength of the video tapes due to their poor quality, that does not negate the fact that the Commonwealth offered the jury a participating eyewitness.
>
> [V]iewing these facts in a light most favorable to the Commonwealth, we conclude that a reasonable trier of fact could have found Appellant guilty beyond a reasonable doubt based on the eyewitness testimony in this case.

Id. (*citing Baker v. Commonwealth*, 234 S.W.3d 389 (Ky. App. 2007); *People v. Calabria*, 816 N.E.2d 1257 (N.Y. 2004); *State v. Davis*, 848 So.2d 557 (La. 2003)). Thus, having ruled that a jury could base a verdict solely on the eyewitness testimony and since a guilty verdict requires a finding of beyond a reasonable doubt, we must conclude that a trial court does not abuse its discretion in determining that uncorroborated eyewitness testimony is enough to support the lower evidentiary standard required to prove prior acts, i.e., evidence upon which the jury could reasonably conclude that the act occurred and that the defendant was the actor.[4] Therefore, given the eyewitness testimony at hand, we hold that there was sufficient evidence to support the prior acts evidence in this case.

---

[4] Far from establishing a carte blanche rule that eyewitness testimony will always be sufficient to support prior acts, we pause to note that such a determination rests in the trial court. Thus, it is conceivable that a trial court might exclude prior acts where it is supported by uncorroborated eyewitness testimony. Such a determination rests in the sound judgment of the trial court and will be reviewed on appeal only for an abuse of discretion.

ii. **Prejudicial Effects**

Having concluded that the evidence was supported by sufficient evidence so as to be probative of Appellant's knowledge and intent, we must balance that probativeness against the undue prejudice as directed by KRE 403 which provides in pertinent part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice . . . ."

We recognize that virtually all evidence submitted by the Commonwealth for the purposes of implicating a defendant is prejudicial to some degree. *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991); *Brown v. Commonwealth*, 313 S.W.3d 577, 606 (Ky. 2010). Yet, before evidence may be excluded under KRE 403, the prejudice must be undue and it must substantially outweigh the evidence's probative value. KRE 403. Undue or unfair prejudice as used in 403 is not to be equated with testimony simply adverse to the opposing party. *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir.1977).

In this case, the cooperating witness, responding to direct examination by the Commonwealth, made several statements regarding prior drug transactions involving Appellant, to wit:

> Q: [A]t the beginning of '08, January, February, leading up to this event, what contact, if any, did you have with [Appellant] at that time?
>
> A: Well, I had stayed with him several nights, and was buying drugs from him.
>
> . . . . .
>
> Q: So you were buying drugs from him at this time?

A: Yes

. . .

Q: Did you receive your 2007 tax refund check at this time?

A: Yes.

Q: What did you do with it?

A: Spent it on cocaine.

Q: And who did you spend it with?

A: [Appellant]

After this exchange, the trial court admonished the jury not use the above testimony as "evidence of defendant's guilt in this case," and instructed them not to use it except so far as the evidence "may show, if it does show, the defendant's identity with this case, or his knowledge about this case, or his intent in this case." Then, after the admonishment, the Commonwealth continued to question the cooperating witness regarding the events leading up to and surrounding the March 6 transaction.

Q: What did you ask for?

A: I asked for a, what we called a bill, which is a hundred dollars worth.

Q: And is that a common denomination of purchasing cocaine?

A: Pretty much, yes

Q: Is that a term in language you had used with [Appellant] in the past?

A: Yes.

. . . .

Q: What happened on March 6, 2008?

A: Pretty much the same thing, talk to him on the phone—I tried to call him and he called back and set up a deal for a bill . . . .

With this testimony in mind, we now question whether the trial court abused its discretion in determing that the probative value was not substantially outweighed by the undue prejudice.

We begin our analysis by reiterating the maxim that testimony regarding prior bad acts should be "closely watched" and that 404(b), as an exclusionary rule, should be "strictly enforced" because of the "dangerous quality and prejudicial consequences" of this sort of evidence. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). Indeed, at first blush, and within a vacuum, the testimony above, standing alone, probably would have merited exclusion. However, given the fact that Appellant made a general denial, directly placing his intent in genuine dispute, and because he denied knowledge that the term "bill" referred to a cocaine transaction, we are persuaded in the opposite direction.

The prior transactions which took place mere months[5] before the one at hand clarified and probed the cryptic language used by Appellant and the

---

[5] Appellant also argues that the prior acts in this case were too "remote in time" to the March 6 transaction and thus avers that our holding in *Walker* should not apply. However, *Walker* does not go so far as to create a carte blanche rule that prior acts must have taken place within a certain period of time before they may be properly admitted. In any event, as pointed out by the Commonwealth, other courts have permitted the admission of prior acts evidence where the time between the prior acts and the charged crime was even greater than that here. *See, e.g.,*

cooperating witness—the jury was entitled to know that the word "bill" was code for cocaine, the basis for which the cooperating witness deciphered the term, and further that Appellant had knowledge of its coded meaning. Moreover, the testimony regarding the prior drug buys tended to disprove Appellant's general argument that he did not know that the cooperating witness sought to buy drugs when he conversed with him on March 6; and furthermore, Appellant's assertions that the conversation encompassed mechanic work. Thus, while we recognize that the prior acts in this case—being of such a similar nature to that which Appellant stood accused—were prejudicial, we cannot conclude that such prejudice substantially outweighed the probative value. Therefore, we hold that the trial court did not abuse its discretion by admitting the prior acts evidence in this case.[6]

B. ***Batson***

Finally, we turn to Appellant's assertion that the trial court erred by overruling his *Batson* challenge to the Commonwealth's peremtory strike of juror 155. Finding no error, we affirm the trial court's ruling.

United States v. Robinson, 904 F.2d 365, 368 (6th Cir. 1990) (admitting prior sales five months before indicted offense); *United States v. Thomas*, 58 F.3d 1318, 1320 (8th Cir. 1995) (admitting prior acts covering four month period); *United States v. Wiley*, 29 F.3d 345, 351 (8th Cir. 1994) (admitting prior possession of cocaine base twenty months earlier).

[6] Our decision today is particularly influenced by the fact that the trial court gave the jury an adequate admonition, instructing them on how to use the testimony regarding Appellant's prior acts. It is a long standing and lofty rule that juries are presumed to follow judicial instructions and that an admonition will cure an evidentiary error. *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). Moreover, as is specifically pertinent in a KRE 403 analysis, an admonition reduces the prejudicial impact of evidence regarding uncharged acts. *Young v. Commonwealth*, 25 S.W.3d 66, 73 (Ky. 2000).

When a defendant objects to the use of a peremptory strike under the auspices of *Batson*, 476 U.S. 79, the defendant must first make a prima facie showing that the peremptory challenge is on the basis of race. *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 178 (Ky. 1992). Once the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for making the peremptory challenge. *Id.* Ultimately, the trial court must decide whether the defendant has carried the burden of proving purposeful discrimination. *Id.* Such a decision is entitled to "great deference" on appeal and will only be disturbed where the trial court is clearly erroneous. *Gray v. Commonwealth*, 203 S.W.3d 679, 690-91 (Ky. 2006); *Washington v. Commonwealth*, 34 S.W.3d 376 (Ky. 2000).

In this case, the record reveals that the trial court did not determine whether Appellant established a prima facie showing that the peremptory challenge was based on race. Instead, the trial court jumped to the question of whether the Commonwealth had sufficient race-neutral reasons for the peremptory challenge. However, as discussed below, we conclude that the Commonwealth properly asserted a race neutral reason for the strike and thus consider the issue of whether Appellant established a prima facie case moot. Therefore, we confine our analysis to whether the trial court was clearly erroneous in ruling that the Commonwealth had sufficient race-neutral reasons for the peremptory strike. *See Snodgrass*, 831 S.W.2d at 179 (*citing Hernandez v. New York*, 500 U.S. 352, 359 (1991)).

In this case, the Commonwealth provided the following race-neutral reasons to the trial court, explaining why it employed a peremptory strike against juror 155:

> During voir dire she indicated she was very uncomfortable serving on the jury. She said there is a distant family relationship [with the defendant]. She also indicated that the mother, who is going to testify, was her childhood friend. And it wouldn't matter what color she was I would strike somebody from the jury pool that was a close childhood friend of one of the witnesses going to testify.

In response to the race-neutral reasons put forward by the Commonwealth, defense counsel asserted, as he does in this appeal, that since the trial court rejected the abovementioned reasons when it considered a for cause challenge against the same juror, the court should again reject those reasons for purposes of the *Batson* issue. The trial court rejected that position, and so do we.

When a defendant attacks a peremptory challenge under the auspices of *Batson*, and after a prima facie case of purposeful discrimination is made, all that is required of the Commonwealth is to articulate a reason that is race-neutral on its face. *Commonwealth v. Coker*, 241 S.W.3d 305, 307 (Ky. 2007). Absent a discriminatory intent inherent in the prosecutor's explanation, the reason offered "will be deemed race neutral." *Gray v. Commonwealth*, 203 S.W.3d 679, 690-91 (Ky. 2006) (*citing Hernandez*, 500 U.S. 352). And as is pertinent to this case, the Commonwealth's explanation for the strike "need not

rise to the level justifying exercise of a challenge for cause . . . . " *Gamble v. Commonwealth*, 68 S.W.3d 367, 371 (Ky. 2002).

Having reviewed the Commonwealth's race-neutral reasons in this case, we cannot say that the trial court was clearly erroneous in accepting them as sufficient justification for a race-neutral peremptory challenge. We reiterate today that the race-neutral reason requirement in *Batson* does not mandate a party assert reasons equal to those in a for-cause challenge.

III. Conclusion

For the aforementioned reasons, we affirm the Lincoln Circuit Court in all respects.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Justin Thomas Genco
305 West Third Street
P.O. Box 164
Stanford, KY 40484

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

John Paul Varo
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601