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Supreme Court of Kentucky

2010-SC-000267-MR

KENIELLE FINCH

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
NO. 08-CR-002333

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

While fleeing police in downtown Louisville, Kenielle Finch drove through an intersection, striking and killing two pedestrians and injuring a third. On charges arising from this incident, a circuit court jury convicted Finch of two counts of murder, first-degree assault, and other crimes, including fleeing and evading police. He was sentenced to life in prison.

Finch now appeals as a matter of right,¹ contending that the judgment must be reversed because the trial court (1) abused its discretion when it allowed the Commonwealth to introduce four prior incidents in which Finch used a motor vehicle to flee from the police and (2) committed reversible error for failure to grant a mistrial when a witness testified about a matter the trial

¹ Ky. Const. § 110(2)(b).

court specifically excluded. We disagree with Finch's contentions on appeal and affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY.

Finch borrowed a 1993 blue Pontiac Grand Am from Keynisha Butler to run errands. Later that same day, Officer Darrell Hyché attempted to stop Finch in that vehicle for a traffic violation.

In response to Officer Hyché's signal, Finch stopped at the intersection of Floyd Street and Central Avenue but sped away on Floyd Street as the officer approached. Officer Hyché pursued on Floyd Street.

Finch raced straight down Floyd Street toward its intersection with Warnock Street where three pedestrians waited to cross the street. As the pedestrians stepped from the curb, Finch ran the red light at the intersection and struck the three pedestrians: Angela Wadlington, who was walking with her five-year old daughter, Claudia, and her four-year old niece, Riley Lawrence. Several people witnessed the incident.

Upon reaching the intersection, Officer Hyché abandoned the chase of the blue Grand AM to provide assistance to the pedestrians. Both children died, and Angela suffered multiple broken bones.

Another officer later spotted the blue Grand Am parked one block north of the scene of the accident. At the time, the Grand Am sat with its doors closed, engine running, and windshield wipers engaged. The car had visible damage to the front, right side of the vehicle; and parts of the car were later recovered from the intersection at Floyd and Warnock Streets. Police officers

traced the license plate to Keynisha Butler. Officers drove to Butler's apartment where they heard about Finch's use of the Grand Am that day and of his possible whereabouts.

As the police were leaving Butler's apartment, observers alerted them to the fact that Finch was the passenger in an automobile located in the apartment's parking lot. Finch fled that location in that automobile, and the police gave chase. At some point, Finch jumped from the automobile and ran. Eventually, officers found Finch hiding in a drainpipe. Finch made a final attempt to flee the officers by running into an open area where he was discovered lying down in a field of overgrown weeds.

The grand jury indicted Finch on two counts of murder, assault in the first degree, fleeing or evading police in the first degree, failure to stop and render aid, tampering with physical evidence, assault in the third degree, second-degree fleeing or evading police, no insurance, no operator's license, reckless driving, two counts of disregarding a traffic control device, and of being a second-degree persistent felony offender (PFO).

After several days of trial, the jury convicted Finch on two counts of murder, assault first-degree, fleeing and evading police first degree, tampering with physical evidence, fleeing and evading police second-degree, failure to stop and render aid, two counts of disregarding a traffic control device, and being a second-degree PFO. The jury recommended the maximum sentence, and the trial court sentenced Finch to life in prison.

II. ANALYSIS.

A. The Trial Court Did Not Abuse its Discretion by Admitting Evidence of Four Prior Convictions in Which Finch Used a Motor Vehicle to Flee From Police.

Before trial, the Commonwealth gave notice of its intention to introduce seven earlier convictions and a pending charge to show Finch's long history of fleeing from police.² Finch's trial counsel argued these earlier convictions were not relevant to prove Finch's identity as the driver, fleeing was not Finch's signature crime, and the prejudicial nature of the convictions outweighed any probative value. After a hearing, the trial court issued a KRE 404(b) order permitting the Commonwealth to introduce four of Finch's prior convictions. The trial court excluded convictions in which Finch did not use an automobile to flee law enforcement. Finch presents the same arguments on appeal that were argued before the trial court.

As a general rule, the proper standard of review for evidentiary rulings is abuse of discretion.³ Specifically, we must consider whether the trial court abused its discretion⁴ when this Court reviews trial court decisions related to KRE 404(b). KRE 404(b) provides that evidence an individual committed other

² See Kentucky Rules of Evidence (KRE) 404(c).

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

⁴ *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) ("The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, or unsupported by sound legal principles.").

crimes is inadmissible unless that evidence falls within an exception to the rule⁵ and states, in pertinent part:

Other crimes, wrongs, or acts. 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

This Court developed an analysis that the trial court must utilize when determining the admissibility of acts that might fall into the KRE 404(b) category in *Bell v. Commonwealth*.⁶ The analysis is three-part and considers the (1) relevance, (2) probativeness, and (3) prejudicial effect of the evidence at issue.⁷ Regarding the matter before us, the trial court properly considered all parts of the test.

The Bell Analysis.

On the issue of relevance, the trial court found the four convictions in which Finch fled from the police in a motor vehicle exhibited relevance concerning the Commonwealth's burden of proof in Finch's prosecution. Because Finch was charged with murder, the Commonwealth bore the burden of proving that Finch operated "a motor vehicle under circumstances manifesting extreme indifference to human life [and] wantonly engage[d] in conduct which create[d] a grave risk of death to another person and thereby

⁵ *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994); *See generally, Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998) (stating the list of exceptions in KRE 404(b) is not exhaustive of all permissible uses).

⁶ 875 S.W.2d 882 (Ky. 1994).

⁷ *Id.* at 889.

cause[d] the death of another person.”⁸ The trial court found that the earlier incidents of fleeing the police were relevant to the Commonwealth’s burden of proving Finch acted wantonly.⁹ Specifically, the previous incidents indicated Finch possessed knowledge about operating a vehicle in flight from law enforcement, understood the risks related to causing accidents or injury to others, and may have acted with conscious disregard of the innate dangers associated with such activity.

The trial court described the probativeness prong of the *Bell* test as addressing whether the other crimes evidence was, “*probative of the Defendant’s guilt in the other crimes.*”¹⁰ In *Bell*, the court needed to determine the propriety of permitting testimony detailing an uncharged act.¹¹ Consequently, the analysis developed in *Bell* was whether the evidence is sufficiently probative of the uncharged act to warrant its introduction.¹² As a part of the trial court’s analysis of probativeness, it must decide whether the uncharged act or other crime possesses a sufficient factual background to

⁸ Kentucky Revised Statutes (KRS) 507.020(b).

⁹ KRS 501.020(3). (“A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.”)

¹⁰ 875 S.W.2d at 890.

¹¹ *Id.*

¹² *Id.* See generally, ROBERT G. LAWSON, *THE KENTUCKY EVIDENCE LAW HANDBOOK*, § 2.25 (4th ed. 2003) (Professor Lawson generally describes the formula for this balancing test. Specifically, he alludes that the probativeness prong most often relates to evidence of uncharged crimes and their admissibility.).

indicate reliability, not whether it is probative of the current charge before the court.

The convictions in question possess strong indicia of reliability. Unlike an uncharged act, a conviction is a methodical result of fact and law. Finch was charged and convicted for the crimes the Commonwealth sought to introduce at trial. Evidence of other crimes can be allowed by the trial judge upon belief that “the jury could reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts.”¹³ Finch’s convictions lead to a conclusion prior bad acts occurred, and Finch was held criminally responsible for them.

Finally, the trial court was required to engage in a routine balancing test: does the prejudice to the defendant substantially outweigh the probative nature of the evidence? Specifically, would the introduction of Finch’s prior convictions be so suggestive to a jury that Finch would be prejudiced to a degree impairing his fundamental due process rights? To determine whether the introduction of the evidence would be unduly prejudicial, the trial court considered whether the Commonwealth would attempt to use the convictions as evidence that Finch committed the current charged offenses.

The trial court appropriately concluded the admission of the convictions was proper for the purposes of showing the defendant’s awareness and conscious disregard of the risk of leading a high-speed chase in an urban area. Furthermore, the earlier convictions were greatly significant to the

¹³ *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky. 1997).

Commonwealth's case because it bore the burden of proving beyond a reasonable doubt that Finch acted in a wanton manner.

The trial court carefully considered the Commonwealth's motion to present to the jury seven convictions and one pending charge for fleeing from law enforcement. After applying the three-part analysis detailed in *Bell*, the court imposed restraints on the Commonwealth by limiting admission of other-crimes evidence to Finch's four convictions for fleeing while operating a motor vehicle. In addition to restricting which convictions could be presented to the jury, the trial court admonished the jurors to consider the prior convictions only for the purpose of determining Finch's intent.

Because the court properly evaluated the issues of relevance, probativeness, and prejudice; limited the introduction of charges to those instances in which Finch was convicted of fleeing from law enforcement in a vehicle; and admonished the jury to consider the convictions in an appropriate manner, the trial court did not abuse its discretion.

B. The Trial Court Did Not Err by Failing to Grant a Mistrial When a Witness Testified to a Matter that the Trial Court Excluded.

Finch contends the trial court committed reversible error by not granting a mistrial when a witness testified in contravention of the trial court's KRE 404(b) order. As previously discussed, the trial court's KRE 404(b) order prevented the Commonwealth from introducing three prior convictions of Finch's in which he fled from the police but did so on foot or bicycle. In its discretion, the court determined the use of these convictions was not

appropriate in this trial. On appeal, the standard of review for a decision denying a mistrial is abuse of discretion.¹⁴

Sergeant Hensler was one of the Commonwealth's KRE 404(b) witnesses. Although any testimony regarding Finch ever fleeing on foot was excluded,¹⁵ Sergeant Hensler made reference during his testimony to an occasion in which he chased Finch on foot for two and half city blocks. Sergeant Hensler appropriately testified to an occasion in 2001 when he observed Finch speeding away from police officers and running red lights. Near the conclusion of his testimony regarding the incident, Sergeant Hensler mentioned that Finch leaped from his moving vehicle to attempt an escape on foot while his driverless car careened into a building. Immediately, defense counsel moved for a mistrial; but the trial court chose to admonish the jury as a curative measure and proceed with the trial.¹⁶

This Court has long accepted the proposition that a proper admonition is curative of any erroneous admission of testimony or other trial irregularities, and a jury is presumed to follow that admonition.¹⁷ Two circumstances exist in which an admonition's adequacy comes into question:

¹⁴ *Maxie v. Commonwealth*, 82 S.W.3d 860, 863 (Ky. 2002) (citing *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734 (1996).)

¹⁵ The Opinion and Order of the Trial Court, p. 6, declared, "[T]he Commonwealth should be entitled to introduce evidence of behavior in which the Defendant was fleeing in a vehicle or engaging in reckless behavior in a vehicle in an urban area." The prosecutor explained she was unaware the KRE 404(b) order excluded a foot chase subsequent to a vehicle chase.

¹⁶ Though the trial record is difficult to discern, it sounds as though defense counsel ultimately accepted the trial court's decision to give an admonition.

¹⁷ *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003) ("A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." (citing *Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999))); See

(1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was inflammatory or highly prejudicial.¹⁸

We conclude neither inadequacy circumstance exists here.

Finch argues that the first circumstance is applicable to the matter at hand because a jury could not ignore Sergeant Hensler's testimony that Finch continued to flee on foot after exiting the vehicle. Finch believes the acquisition of such knowledge might lead a jury necessarily to infer he was more likely to flee and possess a wanton state of mind in the commission of the crimes for which he was charged.

Unquestionably, the end of Sergeant Hensler's testimony exceeded the scope of evidence permitted in the trial court's 404(b) order. And the trial court tacitly acknowledged Sergeant Hensler's statement of gratuitous information by giving an admonition to the jury, which stated:

I want to admonish you in relation to this witness's testimony not to consider any testimony that he may have given with respect to the defendant fleeing on foot in this particular situation. So do not take into consideration in your deliberations any testimony or evidence from this witness concerning the defendant fleeing on foot.¹⁹

Parker v. Commonwealth, 291 S.W.3d at 658 (Ky. 2009) (holding that the trial court's admonition was a sufficient curative measure given the relatively brief nature of the improper testimony in the context of a lengthy trial); *Maxie*, 82 S.W.3d at 863-64, (Ky. 2002) (stating that the appellant showed no actual prejudice so it must be assumed the jury followed the trial court's admonition.).

¹⁸ *Johnson*, 105 S.W.3d at 441 (Ky. 2003) (citations omitted).

¹⁹ V.R. No. 5: 12/14/09; 11:21:44 through 11:22:15.

In adhering to precedent, this Court presumes an admonition performs the curative, remedial function necessary when testimony exceeds admissible standards during trial. The trial court's admonition specifically addressed the excessive testimony, Sergeant Hensler's description of Finch fleeing on foot, and advised the jury not to consider it. Taken within the totality of the trial, the brief and unsolicited statement made by Sergeant Hensler was not devastating to Finch. The Commonwealth introduced evidence of four occasions in which Finch fled from law enforcement while operating a motor vehicle. A reasonable person might conclude that an isolated instance of fleeing police officers in an urban area sufficiently indicates wanton conduct. Because the Commonwealth produced four convictions of Finch fleeing in an automobile and several eyewitnesses of Finch driving the blue Grand Am that struck the victims,²⁰ the brief bit of information during the course of a multi-

²⁰ Officer Hyche testified to engaging in high speed chase with Finch and observing him strike three pedestrians. Barbara Cook testified to seeing a blue Grand Am become airborne at a speed of around 50 miles per hour crossing a railroad near the intersection where the accident occurred. At trial, she identified Finch as the driver of that blue Grand Am. Juanita Landers saw a car strike three pedestrians in her rearview mirror as she turned south onto Floyd Street on July 25, 2008. Shirley Johnson gave testimony that she saw a blue Grand Am driving approximately 80-90 miles per hour speed through an intersection that three pedestrians just entered. Ms. Johnson said she waited to see what happened because she assumed the pedestrians had not reached the other side of the street. Natalia Bishop testified that she saw a blue Grand Am strike three pedestrians and drive away as she waited in her vehicle to turn right from Warnock onto Floyd Street. Margaret Ross was behind Natalia Bishop at the intersection and she also testified to seeing a blue car come through the intersection and strike a woman and two children. Finally, Rebecca Jones was at a nearby McDonald's® when the accident occurred. She heard a screech and a thud and saw a blue car driving very fast away from the intersection.

day trial about him fleeing on foot cannot be considered devastating to Finch's defense.²¹

A motion to declare a mistrial invokes the sound discretion of the trial court²² and "should only be granted when there is a 'manifest necessity for such action or an urgent real necessity.'"²³ In the present case, the trial court properly admonished the jury; and no reason exists for this Court to suspect the admonition was ineffective. Based on the overwhelming amount of evidence against Finch, the slight amount of information Sergeant Hensler provided that exceeded the scope of the trial court's KRE 404(b) order did not create a necessity for a new trial. The trial court acted soundly within its discretion.

III. CONCLUSION.

For the foregoing reasons, the trial court's judgment is hereby affirmed.

All sitting. Minton, C.J.; Abramson, Cunningham, Schroder, and Scott, JJ., concur. Noble and Venters, JJ., dissent.

²¹ Although Finch does not take issue with the second circumstance, Sergeant Hensler responded to an appropriate question but shared too much information regarding the conviction at issue. In the scope of the trial, Sergeant Hensler's extra details of the event would not be inflammatory or highly prejudicial. Because the second circumstance requires a question without a factual basis *and* an inflammatory or highly prejudicial answer (*Johnson*, 105 S.W.3d at 441 (Ky. 2003) (citations omitted)), we do not need to reach that discussion at this time. It is clear Sergeant Hensler responded to an appropriately fact-based question by the Commonwealth with a fact-based answer.

²² *Gosser v. Commonwealth*, 31 S.W.3d 897, 906 (Ky. 2000).

²³ *Id.*

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