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NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000388-MR

RODNEY FOY — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY M. EASTON, JUDGE
NO. 12-CR-00380

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Hardin Circuit jury found Appellant, Rodney Foy, guilty of three counts of third-degree assault and of being a first-degree persistent felony offender (PFO). As a result, he was sentenced to twenty years' imprisonment. He now appeals as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erred by (1) improperly admitting evidence of other crimes and (2) violating the separation of witnesses rule. For the following reasons, we affirm.

I. BACKGROUND

On June 8, 2012, Appellant was involved in an altercation at the Hardin County Detention Center. The incident was precipitated by a dispute between Appellant and Deputy Medley, a corrections officer. On the day in question, Medley noticed Appellant lying in bed under a blanket. Medley ordered Appellant to uncover himself and put his uniform on. Appellant responded that he had been told that he could be covered from the waist down, and he

demanded to speak to the shift leader. Medley stepped away to call for the shift leader, Corporal Watts.

Moments later, Medley returned with Watts and Deputy Nipp, another corrections officer. The officers informed Appellant that, per jail policy, he could not be covered up and had to be in uniform. Appellant unleashed a string of obscenities toward the guards, saying that he was going to "kick all of their motherfucking asses." The shouting match continued to intensify, and the officers told Appellant to gather his belongings so he could be taken to lockdown. Appellant refused to comply with the orders of the corrections officers, and, after several more minutes of shouting, Watts pepper-sprayed him. A fracas ensued wherein Appellant lunged at the officers and was taken to the ground. During the skirmish, Medley suffered a severe chest wall contusion from Appellant's head hitting his ribs, Nipp received a minor concussion from an elbow hitting his face, and Watts sustained two scratches on his arm and a bump on the back of his head.

Following the jailhouse altercation, a Hardin Circuit Grand Jury indicted Appellant on three counts of third-degree assault, three counts of third-degree terroristic threatening, and for being a first-degree PFO.[1] The case proceeded to a jury trial, and the jury found Appellant guilty of three counts of third-degree assault. After evidence of Appellant's prior convictions was introduced

[1] The three counts of third-degree terroristic threatening were dismissed the morning of the trial at the request of the Commonwealth. The original charge of first-degree PFO was amended to second-degree PFO at a pretrial hearing. However, prior to trial, the Commonwealth re-indicted Appellant for being a first-degree PFO.

during the penalty phase, the jury also found him guilty of being a first-degree PFO and recommended that he be sentenced to twenty years' imprisonment. The trial court adopted the jury's recommendation. This appeal followed.

II. ANALYSIS

A. The Trial Court Did Not Improperly Admit Evidence of Other Crimes

The Commonwealth filed a pretrial notice pursuant to KRE 404(c) to introduce a prior threat of violence Appellant made against Deputy Medley several months before the jailhouse altercation occurred. Appellant responded with a motion in limine to exclude the evidence. The trial court ruled that the prior bad acts evidence was admissible under the motive and intent exceptions to KRE 404(b) to show Appellant's motive and intent to harm the corrections officers.[2]

At trial, Medley described the prior threat Appellant made against him. Approximately six months before the altercation for which Appellant was on trial, Medley had been gathering newspapers from inmates. Appellant asked to see a newspaper, and Medley refused. In response, Appellant angrily stated, "Hey motherfucker, I want to see the paper." Medley continued to collect the

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[2] In its KRE 404(c) notice, the Commonwealth argued that the prior threat evidence was admissible under KRE 404(b)(2) because it was inextricably intertwined with the current charge. The Commonwealth has all but abandoned that argument on appeal.

As noted above, the trial court ruled that the prior bad acts evidence was admissible for the purposes of showing Appellant's motive and intent. However, the Commonwealth makes no argument regarding the motive exception to KRE 404(b) on appeal. Because we find that the prior threat was properly admitted for the purpose of proving intent under KRE 404(b), we make no pronouncements on the propriety of its admission under the other KRE 404(b) exceptions previously advanced by the Commonwealth and the trial court.

newspapers. Appellant then raised his fists and unleashed several expletives, telling Medley, "I will kick your motherfucking ass." Medley called for backup and the incident was resolved peacefully. Appellant contends that this prior bad act should have been excluded under KRE 404(b) because its shows neither motive nor intent.

KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The prohibition against evidence of prior bad acts contained in KRE 404(b) "is not limited to other acts that are criminal or unlawful, but applies to any acts offered to prove character in order to show action in conformity therewith." *Davis v. Commonwealth*, 147 S.W.3d 709, 723 (Ky. 2004) (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.25[2] (3d ed. 1993)). However, prior bad acts may be admissible if the evidence falls within one of the exceptions set forth in KRE 404(b)(1). Permissible "other purposes" include "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," KRE 404(b)(1).

This Court reviews the admissibility of prior bad acts evidence under the three-prong test set out in *Bell v. Commonwealth*, 875 S.W.2d 882, 889-91 (Ky. 1994), which examines the proposed evidence in terms of its (1) relevance, (2) probativeness, and (3) prejudicial effect. In addition to the three *Bell* inquiries, when a party attempts to admit KRE 404(b) evidence for purposes of proving intent, as is the case here, an additional inquiry may be necessary as to whether the issue of intent is in genuine dispute. *Walker v. Commonwealth*, 52

S.W.3d 533, 535-36 (Ky. 2001) ("[U]nder KRE 404(b), evidence of other crimes should be admitted to prove intent only when intent is in genuine dispute . . . ."). With these four inquiries in mind, we turn to the case at bar. 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). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Before we proceed to the three *Bell* inquiries, we will first address the issue of whether Appellant's intent was in genuine dispute. Here, Appellant claims intent was not in actual dispute because he did not testify or put on any defense during the guilt phase of the trial that would raise the issue of intent. However, a closer look at Appellant's opening and closing arguments reveals that Appellant did, in fact, put intent into dispute.

During opening statements, Appellant's counsel characterized the corrections officers as the initial aggressors and hinted that Appellant acted in self-defense. This approach was evidenced by counsel's comments that Appellant "tried to get away from the officers," and that he "didn't shake his hands" at them. Furthermore, Appellant's closing argument indicated that Appellant's defense strategy was to assert he lacked intent. Counsel reiterated that Appellant was trying "to get away from" the officers, stated that Appellant was "all talk," and that Deputy Medley knew Appellant was "all talk." Counsel also claimed that Appellant had "no intent to assault" the officers. Based on

Appellant's opening and closing arguments, we hold that the issue of intent was put into genuine dispute. *See Walker*, 52 S.W.3d at 536 (finding that intent was put into dispute by opening and closing arguments even though defendant did not testify and put on almost no defense); *see also Helm v. Commonwealth*, No. 2010-SC-000082-MR, 2010 WL 5238640 at *2 (Ky. Dec. 16, 2010) (indicating that opening statements helped put intent at issue).

Having determined that Appellant placed the issue of his intent into genuine dispute, we turn to the first of the three *Bell* inquiries, relevance. *Bell*, 875 S.W.2d at 889. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

Intent is an element of third-degree assault, and, it is, therefore, a matter "of consequence to the determination of [this particular] action." *See* KRS 508.025(1)(a); KRE 401. Furthermore, this Court has consistently held that threats against the victim of a crime tend to make it more probable that the defendant intended to commit the crime. *See Driver v. Commonwealth*, 361 S.W.3d 877, 884 (Ky. 2012) ("It has long been a rule in this jurisdiction that threats against the victim of a crime are probative of the defendant's motive and intent to commit the crime[.]"); *see also Davis v. Commonwealth*, 147 S.W.3d 709, 722 (Ky. 2004) ("Generally, evidence of prior threats and animosity of the defendant against the victim is admissible as evidence of . . . intent."). Because Appellant's earlier threat against Medley makes it more probable that

Appellant intended to assault him, we find no abuse of discretion in the trial court's determination that the threat was relevant under KRE 401.

Turning to the second *Bell* inquiry, probativeness, we have stated that evidence of other bad acts is sufficiently probative to be admitted if the trial judge believes "the jury could reasonably infer that the prior bad acts occurred and that [the defendant] committed such acts." *Parker v. Commonwealth*, 952 S.W.2d 209, 214 (Ky. 1997). Here, Appellant's prior threat was recorded in an incident report written by Medley. Appellant concedes that the incident report and Medley's testimony provide sufficient evidence that the earlier threat actually occurred.

The final *Bell* inquiry asks whether the evidence's probative value is substantially outweighed by the potential for undue prejudice. *Bell*, 875 S.W.2d at 870. Here, the trial court, relying upon *Driver*, determined that evidence of Appellant's prior threat against Medley was highly probative of Appellant's intent to assault Medley. Appellant now argues that the prior incident was prejudicial because it showed the jury Appellant's foul language and bad temperament.

This Court has previously acknowledged that virtually all evidence submitted by the Commonwealth against a defendant will be prejudicial in some way. *See Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991); *Brown v. Commonwealth*, 313 S.W.3d 577, 606 (Ky. 2010). However, in this instance, we cannot agree with Appellant's contention that the prejudice inherent in the admission of his prior threat against Medley was so overwhelming as to

substantially outweigh its probative value. The trial court's finding of the high probative value of the prior threat was supported by *Driver*, and thus not contrary to legal principles. *See English*, 993 S.W.2d at 945. Because the evidence of Appellant's prior threat against Medley was relevant, probative, and not unduly prejudicial, we hold that the trial court did not abuse its discretion in admitting it under KRE 404(b). *See Bell*, 875 S.W.2d at 889-91.

B. The Trial Court's Decision Allowing Corporal Watts to Remain in the Courtroom Was Not Erroneous

For his second argument on appeal, Appellant alleges that the trial court erred when, over objection, it allowed one of the Hardin County Detention Center's shift commanders, Corporal Watts, to sit at counsel table during the trial. Appellant's objection to Corporal Watts's presence during the trial was based on KRE 615, the separation of witnesses rule. KRE 615 provides as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
>
> (1) A party who is a natural person;
>
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
>
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

If KRE 615 is invoked, as it was in this case, exclusion of witnesses from the courtroom "is mandatory at trial in the absence of one of the enumerated exceptions in [the] exclusion of witnesses rule." *McGuire v. Commonwealth*,

368 S.W.3d 100, 112 (Ky. 2012) (citing *Mills v. Commonwealth*, 95 S.W.3d 838, 841 (Ky. 2003). The rationale underlying the rule is "the recognition that a witness who has heard the testimony of previous witnesses may be inclined, consciously or unconsciously, to tailor his testimony so that it conforms to the testimony given by other witnesses." *Id.* at 112-13 (citing *Smith v. Miller*, 127 S.W.3d 644, 646 (Ky. 2004).

In the present case, the Commonwealth asked that Corporal Watts be designated as its representative pursuant to KRE 615(2), which would allow him to sit at counsel table despite Appellant's invocation of KRE 615. The trial court granted the Commonwealth's request, and Watts remained present in the courtroom throughout the trial. Watts was the last witness called by the Commonwealth, and he did not testify until each of his co-workers had offered their testimony regarding the altercation with Appellant. Appellant argues that Watts's designation as an officer of the Commonwealth was improper because his role as shift commander was not comparable to that of a lead investigator and because, in addition to being a shift commander at the detention center, Watts was one of the three victims of Appellant's assault.

This Court has repeatedly held that lead investigators may be exempted from separation pursuant to KRE 615(2). *See Justice v. Commonwealth*, 987 S.W.2d 306 (Ky. 1998); *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999). The Commonwealth disputes Appellant's contention that Watts's role in the case against Appellant was dissimilar to the role a lead investigator typically plays in a criminal investigation. According to the Commonwealth,

Watts was needed at counsel table during trial to provide information on jail policies and the progression of the case against Appellant.

Although our cases analyzing KRE 615(2) typically deal with the exemption of lead investigative officers from separation, we have never held that KRE 615(2) allows only lead investigators to be excluded from separation. In fact, other courts have held that a government agent need not necessarily be the lead investigator to be exempted. *See United States v. Phibbs*, 999 F.2d 1053, 1073 (6th Cir. 1993) (stating that Federal Rules of Evidence 615(2) allows the government to have law enforcement officers at counsel table); *United States v. Jones*, 687 F.2d 1265, 1267-68 (8th Cir. 1982) (allowing detective to avoid exclusion whose involvement in case was limited to search of defendant's vehicle). In some instances, the lead investigative agent is "not the most important or knowledgeable government witness." *United States v. Martin*, 920 F.2d 393, 397 (6th Cir. 1990). In such situations, the Commonwealth's designation of a representative other than the lead investigator is consistent with KRE 615(2). Here, regardless of whether Watts can be considered a lead investigator, he was the shift commander at the time of the incident, and he was knowledgeable of the jail's policies and protocol for dealing with an inmate assault. Thus, nothing in our prior case law prohibits him from being designated as the Commonwealth's representative.

Appellant also argues that Watts's presence complicated this case because he was not only the designated representative of the Commonwealth, but he was also one of the victims of the charged crime. In fact, this Court has

previously held, in *Mills*, that a trial court erred when it failed to separate a victim-witness who did not meet one of the KRE 615 exceptions. *Mills*, 95 S.W.3d at 841. Although there is no rule providing that victims may not be excluded from separation, we note that a testifying victim-witness's presence during the testimony of the other witnesses threatens the rationale underlying the separation of witnesses rule because the victim will have a strong interest in seeing the accused convicted, which could spur the witness to either consciously or unconsciously conform his testimony to that of the other witnesses. However, a trial court's decision to allow a witness to remain at counsel table to advise the prosecution is error only when the court abuses its discretion. *See Meece v. Commonwealth*, 348 S.W.3d 627, 699 (Ky. 2011). The trial court followed one of the exceptions listed in KRE 615(2) when it allowed Watts to remain at counsel table throughout the trial; therefore, it did not abuse its discretion.

While we held that the trial court did not err in this instance, we also note that any alleged error in Watts's exemption from separation would have been harmless. *See* RCr 9.24; *Justice*, 987 S.W.2d at 315 (conducting harmless error analysis where trial court failed to separate witness). An "error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678-688-89 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)).

Appellant cannot point to any prejudice that resulted from Watts not being separated. In fact, Watts's testimony differed significantly from the other officers' testimony, and it was actually more favorable toward Appellant. For example, Medley testified that Appellant charged Corporal Watts with his head down and his fists up. According to Medley, only after Appellant charged Watts did Watts pepper-spray Appellant. In contrast, Watts testified that he thought Appellant was going to charge him, so he pepper-sprayed him first. Watts admitted that Appellant's hands were not balled into fists, and that, in fact, Appellant's hands were down at his side. Also, Watts conceded that Appellant had not stepped toward him. Overall, Watts's testimony contradicted the testimony of the other guards, painting Appellant as less forceful and aggressive.

As noted above, the purpose of the separation of witnesses rule is to insure the integrity of the trial by denying a witness the opportunity to alter his testimony. *See McGuire*, 368 S.W.3d at 112-13 (citing *Smith*, 127 S.W.3d at 646). Although we acknowledge the validity of Appellant's concerns regarding Watts's presence during the trial, we cannot hold that the trial court erred in this instance because Appellant has offered nothing to show that Watts's testimony actually impacted the guilty verdict reached by the jury. This being the case, we cannot say with fair assurance that the judgment was substantially swayed by Watts's testimony. *See Winstead*, 283 S.W.3d at 688-89 (Ky. 2009) (citing *Kotteakos*, 328 U.S. 750)). Therefore, even if we had found

error in the trial court's decision not to separate Watts, it would have been harmless. *See* RCr 9.24.

III. CONCLUSION

For the aforementioned reasons, we affirm Appellant's convictions and sentence.

Minton, C.J.; Abramson, Cunningham, Keller, and Scott, JJ., concur. Noble, J., concurs in result by separate opinion, in which Venters, J., joins.

NOBLE, J., CONCURRING IN RESULT: I believe that the KRE 404(b) analysis, as done by the majority, fails because evidence of Appellant's previous threat of violence against Deputy Medley is pure propensity evidence. But because the evidence of the previous threat of violence involving the newspaper is proper evidence of animosity, or motive to attack Medley for taking his blanket, I concur in result only.

Venters, J., joins.

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