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**NOT TO BE PUBLISHED OPINION**

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PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),  
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  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  
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ACTION.**

# Supreme Court of Kentucky

2013-SC-000236-MR

WILLIE DALE FAIN

APPELLANT

V. ON APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
NO. 11-CR-00396-004

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

A Jessamine Circuit Court jury found Appellant, Willie Dale Fain, guilty of first-degree burglary, first-degree robbery, complicity to theft by unlawful taking over \$500, and of being a first-degree persistent felony offender (PFO). The jury recommended a sentence of eighty years' imprisonment, which the trial court reduced to seventy years in order to comply with statutory limits.

Fain now appeals as a matter of right, Ky. Const. § 110(2)(b), asserting: 1) the trial court erred by admitting evidence of his prior drug use, and 2) the trial court erred by limiting Appellant's cross-examination of two of the prosecution's witnesses. For the following reasons, we affirm.

### I. BACKGROUND

Appellant and three other men, Rodney Jones, Robert Sheeley, and William Penn, broke into the bedroom of fifty-eight-year-old widow Dorre Mitchell in the middle of the night. The men were all wearing ski masks or

other clothing that obscured their identities. Appellant, armed with a gun, threatened to kill Mitchell and her dog if she did not tell them the location of her valuables. Eventually, the four men stole a laptop, a camera, jewelry, and four electric guitars from Mitchell's home.

Twelve days later, Sheeley, Penn, and Jones were arrested while breaking into a different house. While in jail on charges for the second break-in, both Sheeley and Penn confessed to the robbery at Mitchell's home. They also told the police that Appellant and Jones were involved in the Mitchell robbery. Appellant, tried jointly with Jones,<sup>1</sup> was subsequently convicted and sentenced as previously noted. This appeal follows.

## II. ANALYSIS

### **A. The Trial Court Did Not Err by Admitting Evidence of Appellant's Prior Drug Use**

The Commonwealth sought to introduce evidence at trial, through witness testimony, that Appellant and Jones were users of methamphetamine. It argued that this evidence went toward proof of Appellant's motive—specifically, that the four men involved in the robbery were motivated to commit crimes by their desire to get money to purchase more methamphetamine.

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<sup>1</sup> Jones was convicted of complicity to first-degree burglary, complicity to first-degree robbery, and complicity to theft by unlawful taking over \$500, and was sentenced to twenty-one years' imprisonment. This Court affirmed his conviction and sentencing in an unpublished decision, *Jones v. Commonwealth*, No. 2013-SC-000175-MR, 2014 WL 702286 (Ky. Feb. 20, 2014).

On the morning of the first day of trial, defense counsel argued that under KRE 401 and 403, any possible relevance of the evidence of prior drug use would be substantially outweighed by the prejudicial effect of bringing methamphetamine into a case where it was not otherwise mentioned. The trial court disagreed, stating that evidence of drug use was a legitimate means to prove motive for theft.

The parties further discussed the evidence again on the morning of the second day of trial. The Commonwealth asserted that methamphetamine was the basis of the four men's friendship, and that it expected testimony to reveal that the men were on a methamphetamine-induced high at the time of the crime, motivated to get money for more methamphetamine to continue their high. The Commonwealth also said that it anticipated testimony that methamphetamine has a tendency to change a user's appearance, making his skin appear dirty or grimy. The Commonwealth felt such testimony was relevant to support Mitchell's claim that the gunman (alleged to be Appellant) had a grayish tint on the part of his face that was visible at the time of the robbery. Ultimately, the trial court allowed the Commonwealth to introduce evidence of methamphetamine use by both Appellant and Jones, noting that besides motive, the evidence that methamphetamine use causes changes to the skin was admissible because the victim had described the gunman's skin as unhealthy-looking.

The evidence in question consisted of the testimony of four witnesses, including Penn and Sheeley, who all stated that they knew Appellant to use

methamphetamine. Sheeley also testified that based on his observations, methamphetamine makes a user's body very dirty and his eyes sunken. Appellant's counsel contemporaneously objected to this testimony and was overruled.

At the close of the Commonwealth's case, Jones moved for a mistrial, and Appellant joined in that motion. Jones believed the Commonwealth had failed to prove what it set out to prove—that Appellant and Jones had been under the influence of methamphetamine when they committed the crime, or that they committed it in order to get money for methamphetamine. The trial court overruled the motion for a mistrial.

After trial, defense counsel filed a motion for a new trial, stating once again that admitting the evidence was prejudicial as well as irrelevant, as it did not go toward proving commission of the crime. The trial court overruled the motion for a new trial because it found that the Commonwealth had adequately proven Appellant and Jones had an addiction and lacked a way to fund that addiction.

KRE 404(b)(1) provides that “evidence of other crimes, wrongs or acts” may be admissible if offered to show proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Trial courts must apply KRE 404(b) cautiously. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). In *Bell*, we established a three-pronged inquiry for determining admissibility of evidence under KRE 404(b) that evaluates the evidence for 1) relevance, 2) probativeness, and 3) prejudice. *Id.*

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 Caudill v. Commonwealth*, 120 S.W.3d 635, 661 (Ky. 2003) (evidence of defendant's heavy cocaine use and lack of sufficient resources to support habit was admissible under KRE 404b(1) “to show motive to commit a crime in order to gain money to buy drugs”).

Here, the Commonwealth presented evidence that Appellant had no job, was kicked out of his house, in part, for not paying rent, that Appellant was addicted to methamphetamine and smoked it approximately four times a week, and that Appellant, Jones, and Penn all smoked methamphetamine together. As such, the Commonwealth did, in fact, present evidence from which it might be reasonably inferred that Appellant had a methamphetamine habit without sufficient means to support it.

Accordingly, this situation falls within the rule as stated in *Adkins*. It was relevant and probative in establishing Appellant's motive to commit the robbery as a means of obtaining money to purchase methamphetamine, and any prejudicial effect of the testimony did not outweigh its relevance and probativeness.

KRE 404(b) also allows evidence of other crimes if offered for the purpose of proving identity. “The relevance (for ‘identity’ purposes) of other crimes in

this type of situation is very diverse, always connecting defendant to the charged offense through some object or circumstance that coincidentally shows commission of some uncharged crime.” Lawson, *Kentucky Evidence Handbook* § 2.30[4][f] (2013 5th ed.). The trial court admitted evidence concerning the changes that methamphetamine use can cause to a person’s skin, which was probative of Appellant’s identity, given that the victim had described the gunman’s skin as having a grayish-tint and appearing “unhealthy.”

Thus, we conclude that the trial court did not abuse its discretion by permitting the Commonwealth to present evidence concerning Appellant’s prior drug use. Evidence of the uncharged crime of methamphetamine-use went toward both motive and identity in this case, and was admissible under KRE 404(b).

**B. The Trial Court Did Not Err in Limiting Appellant’s Cross-Examination of Penn and Sheeley**

Appellant next argues that the trial court abused its discretion by limiting defense counsel’s cross-examination of Penn and Sheeley. He claims that, pursuant to KRE 608(b), he should have been allowed to question Penn and Sheeley about other similar crimes they had committed without Appellant.

On the morning of the second day of trial, Appellant’s counsel made it known that she intended to question Sheeley about other crimes he had committed with Jones and Penn in which Appellant was not implicated. Defense counsel also wanted to bring in two additional witnesses, David Hartsall and his wife, to testify as to statements Sheeley made to them about his crimes. The trial court did not allow the questioning because it determined

that Sheeley's other crimes and statements to other potential witnesses regarding his participation in additional burglaries were not substantially probative of the matter at hand.

At trial, Appellant's argument was that the evidence involved in Sheeley's statements to David Hartsall and Hartsall's wife was admissible as reverse 404(b) evidence.<sup>2</sup> On appeal, Appellant argues that he should have been allowed to question Sheeley about such statements or that he should have been allowed to introduce such testimony pursuant to KRE 608(b).<sup>3</sup>

We first note that this Court is not at liberty "to review issues not raised in or decided by the trial court." *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) (quoting *Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989)). An objection made in the appellate court must be within the scope of the objection made in the trial court, both as to the matter objected to and as to the grounds of the objection, so that the question may be fairly held to have been brought to the attention of the trial court. *Elery v. Commonwealth*, 368 S.W.3d 78, 97-98 (Ky. 2012) (citing *Richardson v. Commonwealth*, 483

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<sup>2</sup> "Rule 404(b) evidence is generally offered by the government to prove the defendant's guilt. 'Reverse 404(b)' evidence is evidence of an [alternative perpetrator's] other crimes, wrongs, or acts offered by the defendant to prove that the [alternative perpetrator] committed the offense with which the defendant is charged." *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 n.4 (Ky. 2003).

<sup>3</sup> KRE 608(b) states in pertinent part: "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."



S.W.2d 105, 106 (Ky.1972)). In other words, “appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1977).

Appellant raised the issue of Sheeley’s cross-examination at trial, however, at trial Appellant did not base his argument on 608(b) grounds, and instead argued that the questioning of Sheeley and other witnesses about separate burglaries was permitted as reverse 404(b) evidence. Thus, we will not address this new argument on appeal.

At best, such error is subject to review for palpable error under RCr 10.26. *Elery*, 368 S.W.3d at 98. The palpable error rule allows reversal for an unpreserved error when “manifest injustice has resulted from the error.” RCr 10.26. However, because Appellant has not requested palpable error review here, we decline to address his claims under this standard.

### **III. CONCLUSION**

For the foregoing reasons, we affirm the judgment of the Jessamine Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Linda Roberts Horsman, Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway, Attorney General of Kentucky  
Courtney J. Hightower, Assistant Attorney General