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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000338-MR

JIMMY THACKER, JR. — APPELLANT

V.

ON APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 10-CR-00114

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

On July 21, 2010, Appellant Jimmy Thacker, Jr. was indicted for one count of first-degree assault, five counts of first-degree wanton endangerment, and for being a first-degree persistent felony offender. The charges in this case resulted from a shooting that occurred on July 16, 2010. Appellant shot Elizabeth Conn multiple times while she, her little girl, and some of her friends were at her mother's house. He was charged with one count of wanton endangerment for each of the other persons who were at the home at the time of the shooting.

The trial was conducted in Floyd Circuit Court on March 21-23, 2011. At trial, Appellant did not deny guilt, but claimed that he was acting under extreme emotional disturbance (EED) and asserted a voluntary intoxication

defense. The jury convicted Appellant on all counts, and he was sentenced to a total of twenty-six (26) years in prison. He now brings this appeal as a matter of right. Ky. Const. § 110(2)(b).

Evidence of Prior Bad Acts

The victim and four other eyewitnesses testified that just before the shooting, Appellant exclaimed, "I'm going back to prison." Prior to trial, Appellant filed a motion in limine to suppress the statement, arguing that it was not relevant and was more prejudicial than probative. The trial court held that the statement could be introduced to rebut Appellant's claim that he acted under EED. On appeal, Appellant contends that, pursuant to KRE 404(b), it was error to admit the statement. We review a trial court's decision to admit such evidence for an abuse of discretion. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

KRE 404(b) is exclusionary in nature and prevents "[e]vidence of other crimes, wrongs, or acts" from being admitted in order "to prove the character of a person in order to show action in conformity therewith." However, evidence of bad acts may be admissible for the purpose of showing a person's intent. KRE 404(b). To be admissible, such evidence must be probative and relevant to some purpose other than proving a defendant's criminal disposition. Also, its prejudice must not substantially outweigh its probative value. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994).

Here, Appellant's statement was evidence of a prior bad act since it revealed that he had previously been convicted and imprisoned for a crime.

Appellant contends that his previous incarceration was not relevant and, thus, the statement was inadmissible on that basis alone. However, the statement was relevant to this case because it showed Appellant's intent and state of mind just prior to his shooting the victim multiple times.

At trial, Appellant attempted to negate his own intent by claiming he was acting under extreme emotional disturbance and by asserting a voluntary intoxication defense. Evidence of prior bad acts has been held to be admissible in order to rebut a defendant's claim of EED. *Sherroan v. Commonwealth*, 142 S.W.3d 7, 19 (Ky. 2004); *Haight v. Commonwealth*, 938 S.W.2d 243, 252 (Ky. 1996). The statement rebutted Appellant's EED claim because it showed that he was not extremely emotional at the time of the shooting, but rather was mindful of the consequences of his actions and yet decided to shoot the victim anyway. It also rebutted the voluntary intoxication defense by showing that Appellant had formed the intent to commit what he knew was a criminal offense. Appellant having uttered the statement immediately prior to shooting the victim made it relevant and highly probative of whether he had formed the requisite intent or was acting under EED.

In his brief, Appellant contends that even if the statement was relevant, it was unnecessary and cumulative. We disagree. Appellant's own statement provided unique insight into his demeanor at the time of the shooting. The only prejudice resulting from the statement was that it informed the jury that Appellant had been to prison before. It did not reveal the nature of the previous crime, nor whether it was similar to the one for which he was being

tried. Thus, the statement was relevant and its probativeness as to Appellant's intent and state of mind was not substantially outweighed by any prejudice he may have suffered from the jury hearing he had been to prison before. The trial court did not abuse its discretion in admitting the statement.

Sentencing Error

Appellant was sentenced to twenty (20) years for first-degree assault and twenty (20) years for being a first-degree persistent felony offender (PFO I), to run concurrently; and a total of six (6) years for five counts of first-degree wanton endangerment. He was sentenced to a total of twenty-six (26) years in prison.

Appellant argues that it was error for the trial court to run the 20-year sentence for PFO I concurrently with the 20-year sentence for the underlying first-degree assault. Although not raised at trial, we review this issue because sentencing errors are jurisdictional and cannot be waived by failure to object. *Wellman v. Commonwealth*, 694 S.W.2d 696, 698 (Ky. 1985). Appellant is correct that the sentence for PFO I should be *in lieu* of, instead of concurrent with the sentence for first-degree assault. KRS 532.080(1); *see also Wellman* at 698. "Thus, any attempt to run the persistent felony offender conviction either concurrently with or consecutively to the underlying offense on which it is based . . . is improper." *Pace v. Commonwealth*, 636 S.W.2d 887, 891 (Ky. 1982) (overruled on other grounds by *Commonwealth v. Harrell*, 3 S.W.3d 349 (Ky. 1999)).

Accordingly, the judgment of the Floyd Circuit Court is affirmed in part and vacated in part, and this matter is remanded to the trial court to enter a new judgment of one sentence of 20 years on the first-degree assault conviction, enhanced to 20 years under the first-degree persistent felony offender conviction, instead of two separate 20-year sentences on the assault and PFO convictions which the trial court erroneously imposed and ran concurrently.

All sitting. All concur.

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