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NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2013-SC-000175-MR

RODNEY JONES

APPELLANT

V. ON APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
NO. 11-CR-00396-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Rodney Jones, appeals from a judgment of the Jessamine Circuit Court convicting him of complicity to first-degree burglary, complicity to first-degree robbery, complicity to theft by unlawful taking over \$500.00, and sentencing him to twenty-one years' imprisonment.

On appeal, Appellant contends that the trial court erred by allowing the Commonwealth to introduce evidence of his prior methamphetamine use without drawing a nexus between the prior drug use and the crimes for which he was being tried. Because we are persuaded that the prior drug use was relevant to showing Appellant's motive for committing the indicted crimes, we affirm the trial court's decision to admit the evidence.

I. FACTUAL AND PROCEDURAL BACKGROUND

Evidence presented at trial supporting the verdict included the following. Dorre Mitchell was asleep in her bed when she was awakened by the intrusion

of four individuals who were all wearing masks or clothing that obscured their identities. Brandishing a gun and a hammer, they demanded her valuables and threatened to kill Mitchell and her dog if she did not cooperate. They also told her that she was being watched and that she would be killed if she called the police about the burglary. The robbers eventually fled the residence with jewelry, four electric guitars, and other valuable items.

About two weeks later, Appellant, William Penn, and Robert Sheeley were caught breaking into another residence. Upon questioning by police, Penn and Sheeley admitted to the Mitchell robbery; they also identified Appellant and Willie Fain as their accomplices. As a result, Appellant was indicted in connection with the Mitchell robbery and charged with complicity to first-degree burglary, complicity to first-degree robbery, and complicity to theft by unlawful taking over \$500.00. After Penn and Sheeley entered plea agreements, Appellant and Fain were tried jointly for the crimes relating to the Dorre Mitchell robbery.

Appellant was convicted and sentenced as noted above. The sole ground upon which he seeks appellate relief is the contention that the trial court erred by permitting the Commonwealth to introduce evidence of his, and his accomplices', prior drug and methamphetamine use.

II. EVIDENCE OF APPELLANT'S PRIOR DRUG USE WAS PROPERLY ADMITTED

Prior to trial, the Commonwealth gave notice, pursuant to KRE 404(c), of its intention to introduce evidence of Appellant's "involvement in illegal

controlled substances activities.” In support of its motion the Commonwealth stated that “such evidence is relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident. Furthermore, it is inextricably intertwined with other evidence that is essential to the presentation of the Commonwealth’s case.”

The matter was first addressed by the trial court on the morning of the first day of trial. The Commonwealth argued that the proposed evidence was admissible because the four robbery accomplices were well acquainted with one another as a consequence of their mutual drug use, and that part of the motive for committing the crimes was their need to get more money for methamphetamine. Appellant and Fain argued that the evidence did not show motive, intent, or anything else. The trial court concluded that drug use was a legitimate means to prove motive for theft, and that the relevance was obvious because it showed a motive to rob someone.

On the morning of the second day of trial, the issue was again discussed. The Commonwealth reasserted that methamphetamine was the basis for the four accomplices’ friendship, and that it expected the trial testimony to reveal that the men were under the influence of methamphetamine at the time of the crimes and that they wanted to get more money to purchase more methamphetamine. The Commonwealth further stated that it anticipated that there would be testimony that the use of methamphetamine has a tendency to change one’s appearance, causing the skin to appear dirty or grimy, and that

such testimony was relevant to support Mitchell's testimony that the gunman (believed to be Fain) had appeared dirty, grayish, and unhealthy.

The evidence in question consisted of the following. Penn testified that he, Appellant and Fain used methamphetamine together at the home of Carol Estes. Upon contemporaneous objection, the trial court ruled that the testimony was relevant because the use of methamphetamine suggested a motive for the robbery. Carol Estes's testimony confirmed that she, Appellant, Fain, and Penn had used methamphetamine and marijuana at her home. Sheeley testified that he had seen Appellant and Penn use methamphetamine and marijuana, and that he knew Fain used methamphetamine. He also testified from his experience and observation, that the use of methamphetamine caused the user's body to appear dirty and his eyes to appear sunken. The latter evidence was offered in conjunction with Mitchell's testimony that the gunman's skin appeared dirty and grayish.¹ Finally, Paula Carr testified that she and Fain were addicted to methamphetamine.

At the close of the Commonwealth's case, Appellant moved for a mistrial on the grounds that the Commonwealth had failed to meet its proffer for admission of the drug evidence by showing that, because of their mutual drug use, the co-defendants had a motive to commit robbery and theft, or that they otherwise lacked the means to obtain methamphetamine. Appellant also argued that the Commonwealth failed to present any evidence that the co-

¹ Appellant raises no arguments on appeal regarding the theory, and related testimony, that methamphetamine use may be deduced based upon a person's appearance, or that a layperson would be competent to testify to this.

defendants were under the influence of methamphetamine when they committed the crimes. Appellant, arguing for a mistrial, asserted that the trial court's KRS 404(b) ruling had been obtained by erroneous representations of the Commonwealth and that the jury was unduly inundated with prejudicial drug evidence. The trial court overruled the motion. Appellant filed a motion for a new trial based upon the reasons just stated. This motion, too, was denied.

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;

Generally, evidence of crimes other than that charged is not admissible.

KRE 404(b); Lawson, *Kentucky Evidence Law Handbook*, 3rd Ed., § 2.25 (1993).

However, evidence of other crimes or wrongful acts may be introduced as an exception to the rule if relevant to prove motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(1). To be admissible under any of these exceptions, the acts must be relevant for some purpose other than to prove criminal predisposition, and they must be sufficiently probative to warrant introduction. Further, the probative value of the evidence must outweigh the potential for undue prejudice to the accused. *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (Ky. 1991); *Chumbler v. Commonwealth*, 905 S.W.2d 488, 494 (Ky. 1995).

As we have previously stressed, KRE 404(b) is “exclusionary in nature,” and, as such, “any exceptions to the general rule that evidence of prior bad acts is inadmissible should be closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.” *O’ Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982). To determine the admissibility of prior bad act evidence, we have adopted the three-prong test as described in *Bell v. Commonwealth*, 875 S.W.2d 882, 889–91 (Ky. 1994), which evaluates the proposed evidence in terms of: (1) relevance, (2) probativeness, and (3) its prejudicial effect. We review the trial court’s application of KRE 404(b) for an abuse of discretion. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007).

“Evidence of a drug habit, along with evidence of insufficient funds to support that habit, is relevant to show a motive to commit a crime in order to gain money to buy drugs.” *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003); *see also United States v. Cunningham*, 103 F.3d 553, 557 (7th Cir. 1996) (evidence of nurse’s Demerol addiction admissible to show motive to tamper with Demerol-filled syringes); *State v. Kealoha*, 22 P.3d 1012, 1027 (Haw. Ct. App. 2000) (“Evidence that Defendant sold methamphetamine to finance her cocaine use is probative of whether Defendant had a motive to manufacture methamphetamine and her intent to do so.”); *United States v. Cody*, 498 F.3d 582 (6th Cir. 2007) (trial court did not abuse its discretion in allowing evidence of drug use as motive for robbing bank).

Here, the Commonwealth presented evidence that Appellant was unemployed, had no vehicle, drifted from friend to friend for a place to live, and yet regularly used methamphetamine. As such, the Commonwealth indeed did present evidence from which it might reasonably be inferred that Appellant had a methamphetamine habit and was without sufficient means to support it. Accordingly, we are persuaded that the situation we address falls squarely within the rule as stated in *Adkins*. We also perceive the evidence as relevant to establishing the nature of the relationship that existed among the four accomplices to the robbery.

Pursuant to the *Bell* test, the evidence was relevant and probative in establishing a motive for the robbery, and the prejudicial effect of the testimony did not substantially outweigh its probative value so as to violate KRE 403. Accordingly, we are constrained to conclude that the trial court did not abuse its discretion by permitting the Commonwealth to present evidence concerning Appellant's prior drug use.

III. CONCLUSION

For the foregoing reasons, the judgment of the Jessamine Circuit Court is affirmed.

All sitting. All concur.

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