

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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.

Supreme Court of Kentucky

2010-SC-000667-MR

ADRIAN A. OLIVER

APPELLANT

V. ON APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
NO. 09-CR-00125

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Adrian Oliver of third-degree terroristic threatening, third-degree criminal trespass, two counts of second-degree assault, reckless driving, resisting arrest, and being a second-degree persistent felony offender (PFO). The trial court sentenced him to a total of twenty years' imprisonment.¹

Oliver now appeals as a matter of right,² arguing that the trial court erred by (1) failing to either grant Oliver's motions for a mistrial or admonish the jury and (2) failing to instruct the jury on fourth-degree assault.

On review, we affirm the trial court's judgment.

¹ The jury also recommended multiple fines in connection with the convictions, but the trial court waived them because Oliver was indigent.

² Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL HISTORY.

Oliver argued with Eddie Church over the phone. Church answered when Oliver called to speak with Church's sister-in-law, with whom he previously had a romantic relationship. Church declined Oliver's request to speak to the sister-in-law and told him to stop calling the house. Oliver threatened to come to Church's house and fight him. Church responded to these threats by saying, "You know where I'm at." Oliver, who is African American, claimed that Church called him a racially derogative term.

The uncontroverted evidence shows the following facts. A few hours after the phone conversation, Church was mowing his lawn when a vehicle entered his driveway. Tiffany Brown was driving the car, Joel Carter was in the passenger seat, and Oliver occupied the backseat. With a metal baseball bat in hand, Church approached the car and ordered them to leave. Carter left the vehicle and shoved a pistol barrel into Church's neck hard enough to cut the skin. Oliver then exited the vehicle and took the bat away from Church.

At this point, Church's wife, Joyce Reece, ran out of the house and grabbed the back of Carter's hat. Carter released Church, who went inside the house to ensure someone called the police. Carter and Oliver started arguing with Reece, cursing and slapping her. Carter pulled her down by her hair while Oliver hit her on the thigh with the bat, leaving a red mark.³ The fight subsided; and as Brown, Carter, and Oliver left, Carter fired three shots into the air and four shots over the top of the car, with the barrel pointed toward

³ As discussed below, Oliver contests only his state of mind when he struck Reece with the bat.

Church and his family. Police arrived on the scene after the three individuals left the Church residence. They photographed Church's and Reece's wounds and the seven bullet casings.

Later that night, police stopped Oliver and Carter for driving a vehicle with only three inflated tires and a broken windshield. Oliver did not comply with police directives to exit the vehicle and lie on the ground. He was subdued by a Taser and arrested.

The grand jury indicted Oliver for third-degree terroristic threatening, third-degree criminal trespass, two counts of second-degree assault,⁴ reckless driving, resisting arrest, possession of a handgun by a convicted felon,⁵ and being a second-degree PFO. A grand jury also indicted Brown and Carter for various offenses.

Oliver, Brown, and Carter were tried together before a circuit court jury. Oliver's defense at trial was that Church instigated the fight by calling him a racially derogative term on the phone. Oliver contended that he went to Church's house for a fistfight, but the fight escalated when Church approached with a baseball bat. Oliver also claimed that although he may have touched Reece with the bat, he did not intend to injure her. The jury convicted Carter of all counts and found him guilty of being a second-degree PFO. The trial

⁴ One count was based on Oliver's hitting Reece with a bat; the other count was based on complicity with Carter to cut Church's neck with a gun.

⁵ Carter's charge of possession of a handgun by a convicted felon was not tried before the jury.

court sentenced Oliver to a total of twenty years' imprisonment and waived all fines and court costs.

II. ANALYSIS.

A. The Trial Court Properly Denied Oliver's Motions for a Mistrial.

Oliver asserts that the trial court improperly allowed evidence of prior bad acts in violation of Kentucky Rules of Evidence (KRE) 404(b).⁶ He argues the trial court should have either admonished the jury not to consider the offending testimony or granted his motions for a mistrial. We disagree.

During its case-in-chief, the Commonwealth asked Church why he told Oliver to quit calling the house. Church replied, "We don't need nothing to do with him. He's hit on Julie and stuff before, so just stay away." Oliver generally objected to the statement and asked for a jury admonition or a mistrial. The trial court denied the motion, ruling that the jury could determine whether Church meant "hit on" as physical abuse or romantic advances.

When Carter cross-examined Church, he asked Church why he told Oliver to quit calling. Church replied, "I was done with him. He done beat on her for the last time as far as I was concerned." Again, Oliver objected and asked for a mistrial. He commented to the trial court that he sought to avoid this earlier by telling the witness not to refer to any physical abuse. He asked the trial court to direct the Commonwealth to instruct Church "not to go down

⁶ He contends that Church's testimony prejudiced him because it portrayed Church as a protector, not as "the racially insulting instigator of this confrontation."

[that] lane.” The trial court replied, “How am I going to tell him that without the jury hearing me say that? That makes it even worse.” But Oliver’s attorney made no response to the trial court’s inquiry. The trial court denied Oliver’s motion for a mistrial and did not instruct the witness.⁷ During this discussion, Oliver never asked the trial court to admonish the jury, only to instruct the witness about further responses.

A detective assigned to the case testified that he was a narcotics investigator and that he assisted on the case because he “was familiar with the defendants.” Oliver objected and requested a mistrial but did not ask the trial court to admonish the jury. Carter asked the trial court to instruct the detective not to say that again. The trial court denied Oliver’s motion for a mistrial and agreed to instruct the witness rather than admonish the jury. Carter agreed to this, and Oliver remained silent.

We find that any error in allowing the testimony or failing to admonish the jury does not warrant a mistrial.

KRE 404(b) provides,

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; or

⁷ Carter initially said that he did not intend to elicit the testimony from Church. But he told the judge that he wanted to know why Church hates Oliver; his defense was that Church called Oliver a racially derogative term on the phone, and he wanted to know why. Nevertheless, Carter did not pursue the matter further in his cross-examination of Church.

(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.

“[T]rial courts must apply the rule cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime.”⁸ To determine whether evidence of prior bad acts is admissible, we must decide if the evidence is relevant, probative, and not overly prejudicial.⁹ The standard of review for a trial court's evidentiary ruling is abuse of discretion.¹⁰

If inadmissible prior-bad-acts evidence is introduced and the defendant requests a jury admonition, the trial judge should provide it.¹¹ An admonition to the jury may be sufficient to cure the error.¹² Absent an admonition, the improper introduction of prior-bad-acts evidence is still harmless when the judgment was not substantially swayed by the error.¹³ If the error is harmless, a new trial is not warranted.

When improper prior-bad-acts evidence is admitted, the trial court does not admonish the jury and the error is not harmless, a mistrial may be necessary. A mistrial is an extraordinary remedy that “should only be granted

⁸ *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994).

⁹ *King v. Commonwealth*, 276 S.W.3d 270, 275 (Ky. 2009).

¹⁰ *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

¹¹ *King*, 276 S.W.3d at 275.

¹² *Id.* (citation omitted).

¹³ *Wiley v. Commonwealth*, 348 S.W.3d 570, 581 (Ky. 2010) (citation omitted).

where there is a ‘manifest necessity for such an action or an urgent or real necessity.’”¹⁴ Mistrial should only be “used in those situations where an error of such import has been committed that a litigant's right to a fair and impartial jury would be violated if a new trial were not held.”¹⁵ If prior-bad-acts evidence is introduced through a witness’s non-responsive answer, “this [C]ourt must look at all of the evidence and determine whether the defendant has been unduly prejudiced by that isolated statement.”¹⁶ An isolated, non-responsive reference to prior bad acts can be insufficient to create a manifest necessity for a mistrial.¹⁷ And “a trial court's decision to deny a motion for mistrial will not be disturbed absent an abuse of discretion.”¹⁸

Regardless of whether Oliver’s objections were properly preserved,¹⁹ the testimony was improperly admitted,²⁰ or whether the trial judge should have

¹⁴ *Gosser v. Commonwealth*, 31 S.W.3d 897, 906 (Ky. 2000) (citation omitted).

¹⁵ *Welch v. Commonwealth*, 235 S.W.3d 555, 559 (Ky. 2007) (citation omitted).

¹⁶ *Phillips v. Commonwealth*, 679 S.W.2d 235, 238 (Ky. 1984) (citation omitted).

¹⁷ See *Matthews v. Commonwealth*, 163 S.W.3d 11, 18 (Ky. 2005) (the reference to an isolated, non-responsive reference to prior crimes was insufficient to create a manifest necessity for a mistrial).

¹⁸ *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002) (citation omitted).

¹⁹ We have serious reservations about whether Oliver properly preserved his objection to Church’s first statement and the detective’s testimony. Oliver did not specifically object based on relevance, prejudice, or KRE 404(b). He merely kept repeating to the judge that Church said Oliver “hit on” someone. Nor did he specifically object to the detective’s testimony as prior-bad-acts evidence. But we will decide the matter on the standard for a mistrial.

²⁰ The Commonwealth argues that the testimony was properly admitted under KRE 404(b) because it tended to show the reason for Church’s reaction to Oliver’s phone call.

admonished the jury,²¹ we find that a mistrial was not warranted based on all the evidence at trial. Assuming that the complained-of testimony was improperly admitted and the trial court should have admonished the jury accordingly, the error was harmless. So the trial court properly denied Oliver's motions for a mistrial.

As for the detective's statement, assuming it was erroneously admitted, its introduction was harmless.²² The statement was unsolicited,²³ fleeting, and isolated.²⁴ And overwhelming, uncontradicted evidence supported Oliver's convictions. Church, Reece, Church's sister, two of Church's neighbors, and several detectives testified to the events at issue. Oliver did not put on any proof at trial. We cannot say Oliver's conviction was substantially swayed by the error, given the evidence of Oliver's guilt.²⁵

²¹ After Church's first statement, Oliver asked for an admonition. But he later characterized this request as an admonition to the witness. Oliver did not ask to admonish the jury after Church's second comment or the detective's statement.

²² See *Wiley*, 348 S.W.3d at 581-82. A detective testified that he knew the defendant before their contact related to the charges at issue. He observed the defendant acting suspiciously and, "being familiar with" him; the detective checked for outstanding warrants. This Court found the testimony, which was not fleeting, was improperly admitted under KRE 404(b); but the error was harmless due to the overwhelming evidence in the case.

²³ There is nothing to suggest that the Commonwealth deliberately sought the detective's answer.

²⁴ The Commonwealth asked the detective how he assisted on the case. The detective replied that he was familiar with the defendants, paused, and repeated himself. Then Oliver objected. Although the detective repeated his statement, he did not expound upon it or make further references to his familiarity with Oliver.

²⁵ We also note that Oliver was not charged with a drug-related offense. This further reinforces our finding that the narcotic detective's testimony did not sway Oliver's convictions.

Assuming Church's testimony was improper prior-bad-acts evidence, its admission was similarly harmless. Church's comments were not isolated in the sense that he mentioned the prior abuse twice. But the Commonwealth did not elicit this testimony²⁶ or try to use any of the statements to prove that Oliver acted in conformity with the prior bad acts. And Oliver's charges were not related to Church's sister-in-law, the alleged victim. Given the uncontradicted evidence supporting Oliver's conviction, we find that Church's testimony did not sway the judgment.

Even if the trial court abused its discretion in allowing the testimony or should have admonished the jury, the error was harmless. We cannot say the statements created a manifest necessity for a mistrial. So we find that any improper admission of prior-bad-acts evidence did not warrant a mistrial.

B. The Trial Court Properly Instructed the Jury.

The trial court instructed the jury on two counts of second-degree assault. Instruction No. 3 read:

You will find [Oliver] guilty of Assault in the Second Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That in this county on or about August 27, 2009, and before the finding of the Indictment herein, Joel Carter intentionally caused physical injury to Eddie Church, Jr., by cutting him with a handgun;

²⁶ The Commonwealth's Attorney stated that he did not elicit Church's comment that Oliver "hit on" Church's sister-in-law, and he had no idea the comment was coming. The "beat on" comment was in response to Carter's cross-examination. Carter indicated to the trial court that he would like to pursue the line of questioning to determine why Church hated Oliver enough to call him a racially derogative term. Carter apparently abandoned this strategy after Oliver's objection.

B. That such handgun was a deadly weapon or was a dangerous instrument as defined in Instruction No. 7[;]

AND

C. That [Oliver], intending that Joel Carter would do all of the foregoing, aided and assisted Joel Carter.

Instruction No. 4 read:

You will find [Oliver] guilty of Assault in the Second Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about August 27, 2009, and before the finding of the Indictment herein, he intentionally caused a physical injury to Joyce Reece by striking her with a bat;

AND

B. That the bat was a dangerous instrument as defined under Instruction No. 7.

Oliver argues that the trial court erred by refusing to instruct the jury on fourth-degree assault for the acts underlying Instructions 3 and 4. We disagree and affirm the trial court's judgment.

Oliver did not preserve for appellate review his argument concerning fourth-degree assault instructions for his complicity in Carter's assault on Church. Oliver claims both issues are preserved because he tendered instructions for fourth-degree assault to the trial court.²⁷ But the record contains only tendered instructions for fourth-degree assault for recklessly causing a physical injury to Reece with a baseball bat. This is insufficient

²⁷ Objections to the instructions or requests for lesser-included instructions were not recorded. But Oliver does not claim that he objected to the second-degree assault instructions, only that he tendered fourth-degree assault instructions.

fairly and adequately to present Oliver's position to the trial court regarding instructions for his complicity in Carter's actions, as required by Rules of Criminal Procedure (RCr) 9.54.²⁸ So we will review only whether the trial court properly denied Oliver's request for fourth-degree assault instructions for striking Reece with a bat.

A trial court must instruct a jury on all offenses that the evidence supports.²⁹ But "[a]n instruction on a lesser[-]included offense is appropriate if, and only if, on the given evidence a reasonable juror could entertain a reasonable doubt as to the defendant's guilt of the greater offense, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense."³⁰

Fourth-degree assault differs from second-degree assault only in that it requires a lesser degree of culpability to establish its commission. A person is guilty of second-degree assault when "[h]e **intentionally** causes physical injury to another person by means of a deadly weapon or a dangerous instrument[.]"³¹ A person is guilty of fourth-degree assault when "[w]ith **recklessness** he causes physical injury to another person by means of a deadly weapon or a dangerous

²⁸ RCr 9.54(2) provides,

No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

²⁹ *Clark v. Commonwealth*, 223 S.W.3d 90, 93 (Ky. 2007) (citation omitted).

³⁰ *Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999) (citations omitted).

³¹ KRS 508.020(1)(b) (emphasis added).

instrument.”³² So fourth-degree assault is a lesser-included offense of second-degree assault.³³

“A person acts intentionally with respect to a result or to conduct . . . when his conscious objective is to cause that result or to engage in that conduct.”³⁴ He acts recklessly with respect to a result or circumstance when “he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists.”³⁵

Oliver contends the evidence at trial supports the theory that he acted recklessly under fourth-degree assault. He argues that witnesses described the scene as chaotic; and, based on Oliver’s size³⁶ and the minor injury to Reece, the jury could have believed that Oliver acted recklessly in causing the injury. We disagree.

Uncontroverted evidence at trial established that Oliver hit Reece with a metal baseball bat.³⁷ And “[i]t is a well-settled principle that a person is

³² KRS 508.030(1)(b) (emphasis added).

³³ The relevant part of KRS 505.020(2) states,

A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

.....

(c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission[.]

³⁴ KRS 501.020(1).

³⁵ KRS 501.020(4).

³⁶ Documents in the record indicate that Oliver was 6’1” and 225 pounds.

³⁷ Church’s sister observed the scene from a short distance away. She testified that it was a tussle and hands were flying, and she saw Oliver hit Reece with the bat. She and Church’s neighbor testified that Oliver did not swing the bat as one would hit

presumed to intend the logical and probable consequences of his actions and, thus, 'a person's state of mind may be inferred from actions preceding and following the charged offense.'"³⁸ Oliver's intent to cause physical injury can be inferred from his hostility to Reece before hitting her with the bat and from the extent of Reece's injury.³⁹ Pictures taken by the police around two hours after the incident showed an oblong red mark on Reece's thigh. This mark was inflicted through her clothing. Reece testified that her thigh hurt for several days, and she did not see a doctor only because she did not have health insurance at the time.

While witnesses described the scene as chaotic,⁴⁰ nothing in the record indicates that Oliver acted with anything but intent. Oliver and Carter were focused solely on Reece when Oliver hit her with the bat. Oliver was not physically engaged with any other individual. And Reece testified that before hitting her with the bat, Oliver cursed and slapped her. The witness's

a baseball. Reece testified that Carter and Oliver argued with her after she pulled Carter's hat. Oliver slapped and cursed at her. Carter also hit her and pulled her down, almost to her knees, by her hair. While she was in this prone position, Oliver hit her with the bat. Reece did not see Oliver's face when this happened because she was facing the ground, but she saw his feet about three to four feet away from her. Church's neighbor also testified that he saw Oliver swing the bat but could not observe where it landed from his point of view.

³⁸ *Harper v. Commonwealth*, 43 S.W.3d 261, 265 (Ky. 2001) (citations omitted);

³⁹ See *Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky. 1997) ("Proof of intent in a homicide case may be inferred from the character and extent of the victim's injuries.").

⁴⁰ Oliver did not direct us to instances on the trial video where witnesses referred to the scene as "chaos" or a "melee." Upon review of the trial video, we found only that Church's sister described the scene as chaos to explain why she did not notice Brown back the car down the driveway.

testimony that Oliver did not swing the bat back as he might to hit a baseball does not support Oliver's theory that he acted recklessly.

There is no evidence in the record supporting an instruction on fourth-degree assault. So we find the trial court properly instructed the jury only on second-degree assault.

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the trial court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Thomas More Ransdell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

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, Kentucky 40601