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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MARCH 22, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000764-MR

RICHARD GABBARD — APPELLANT

V.

ON APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
NO. 10-CR-00081

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

This case comes before us on appeal for the second time. Appellant was convicted by a jury in Lee Circuit Court of wanton murder in 2007. We reversed and remanded that conviction for failure to strike a juror for cause in *Gabbard v. Commonwealth*, 297 S.W.3d 844 (Ky. 2009). At the second trial, transferred from Lee County to Estill County on motion of Appellant, the jury again convicted Appellant of wanton murder and he was sentenced to twenty-five years in prison. He now appeals that conviction as a matter of right. Ky. Const. § 110(2)(b).

The evidence presented in the second trial remains essentially the same as that in the first trial. Therefore, we will limit our recitation of the facts only as necessary to address the issues raised in this appeal.

Appellant shot and killed his girlfriend, Michelle Davidson Krystofik, on April 20, 2006, in Lee County, Kentucky. They had been living together for

several years. On the night of the shooting, one of the victim's daughters, Kelly, was at the house in the next room where the shooting took place. Appellant was allegedly cleaning his gun and claims that the shooting was an accident. Kelly testified that her mother and Appellant had been bickering earlier, and that Appellant had been drinking. Kim, the victim's other daughter, testified that, at one point during the evening, Appellant took the gun from the gun cabinet and walked outside with it. When questioned by the victim as to what he was doing with the gun, Appellant answered that he might need to shoot somebody. Later, he reported to the police that he had been having trouble with a neighbor who had threatened him.

On this appeal, Appellant cites two grounds for reversal. First, it is claimed that improper evidence of prior bad acts was admitted in violation of KRE 404(b). Secondly, it is argued that it was reversible error for the Commonwealth to introduce evidence of the statutory presumption of intoxication under KRS 189A.010.

KRE 404(b) Evidence

Stacey Little testified that, around September of 2001, some four and a half years before the fatal shooting of Michelle Kyrstofik, Little and her boyfriend, Jeremy Peters, were visiting Appellant and the victim at their home. The four were outside sitting around a picnic table while drinking. Appellant became annoyed by the noise from a "Furby" toy which was in the middle of the table. Appellant said that he was going to blow the toy's brains out if it made the noise again. When the toy repeated the noise, Appellant retrieved his

pistol from inside. When he returned, with everyone still sitting around the table, Appellant proceeded to fire at the toy, hitting it directly between the eyes. Stacey testified that she became uncomfortable after realizing that she had been sitting less than two feet away from the toy when Appellant shot it. She and Jeremy left at that time.

Appellant objected to the admission of this testimony under KRE 404(b). Evidence of a defendant's prior bad acts is inadmissible to show that he acted in conformity therewith, but the evidence may be admissible for other purposes, such as to show lack of accident or mistake. KRE 404(b)(1). However, even if evidence of prior bad acts is relevant to such other purposes, it must still pass the balancing test of KRE 403. *Bell v. Commonwealth*, 875 S.W.2d 882, 888 (Ky. 1994); *Billings v. Commonwealth*, 843 S.W.2d 890 (Ky. 1992); KRE 404(b)(1). The probative value of the evidence must outweigh the prejudicial effect it has with respect to Appellant's character. *Id.* We review trial court decisions to admit such evidence under the abuse of discretion standard. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

In analyzing the KRE 403 issue, it is important for us to focus on the exact nature of the crime for which Appellant stands convicted. On retrial, the trial court apparently took the crime of an intentional shooting off the table. The jury was instructed only on "wanton" murder and the lesser included crimes of second-degree manslaughter and reckless homicide.

In its ruling on the admissibility of this evidence, the trial court found that the prejudice to Appellant was outweighed by its probative value. It

concluded that the evidence was probative because it was similar in nature and demonstrated a similar pattern of conduct as the circumstances surrounding the shooting of the victim in this case. The trial court further indicated that the incident with the Furby toy may have demonstrated a wanton disregard of human life. The trial court noted that the Furby incident was prejudicial to Appellant because it made it look like the shooting of the victim was not a mistake or accident. The trial court acknowledged that Appellant was not charged with *intentional* murder, but explained that the point of the Furby incident was that it showed Appellant's indifference to human life. The trial court also explained that this evidence went against Appellant's defense theory that "[the victim] was shot when his gun went off while he was cleaning it, and supports the Commonwealth's theory of absence of mistake or accident."

We agree that the Furby incident implied that Appellant was competent in handling and firing guns since he was able to accurately fire and hit a small toy between the eyes. This suggests that Appellant was skilled in handling the gun and less likely to have accidentally discharged the weapon. However, Appellant's defense theory was that the gun malfunctioned, causing it to fire accidentally. The fact that he was a good shot with the gun was not particularly probative of whether the gun malfunctioned or fired accidentally.

However, as noted in the trial court's order, this evidence was extremely prejudicial with respect to Appellant's character. It showed that Appellant was easily angered. In the previous incident with the Furby toy, he talked about blowing the toy's brains out. He also fired the pistol in close proximity to other

people while drinking. Many of these circumstances were present in the case sub judice. These similarities between the two incidents make the possibility of prejudice even higher. Based on this evidence, a reasonable juror would be tempted to infer that, because Appellant acted wantonly with a gun in the Furby incident, he probably acted wantonly with the gun on the night of the victim's death.

The rationale that this evidence should be admitted because it shows conduct that was possibly wanton is the very rationale prohibited by KRE 404(b). Even if evidence of prior bad acts is similar to the facts of the crime charged, it still must be probative of something other than the defendant's character. KRE 404(b). While this evidence had some probative value to Appellant's defense that the shooting was accidental, it is pretty thin. Whatever value it has is outweighed by its prejudicial effect, both in highlighting Appellant's negative character traits and in suggesting that he acted in conformity with the Furby incident on the night of the victim's shooting.

The fact that the previous incident occurred years before the shooting of the victim must also be weighed in the balance on the side of exclusion. *Robey v. Commonwealth*, 943 S.W.2d 616, 618 (Ky. 1997). *See also Gray v. Commonwealth*, 843 S.W.2d 895, 897 (Ky. 1992).

The Commonwealth contends that the admission into evidence of the Furby incident was harmless. An evidentiary error is not harmless if "the error had 'substantial influence' upon Appellant's trial such that it 'substantially

swayed' his conviction." *Wiley v. Commonwealth*, 348 S.W.3d 570, 579 (Ky. 2010) (citing *Winstead v. Commonwealth*, 283 S.W.3d 678, 688–89 (Ky. 2009)). *See also* RCr 9.24. We cannot say that the prejudicial nature of the Furby incident did not "substantially sway" the verdict. We find that this evidence was not harmless for the same reasons its prejudicial effect outweighed its probative value.

Statutory Presumption of Intoxication

At trial, over Appellant's objection, the Commonwealth introduced evidence of the statutory presumption of intoxication contained in KRS 189A.010 through the testimony of Dr. Jennifer Schott. The Commonwealth asked Dr. Schott if she was aware that the blood/alcohol limit for driving a car is .08, and that Appellant's blood/alcohol level of .14 at the time of the shooting was 75% higher than that limit. Dr. Schott answered affirmatively as to the .08 limit, but said that she could not do the math for the percentage calculation. The Commonwealth also referred to the presumption in its closing argument, saying that Appellant "was intoxicated with a .14 blood/alcohol level which is nearly double the legal limit for a DUI in Kentucky. That is wanton behavior if I've ever seen it."

Evidence of the statutory presumption of intoxication contained in KRS 189A.010 should not be admitted in any case other than one involving misdemeanor charges for driving under the influence (DUI). *Walden v. Commonwealth*, 805 S.W.2d 102 (Ky. 1991) (overruled on other grounds by *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996)). *See also Overstreet v.*

Commonwealth, 522 S.W.2d 178 (Ky. 1975); *Cormney v. Commonwealth*, 943 S.W.2d 629 (Ky. App. 1996). On appeal, the Commonwealth concedes that admission of the statutory presumption was error. Accordingly, it was an abuse of discretion to admit this evidence. However, because we are reversing this case on other grounds, we do not address whether the error was harmless.

Accordingly, we reverse Appellant's conviction for wanton murder and remand the case to the Estill Circuit Court for further proceedings in accordance with this opinion.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder and Venters, JJ., concur. Scott, J., dissents and states: I would affirm the judgment of the trial court for two reasons. First, the evidence regarding the Furby incident was highly probative against Appellant's defense that the shooting was an innocent accident, and thus its probative value outweighed any prejudicial effect. Second, the trial court's error in admitting evidence regarding the statutory presumption of intoxication was harmless given the remainder of Dr. Schott's testimony that Appellant was impaired.

COUNSEL FOR APPELLANT:

V. Gene Lewter
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Office of Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601-8204