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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001893-MR

KEVIN SMOOT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 14-CR-00051-003

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2015-CA-001944-MR

KENNETH SMOOT — APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 14-CR-00051-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES AND KRAMER, JUDGES.

ACREE, JUDGE: This is a consolidated appeal from separate judgments of the Kenton Circuit Court convicting brothers Kevin and Kenneth Smoot of one count each of complicity to first-degree robbery. On appeal, the Smoots contend the trial court abused its discretion when, in violation of KRE[1] 404, it permitted the Commonwealth to present evidence that the Smoots and their friends referred to themselves collectively as "Love and Loyalty." Kenneth further contends the trial court erred when it: (1) excluded prior bad act, "reverse 404(b)" evidence[2] offered against a Commonwealth witness; (2) improperly limited impeachment of the same witness; and (3) failed to suppress statements Kenneth made to police after he requested counsel. After careful review, we affirm the convictions in both appeals.

FACTS AND PROCEDURAL HISTORY

Late in the evening of September 30, 2013, Daniel Gebremedhin was walking toward his vehicle to go home for the night. He had just finished some paperwork after closing his Covington neighborhood corner store, known as the Garrard Market.[3] As he approached his van, parked across the street from the market, three men who had covered their faces with shirts suddenly approached

[1] Kentucky Rules of Evidence.

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

[3] The market is also known and referred to as AMB Market. To avoid confusion, we use the name Garrard Market in this opinion.

him. One was brandishing a handgun. Frightened, Gebremedhin ran. The assailants took chase and caught him when he fell attempting to jump a fence. The man with the gun held it to Gebremedhin's head while the other two removed his shoes and pants. The assailants took his wallet, cell phone, and a satchel he was carrying, and disappeared down a nearby alley.

Covington police arrived shortly thereafter and interviewed Gebremedhin. He explained what happened but could not identify the men because they had covered their faces. He informed the officers that his stolen wallet contained cash and credit cards, and that his satchel contained his cell phone, cash from the store register, business papers, and winning lottery tickets.

A few days later, Detective Bryan Kane received a call from officials at the Kentucky Lottery Corporation notifying him that someone was attempting to cash two lottery tickets stolen in the robbery. That someone was Anthony Wallace; Officer Kane apprehended Wallace while he was still trying to cash the tickets at a convenience store. Based on information Wallace provided, Detective Kane obtained a search warrant for a residence across the street from Garrard Market. Twin brothers Robert and Bobby Turner lived there.

Officers executed the search warrant and found Gebremedhin's wallet, satchel, ID card, credit cards, social security card, cell phone, and business papers. Police also found a .38 caliber revolver matching the description of the

handgun used in the robbery. The gun belonged to Wallace. Robert and Bobby Turner were arrested and then questioned by police. During their interviews, both Turners implicated Kevin and Kenneth Smoot and Zla Holder as the robbers.

Kevin and Kenneth were arrested. Two detectives, including Detective Kane, interviewed the brothers separately. Kevin initially denied being involved. However, he soon confessed to complicity in the robbery with Kenneth and Holder. He said all three were part of a group of friends who associated as "Love and Loyalty," a name for the group he referred to as the "gang."

In his separate interview, Kenneth claimed no involvement with the robbery, but also stated he was "not denying it." Both Smoots were indicted for complicity to commit first-degree robbery and they proceeded to separate trials.

At Kevin's trial, in addition to the victim and Detective Kane, Kiyah Humphrey testified. She was a frequent visitor at the Turner house and girlfriend of Bobby Turner. Over Kevin's objection, Humphrey testified that she too was affiliated with "Love and Loyalty." She demonstrated the group's hand-sign in the shape of an "L" and said she considered the group her "family." She was at the Turner house on the night of the robbery but left before the robbery occurred. She confirmed that the Turners, Wallace, and the Smoots were still there when she left. Afterward, she saw both Smoots in possession of the stolen items. She testified

that the Smoots said things that made her believe they were involved in the robbery and repeated those statements for the jury.

At Kenneth's trial, Detective Kane, Humphrey, and Robert and Bobby Turner testified. Detective Kane and Humphrey testified consistently with their testimony at Kevin's trial. Bobby Turner testified that after the robbery, four individuals rushed into his room – the two Smoot brothers, Holder, and his brother Robert. Robert testified that the Smoots and Holder robbed the victim while he stayed back and watched from the window of his house.

Both Smoot brothers were convicted on the respective charges against them. Kevin was sentenced to fifteen years' imprisonment, and Kenneth was sentenced to ten years' imprisonment. The Smoots now appeal as a matter of right. Additional facts will be developed as necessary.

STANDARD OF REVIEW

When reviewing "the trial court's . . . on-the-spot rulings on the admissibility of evidence, we may reverse a trial court's decision to admit evidence only if that decision represents an abuse of discretion [meaning] that the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (citation and internal quotation marks omitted). "When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de*

novo standard of review for conclusions of law." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006). "Because the determination of whether a purported invocation of the right to counsel involves an application of law to facts, our review is de novo." *Bradley v. Commonwealth*, 327 S.W.3d 512, 516 (Ky. 2010).

ANALYSIS

A. Admission of evidence about "Love and Loyalty" affiliation was not abuse of discretion.

Kevin and Kenneth contend the trial court erred by admitting evidence in their respective cases of an affiliation with "Love and Loyalty." Prior to trial in both cases, the Commonwealth filed notice that it intended to introduce evidence of the affiliation, claiming it fit within the exceptions to KRE 404(b).[4]

Under this rule, evidence is not admissible "to prove the character of a person in order to show action in conformity therewith." KRE 404(b). However, it may 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; or

[4] Apparently, all concerned assumed affiliation with "Love and Loyalty" was a bad act and that, absent an exception, evidence of such affiliation would be excluded on KRE 404(b) grounds. But the record only depicts "Love & Loyalty" as a positive bond of mutual support among its members who "take care of each other." (Testimony of Bobby Turner, VR No. 1: 10/13/15; 2:47:25 (2015-CA-001893)). The negativity seems to stem from use of the "L"-shaped hand gesture, a characteristic common to "gangs" as that term has come to be used. We note, however, that hand gestures are not exclusive to "gangs." Even the Boy Scouts have a well-recognized, three-finger hand gesture. However, because the parties' arguments and analyses are based on this assumption of negativity, we undertake our review embracing the assumption too.

> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

KRE 404(b)(1)-(2). In both cases, the Commonwealth generally argued that all the exceptions contained in KRE 404(b)(1) and (2) applied, but offered more narrowly focused, similar reasons in each case.

In Kevin Smoot's case, the Commonwealth said the evidence would show Kevin's "ties to the Turner house where the physical evidence from the robbery was located . . . [and] proves the identity of the participants of the store robbery as well as motive. It also provides context of how this robbery took place, i.e. opportunity." (R. 71-72 (2015-CA-001893)).

In Kenneth's case, the Commonwealth argued that: "1) the evidence provides a general context for the robbery and surrounding circumstances; 2) the evidence will provide a general context for . . . witness testimony and the victim's testimony; 3) the evidence provides a possible motive for the crimes." (R. 77 (2015-CA-001944)).

In addition to arguing that proper application of KRE 404(b) prohibited the evidence of the Smoots' affiliation with "Love and Loyalty," the Smoots argued in their separate cases that this evidence was irrelevant or, alternatively, any probative value of the evidence was substantially outweighed by its prejudicial effect. These arguments are based on KRE 401 through KRE 403.

The issue first arose in Kevin's case where the Commonwealth gave timely notice of its intent to offer the evidence. The trial court did not enter a written order on the question but engaged in a lengthy bench conference immediately before trial, after which the court allowed certain evidence related to "Love and Loyalty." Specifically, after Kiyah Humphrey authenticated cellphone videos taken around the time of the robbery, she was allowed, consistent with KRE 404(b)(1) exceptions and other rules of evidence,[5] to testify to the meaning of the "L"-shaped hand gesture each person in those videos displayed, to explain that the gesture indicated affiliation with "Love and Loyalty," and that, to her, "Love and Loyalty" meant "family."[6]

In Kenneth's case, there is a written order. (R. 103 (2015-CA-001944)). That order, in pertinent part, states:

> The Commonwealth will seek to introduce a video through the owner of the phone. This video shows the defendant [Kenneth Smoot] and others sitting in chairs and a couch situated around a table. Located on the table

[5] The trial judge, justifiably confident in her command of the rules of evidence, addressed hearsay arguments as well. The court noted the applicability of KRE 801(a)(2) relative to the "L" hand gesture. That rule says "[a] 'statement' is . . . [n]onverbal conduct of a person, if it is intended by the person as an assertion." The trial court then referenced KRE 804(b)(3), indicating that, to the extent Smoot denied the charge of complicity, the non-verbal statement would be admissible as a "showing that there's unity" – *i.e.*, a statement against Smoot's own interest. The court also noted that Smoot's co-defendants' use of the "L" hand gesture in the video taken three days before the robbery was admissible under KRE 801A(b)(5) which says: "A statement is not excluded by the hearsay rule . . . if the statement is offered against a party and is . . . [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

[6] VR No. 1: 7/21/15; 8:54:20 (2015-CA-001893).

> are a gun, marijuana, and money. The individuals in the tape including the co-defendants make an L sign. The owner of the phone has testified in a prior trial as to the identity of the individuals, the date of the video and she will call this group of individuals "family." A statement of the defendant will call this group a "gang." The court has disallowed the use of the word "gang" by the prosecutor in describing this group of individuals. However, statements of the defendant can be used for many purposes[,] the most important of which is to present the defendant's view on his relationship to these individuals. . . . The affiliation of these individuals through the testimony of those with personal knowledge and the video is relevant to the criminal activity[,] not just that these individuals were in a "gang." As the Commonwealth has authentication and multiple indicia of aff[ilia]tion, the defendant's motion to preclude the videotape to show the relationship and "family" affiliation is OVER-RULED.

(R. 104-05 (2015-CA-1944)).[7]

After reviewing both cases, we find no error or abuse of discretion in the trial court's admission of evidence that the Smoots were affiliated with their co-defendants and with the witnesses who testified against them. The evidence was not offered to prove their character but rather, as the Commonwealth stated, to demonstrate that the relationship among this group – defendants and witnesses

[7] The trial court reiterated its position when, citing KRE 404(b) and KRE 403, Kenneth's counsel objected at trial to a witness's display of and testimony regarding the "L" hand gesture. The court then stated: "The court finds it relevant for a lot of reasons, and even if he [Kenneth Smoot] is being tried separately, he was in a joint endeavor, according to the indictment, and so certainly the Commonwealth is entitled to show some sort of relationship and I think they've been very 'clean' about not showing it to be anything other than an interpretation that the jury can make that's different than them trying to paint it otherwise . . . ." (VR No. 1: 10/14/15; 10:47:05 (2015-CA-001944)).

alike – was "more than casual." We agree that the Smoots' affiliation with "Love and Loyalty" explained, in a way other evidence did not, that the plan to rob was conceived in the Turner's house, how the gun used in the robbery came from the Turner's house which is also where the Smoots stashed the stolen property, and why the Smoots' ill-gotten gains were shared with Wallace (lottery tickets) and Humphrey (victim's credit card). All are proper reasons for admitting evidence of the Smoots' affiliation in "Love and Loyalty" consistent with KRE 404(b)(1) and (2). This affiliation tends to prove the motive for conspiring to rob the victim, it shows the Turner house presented an opportunity to plan and launch the robbery and a place to hole up afterward, and it identifies the separate defendants as a group in complicity with one another. It is also inextricably intertwined with other evidence essential to the case, including the various videos depicting the defendants before and after the robbery.

Furthermore, we find no error or abuse in the ruling that the evidence was relevant, nor in the implicit ruling that the probative value of the evidence was not substantially outweighed by its prejudicial effect. The trial court carefully tailored its ruling to limit the prejudicial effect of the evidence. Obviously, "all relevant evidence is prejudicial to the party against whom it is offered." Robert G. Lawson, *Kentucky Evidence Law Handbook*, § 2.10(4)(b) at 89 (4th ed. 2003). However, evidence that is *unduly* prejudicial "appeals to the jury's sympathies . . .

or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *Id.* (quoting *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir.1980)). The Commonwealth complied with the trial court's tailored ruling assuring that undue prejudice did not occur. We cannot say the trial court's decision on relevance and prejudice was an abuse of discretion. *See Smith v. Commonwealth*, 454 S.W.3d 283, 288 (Ky. 2015) (evidence of gang affiliation "was neither inflammatory nor excessive [and, therefore,] probative value of [evidence] was not substantially outweighed by the danger of undue prejudice."); *Hudson v. Commonwealth*, 385 S.W.3d 411, 419 (Ky. 2012) (same). Although the Supreme Court was referring to full-fledged criminal gang affiliation in the case of *Hudson v. Commonwealth*, the rationale from that case is valid and applicable here:

> evidence of gang activity was relevant to explain the context of and the motive for [the crime;] evidence of gang activity and gang affiliation presented at trial was not excessive and was highly probative of motive and intent. While jurors may have negative associations with gang activity, we do not believe the evidence was unfairly prejudicial under the circumstances of this case.

Hudson, 385 S.W.3d at 419.

We cannot say the trial court erred or abused its discretion, in either case, by allowing the contested evidence. This is Kevin's only claimed ground for reversal. The remaining arguments are presented only by Kenneth.

B. Excluding evidence of a witness's prior crime was not an abuse of discretion.

In the first twelve seconds of cross-examining a Commonwealth witness, Robert Turner, Kenneth's counsel elicited testimony that, in the summer of 2013, Robert robbed the Garrard Market while wearing a mask and holding a gun on the clerk. When the Commonwealth objected, the trial court excused the jury and conducted a hearing of more than two hours to address the preliminary question of the admissibility of Kenneth's proffered reverse KRE 404(b) evidence. Kenneth's counsel called this evidence "the core of [his] defense."[8] He claimed the evidence was proof that Robert was the actual perpetrator, or "aaltperp."[9] At the conclusion of the hearing, the trial court sustained the objection and excluded this alternate perpetrator evidence. Kenneth challenges that evidentiary ruling.

Kenneth told the trial court, and now this Court, that the evidence would show Robert's prior robbery was so unique and so similar to the charged

[8] VR No. 1: 10/14/15; 11:09:22 (2015-CA-001944).

[9] The Supreme Court borrowed this term – "aaltperp" – from a law review article abbreviating the term "alleged alternative perpetrator." *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 n.3 (Ky. 2003) (citing David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered By a Criminal Defendant To Suggest That Someone Else Is Guilty*, 63 Tenn. L. Rev. 917, 920 (1996)). A Westlaw search for the term "aaltperp" indicates Kentucky is the only jurisdiction, federal or state, to adopt this term. Other commonly used references to the same include "alternative perpetrator," "third party perpetrator," or "third party culprit." McCord, *supra*. Another that is gaining in popularity is reference to the SODDI defense ("some other dude did it" defense) first coined in a California court. *People v. Benjamin*, 52 Cal. App. 3d 63, 72, 124 Cal. Rptr. 799, 805 (Cal. Ct. App. 1975); *see also Gill v. Commonwealth*, 2007-CA-001476-MR, 2008 WL 4531303, at *2 (Ky. App. Oct. 10, 2008) (Appellant "claims that defense counsel erred by presenting the defense of 'some other dude did it.'").

crime that the same person had to have committed both. He said, "It was a robbery not only with a gun, but the same firearm, and putting a mask over his face, and he [Robert] robbed the same store."[10] As we discuss below, even this short sentence is an overstatement of similarities between the two crimes. Furthermore, calling the circumstances of either crime "unique" is an exaggeration.

The rules of evidence govern cases, like this one, in which a defendant seeks "to introduce evidence that another person committed the offense with which he is charged." *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 (Ky. 2003)[11] (citation and internal quotation marks omitted). Consequently, before a jury gets

[10] VR No. 1: 10/14/15; 11:08:45 (2015-CA-001944).

[11] Unpublished Kentucky appellate opinions indicate *Beaty* has been "overruled," *Turner v. Commonwealth*, 2016-CA-001443-MR, 2017 WL 5508759, at *2 (Ky. App. Nov. 17, 2017), or "abrogated," *Marshall v. Commonwealth*, 2016-SC-000302-MR, 2017 WL 3634482, at *2 n.10 (Ky. Aug. 24, 2017). Westlaw reportage of *Beaty* marks the case with a red flag. Additional Westlaw inquiry reveals Westlaw's view that "Abrogation [of *Beaty* by *Gray v. Commonwealth*, 480 S.W.3d 253 (Ky. 2016) was] Recognized by" *Geary v. Commonwealth*, 490 S.W.3d 354 (Ky. 2016); Westlaw identifies *Geary* as the "Most Negative" commentary on *Beaty*, while *Gray*, which allegedly abrogated *Beaty*, is not listed as negative at all but simply says *Beaty* was "Examined by" *Gray*. Limiting our study to published opinions reveals that *Beaty* was neither overruled nor abrogated. As our Supreme Court noted, *Beaty* identified "one way to advance an aaltperp theory [–] . . . the motive-and-opportunity approach[.]" *Gray*, 480 S.W.3d at 267. Unfortunately, the *Beaty* approach "seem[ed] to have calcified into a categorical [*i.e.*, exclusive] rule for introducing aaltperp evidence." *Id.* Not so, said the Supreme Court. "[E]vidence of the alternative perpetrator's motive and opportunity was not the only way to establish an aaltperp defense." *Roe v. Commonwealth*, 493 S.W.3d 814, 825 (Ky. 2016). Therefore, *Beaty* "is not the only path to advance an aaltperp theory and it is certainly not an absolute prerequisite for admission into evidence." *Gray*, 480 S.W.3d at 267. And so, *Beaty* remains good law. "To be sure," said the Supreme Court, "we reaffirm *Beaty*'s assertion that a defendant's proof of motive and opportunity is certainly probative enough for admission under KRE 403." *Id.* Furthermore, "*Beaty* and its progeny are [and continue to serve as] this Court's way of guiding the trial court in assessing the probative value of prospective [alternate perpetrator] theories." *Geary*, 490 S.W.3d at 358 (quoting *Gray*, 480 S.W.3d at 267).

to hear and see evidence of an alternate perpetrator, that evidence must be relevant, KRE 401; it must not be excluded by any law or rule of evidence, KRE 402; and its probative value must be such that it is not "substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

Kenneth had no direct evidence to contradict Robert's testimony that Kenneth was participating directly in the robbery and Robert was in his house across the street watching. Despite the trial court's suggestion, Kenneth declined to ask Robert if he did more than watch. Instead, Kenneth believed it permissible to launch directly into leading questions about the prior robbery Robert committed.

Kenneth asserted that the Commonwealth already presented evidence establishing that Robert had a motive for committing the robbery (to obtain money) and the opportunity to do so (he lived across the street and was home at the time). That, he argued, provided sufficient basis for presenting the reverse 404(b) evidence to demonstrate the crime was committed consistent with Robert Turner's *modus operandi*,[12] and such evidence was proof of the real perpetrator's identity,

[12] "To indicate modus operandi, the two acts must show 'striking similarity' in factual details, such that 'if the act occurred, then the defendant almost certainly was the perpetrator[.]' That is, the facts underlying the prior bad act and the current [alleged bad act] must be 'simultaneously similar *and so peculiar or distinct*,' that they almost assuredly were committed by the same person." *Woodlee v. Commonwealth*, 306 S.W.3d 461, 464 (Ky. 2010) (emphasis in original) (citations omitted). "A prime example of *modus operandi* can be found in the movie *Point*

and proof of identity is an exception to KRE 404(b)'s exclusion of evidence. (Appellant's brief, p. 12).

For the reasons that follow, we are not persuaded by this argument. We agree with the trial court's ultimate conclusion that the evidence of Robert's prior crime is too dissimilar from the charged crime to qualify as an exception to KRE 404(b)(1), and that even if it would qualify under that rule as proof of identity, its probative value is substantially outweighed under KRE 403 by the danger of undue prejudice and confusing or misleading the jury. *See Futrell v. Commonwealth*, 471 S.W.3d 258, 286 (Ky. 2015) ("*undue* prejudice, *i.e.*, a risk that the evidence will induce the jury to base its decision on emotion or some other improper ground" (emphasis in original)). We reach agreement on these points by methodically applying the evidentiary rules to the proffered evidence.

First, we will consider that proffer.

1. *Evidence of Robert's participation in a prior robbery*

By avowal, Kenneth presented evidence that a little more than three months before the charged robbery, Jordan Green, Jeremy Bowling, and Robert

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Break. In that movie, the bank robbers consistently wore masks of former U.S. presidents while committing robberies. Use of these specific types of masks is unique. Had the bank robbers, for instance, merely worn ski masks, then it would not have been unique enough to constitute a *modus operandi*." *Royal Bahamian Ass'n, Inc. v. QBE Ins. Corp.*, 745 F. Supp. 2d 1380, 1384 n.3 (S.D. Fla. 2010). Kenneth's counsel actually referenced the so-called *modus operandi* of the antagonists of the movie, *Home Alone*, who left the water running in the homes they burglarized and declared, "It's our calling card. All the great ones leave their mark. We're the Wet Bandits." (VR No. 1: 10/14/15; 11:51:30 (2015-CA-001944)).

Turner robbed the clerk inside the Garrard Market. Although Robert was a juvenile at the time, this evidence was a public record, having been presented at Jordan Green's trial – a trial conducted by the same trial judge who now presides in Kenneth's case. *Green v. Commonwealth*, 2014-SC-000652-MR, 2016 WL 3370912 (Ky. June 16, 2016). The facts of that prior robbery are set forth in the Supreme Court's review of Green's trial. As it pertains to Kenneth's contention that the facts of both crimes were strikingly similar and unique, the opinion states as follows:

> During the evening of June 10, 2013, Jordan Green gathered with some friends at the home of Robert and Bobby Turner. Among those in attendance were Robert and Bobby Turner, Jeremy Bowling, and Anthony Wallace. During the evening, Green suggested to the group that they rob the Garrard Market, a nearby convenience store. There was only a short distance between the Garrard Market and the Turner residence; the residence was across the street and offset from the south side of the market. Subsequently, Green devised a plan to carry out the robbery.
>
> It was agreed that Bowling and Robert Turner would commit the robbery. Wallace would provide the pair with a .45 caliber Hi-Point handgun. Green advised that Robert Turner should be armed with the handgun, given that he was a juvenile. Additionally, Bobby Turner and Green would serve as lookouts inside the store. Green instructed the group that he would appear to be acting as an innocent bystander during the robbery.
>
> At 10:00 p.m. that same evening, Goitom Teklhymnot was working at the Garrard Market filing the daily balance sheets as part of the process to close the store for

> the day. After the sole remaining customer in the store left, Green and Bobby entered. However, before Green entered he stared off in the direction of the Turner residence. This was a signal to Bowling and Robert Turner to prepare for the robbery.
>
> . . . Bowling and Robert Turner entered. Next, Robert Turner drew the handgun and pointed it at Teklhymnot. In response, Green backed away from the counter and walked slowly to the door of the store, stopping there to watch the robbery.
>
> Bowling then went behind the counter and struck Teklhymnot on the head knocking him to the door. Thereafter, Bowling opened a cash drawer and seized cash. After watching Bowling obtain the money, Green departed. Moments later, Bowling and Robert Turner also left, following Green. The three men split up shortly thereafter, with Bowling and Robert Turner going to the residence of their friend Logan Bowman.

Id. at *1.

The *Green* opinion makes no direct mention of masks; however, if during the robbery Robert was wearing a mask, it failed to conceal his identity. The investigating officer, Detective Warner, narrated the surveillance tape for the jury and "was properly permitted . . . to identify the individuals present during the robbery." *Id.* at *5. Notwithstanding Green's claim that Detective Warner "misidentified [twins] Bobby and Robert Turner[,]" the Supreme Court concluded that "Detective Warner correctly identified the Turners in his trial testimony." *Id.* at *3 n.1. However, in the case now before us, Robert testified by avowal, notwithstanding *Green*, that he did wear a mask during the June 10, 2013

robbery.[13] Consequently, for this review, we will presume Robert wore a mask, although we also note that wearing a mask and covering one's face with a shirt are not the same.

There are also discrepancies regarding the weapons used. Kenneth argues the same gun was used in both robberies, but that appears not to be so. In *Green*, the gun used was a .45 caliber handgun. The gun used in the subject robbery was a .38 caliber handgun. Unlike his testimony regarding masks, Robert's avowal testimony about the gun was equivocal. He could not say whether the same handgun was used in both robberies; he created even more confusion regarding the weapon when he said he was carrying a .22 caliber handgun when he was apprehended for the first robbery. When Kenneth's counsel asked Robert if the same gun was used in both robberies, Robert said only, "I believe so."[14] On re-direct, the Commonwealth asked him whether he was sure the same gun was used, and he responded, "Not really."[15] The evidence does not support a finding that the same gun was used in both robberies. Therefore, we can acknowledge only that a handgun was used in both armed robberies, a fact we fail to find unique.

[13] VR No. 1: 10/14/15; 4:46:35 (2015-CA-001944).

[14] *Id.*

[15] *Id.* at 4:50:00.

Furthermore, the trial court, while seeking confirmation for Kenneth's *modus operandi* theory, examined statements by Kevin Smoot and Zla Holder to see if either said Robert was carrying the .38 caliber weapon when Mr. Gebremedhin was robbed, as he was carrying the .45 caliber weapon when Mr. Teklhymnot was robbed. That similarity was eliminated when the trial court saw Kevin Smoot's admission that he was the gunman in the second robbery.[16]

So, what facts are common to both robberies? We start at the beginning. Both robberies were conceived at the Turners' home. However, the first robbery was Green's idea. Robert admitted that the idea for the second robbery originated with him when, in answer to Zla Holder's question about where to get some money, Robert suggested the market.

Aside from Robert, the robberies were committed by mutually exclusive groups. The perpetrators of the first robbery were Bobby Turner, Green, and Bowling. Nothing implicates any of these three in the second crime.

The plans for and execution of the separate robberies (some would say the *modi operandi*) were quite different. The first robbery was committed inside Garrard Market while it was still open for business, with Bobby Turner and Green pretending to be innocent bystanders while Robert and Bowling assaulted the clerk

[16] *Id.* at 12:05:30. Kevin's statement also implicated Kenneth in the robbery of Mr. Gebremedhin.

and secured money from the cash register and stole store merchandise. The second robbery occurred outside the store, ambush style, well after closing when the perpetrators took cash and personal property from the victim such as a cell phone, credit cards, and lottery tickets.

We have assumed the perpetrators of the first robbery wore masks, whereas the second set of robbers covered their faces with their shirts. The weapon used in the first robbery was a .45 caliber handgun. The only weapon associated with the second robbery is Anthony Wallace's .38 caliber handgun and Kevin Smoot wielded it, not Robert.

Kenneth says the victim of both robberies was Garrard Market. Not so. Each "robbery is an offense against a person . . . ." *Stark v. Commonwealth*, 828 S.W.2d 603, 607 (Ky. 1991), *overruled on other grounds by Thomas v. Commonwealth*, 931 S.W.2d 446 (Ky. 1996). The victim of the first robbery was Mr. Teklhymnot as he worked inside the market; the victim of the second robbery was Mr. Gebremedhin as he approached his van on his way home.

When the perpetrators fled the separate scenes of their respective crimes, they sought refuge in different places. After the first robbery, "Bowling and Robert Turner [went] to the residence of their friend Logan Bowman." *Green*, 2016 WL 3370912, at *1. After the second robbery, the perpetrators returned directly to the Turner residence.

Revisiting Kenneth's claim of the similarity and uniqueness of the two crimes demonstrates its exaggeration. He said, "It was a robbery not only with a gun, but the same firearm, and putting a mask over his face, and he [Robert] robbed the same store." This does not accurately describe the second crime. True, each crime was a theft and the perpetrators of each crime used a deadly weapon; however, these two facts are nothing more than elements of the crime under KRS[17] 515.020(1)(b), robbery in the first degree. In *Clark v. Commonwealth*, the Supreme Court "stress[ed] the fundamental principle that conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the modus operandi exception" of KRE 404(b)). 223 S.W.3d 90, 98 (Ky. 2007). Both crimes were committed by multiple individuals (another element of the complicity charge under KRS 502.020), but no one took part in both robberies, unless we infer from Kenneth's evidence of the prior crime that Robert did. And while the perpetrators of both crimes may have hidden their faces, they did so in different ways. Lacking any specific commonality, there is nothing more to say except "it is not unusual for a bank robber to attempt to conceal his identity by using a hood, bandana or ski mask . . . ." *United States v. Woods*, 613 F.2d 629, 640-41 (6th Cir. 1980) (Merritt, J., concurring). The elements shared by these two robberies are either elements of the crime that cannot support a *modus operandi* claim, or they are so common they

[17] Kentucky Revised Statutes.

can be found in multitudes of armed robberies. Every element Kenneth claims as unique is, in fact, entirely commonplace.[18]

Now we must apply the evidentiary rules to this proffered evidence.

2. *KRE 401*[19]

Because "[e]vidence which is not relevant is not admissible[,]" KRE 402, "the critical question for aaltperp evidence is one of relevance: whether the defendant's proffered evidence has any tendency to make the existence of any consequential fact more or less probable." *Gray v. Commonwealth*, 480 S.W.3d 253, 267 (Ky. 2016) (citing KRE 401). The concept the Supreme Court expressed in this abbreviated language – "any consequential fact" – is set out more

[18] Kenneth's further attempt to bolster his *modus operandi* theory with evidence of another subsequent crime failed. As Robert was leaving the stand at the end of his avowal testimony, Kenneth's counsel asked to read from the police report in a pending criminal or juvenile case against Robert. (VR No. 1: 10/14/15; 4:51:00 (2015-CA-001944)). Counsel did not question Robert during his avowal testimony because he knew Robert, on advice of his counsel who was present, would plead the Fifth Amendment in response to any such questioning. The trial court agreed to allow Kenneth's counsel to read the docket number of the pending case to assist this Court in its review, but nothing more. Counsel did not offer the case number. Instead, he objected generally but cited no evidentiary rule that, under these circumstances, would have allowed the admission of obvious hearsay evidence in the form of a police report. *See Manning v. Commonwealth*, 23 S.W.3d 610, 613-14 (Ky. 2000). We find no fault with nor error in the trial court's deft handling of this difficult aspect of a difficult case. Having thoroughly examined the record, we glean something of the police report's contents from references at bench conferences and in avowal testimony. The report would have indicated that, in the process of robbing an intoxicated pedestrian across the street from the Turner house, Robert and yet another member of this cast of criminal characters, Dwight Chambers, "depantsed" their victim, just as Mr. Gebremedhin's assailants had earlier "depantsed" him. The implication Kenneth urges upon the courts is that "depantsing" is an aspect of Robert's *modus operandi*. However, Robert did not "depants" Mr. Teklhymnot when robbing him.

[19] KRE 401 states in its entirety: "'Relevant evidence' means evidence having 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."

completely in KRE 401 which states that evidence will not be admissible, because not relevant, unless it bears on a "fact that is of consequence to the determination of the action[.]" Therefore, the starting point for answering the relevance question is identifying the fact in issue which the proffered evidence is supposed to assist the jury in resolving, and then assessing whether resolution of that fact will be of consequence in determining the case.

What fact does Kenneth propose will be shown more likely or less likely if the evidence is admitted? He says "[t]he defense theory was that four people ran into [Robert's brother's bedroom] that night after the robbery, and only three of them committed the offense. One of the individuals, either Kevin Smoot, Zla Holder, Kenneth Smoot, or Robert Turner did not go to the market that night to rob the market." (Appellant's brief, p. 11). Kenneth's counsel argues that it was *Kenneth* who stayed behind, not Robert. Whether Kenneth stayed behind at the Turner house is the consequential fact. Proof in his favor certainly would have consequence in determining his guilt or innocence.

Now we must answer the next question: will the proffered evidence "make the existence of [that consequential fact – Kenneth staying behind –] more probable or less probable than it would be without the evidence"? KRE 401. For purposes of our relevancy analysis, we presume Robert had a motive and the opportunity to rob Mr. Gebremedhin. If we also presume that the robberies of both

Mr. Teklhymnot and Mr. Gebremedhin were committed in virtually identical or signature ways, the evidence would tend to inculpate Robert to an even greater degree than he admits.[20] For that matter, the evidence would also inculpate another perpetrator of the previous robbery, Robert's brother Bobby, who admitted being in the vicinity at the time.

But, as the trial judge put it, the question is not whether Robert "Turner is more *inculpated* in this [crime] in a different fashion" than he already acknowledges.[21] The question is whether this proof would *exculpate* Robert. That is, did the evidence, or reasonable inferences drawn from that evidence, tend to establish that Kenneth *was not one* of the three assailants – did Kenneth remain behind at the Turner house?

Evidence that Robert was involved directly in the robbery with two accomplices (one of whom could still be Kenneth) is not a consequential fact tending to exculpate Kenneth. *Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004) ("a defendant may use similar 'other crimes' evidence defensively if in reason it tends, alone or with other evidence, to *negate his guilt* of the crime charged against him" (citation omitted; emphasis added)). Robert's participation is neither a material fact in determining Kenneth's guilt or innocence of the charged

[20] In addition to suggesting the robbery to Zla Holder, Robert offered him the .38 caliber weapon Anthony Wallace left at Robert's house.

[21] VR No. 1: 10/14/15; 11:13:00 (2015-CA-001944) (emphasis added).

crime, nor is the extent of Robert's participation, as the trial court said, "in actual dispute." *See Southworth v. Commonwealth*, 435 S.W.3d 32, 49 (Ky. 2014) ("other-acts evidence must 'be offered to prove material facts that are in actual dispute.'" (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.25[3][b], at 127 (3d ed. 1993))). He admits his involvement.

Our analysis might be different if, as in many alternate perpetrator defense scenarios, the crime had been committed by a single perpetrator. Then, *modus operandi* evidence that Robert was the *sole* perpetrator, if believed by the jury, would eliminate all others including Kenneth – *i.e.*, it would exculpate Kenneth. But those are not the facts of this case.

Our Supreme Court said, "under the powerfully inclusionary thrust of relevance under these rules, it would appear *almost* any aaltperp theory would be admissible at trial." *Gray*, 480 S.W.3d at 267 (emphasis added). The facts of this case may represent the kind of alternative perpetrator theory the Supreme Court had in mind when it used the adjective "almost" in this sentence. Where multiple perpetrators are involved, evidence that does nothing to exculpate the accused, but only inculpates another is evidence of an additional perpetrator, not an alternate one.

However, where rights of a constitutional magnitude are at issue, a trial court must be cautious regarding admission of evidence, and this trial court

was cautious. The evidence was not excluded on relevancy grounds, and we will not affirm on that basis because of this "defendant's fundamental right to due process that he be allowed to develop and present *any exculpatory evidence* in his own defense . . . ." *McGregor v. Hines*, 995 S.W.2d 384, 388 (Ky. 1999) (emphasis added). Although the Supreme Court recognizes the possibility that some purported alternative perpetrator evidence may be irrelevant, and although the proffered evidence here may be what the Court had in mind, we will not say Kenneth's evidence fails to satisfy the requirement of KRE 401. The basis for rejecting this evidence must be found elsewhere in the rules, and that leads us to KRE 402.

3. KRE 402[22] and KRE 404(b)

KRE 402 is the general inclusionary rule for admissibility of relevant evidence. However, the rule also says even relevant evidence is inadmissible if excluded by a law or other evidentiary rule. One such rule is KRE 404(b), and that rule is the next stop in our analysis. *United States v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006) ("It was implicit in [*United States v.*] *Stevens*[, 935 F.2d 1380 (3d Cir. 1991)] that we do not begin to balance the evidence's probative value under

[22] The full text of KRE 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible."

Rule 401 against Rule 403 considerations unless the evidence is offered under one of the Rule 404(b) exceptions."); *see generally* Jessica Broderick, Comment, *Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. Colo. L. Rev. 587 (2008).[23]

The very nature of Kenneth's reverse 404(b) *modus operandi* evidence is that it is "[e]vidence of other crimes, wrongs, or acts [which] is not admissible" under KRE 404(b) if it tends only "to prove the character of a person in order to show action in conformity therewith." KRE 404(b). To avoid exclusion under this rule, the evidence must be offered for a proper purpose. A non-exclusive list of proper purposes is set out in KRS 404(b)(1).[24] Kenneth claims the applicable exception which allows introduction of this *modus operandi* evidence is the "identity" exception.

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[23] "While no decisions expressly hold that 404(b) [prohibition against propensity evidence] does not apply to third parties when defendants offer reverse 404(b) evidence, several [federal] circuits impliedly have held . . . that reverse 404(b) evidence may be admitted as long as it tends to negate the defendant's guilt and passes the F[ederal]R[ules of]E[vidence] 403 balancing test. . . . [R]ecently the Third Circuit [in *United States v. Williams*, 458 F.3d 312, 317 (3d Cir. 2006)] narrowed its holding in [*United States v.*] *Stevens*, [935 F.2d 1380 (3d Cir. 1991)] concluding that the prohibition in 404(b) of other acts to prove propensity applies even if defendants offer the evidence. . . . despite the relaxed standard for admitting reverse 404(b) evidence that seems to leave proper purpose out . . . ." Broderick, 79 U. Colo. L. Rev. at 597-98.

[24] Again, evidence of prior crimes or bad acts may be admitted if "offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or . . . If [such evidence is] so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." KRE 404(b)(1), (2).

Federal courts warn that "a proponent's incantation of [a] proper use[] of such evidence under the rule does not magically transform inadmissible evidence into admissible evidence." *Williams*, 458 F.3d at 319 (quoting *United States v. Morely*, 199 F.3d 129, 133 (3d Cir. 1999)). Our Supreme Court is in accord, having repeatedly said, "[e]ven when offered by the defendant, evidence of a person's prior bad act may be admissible to establish identity *only if the prior uncharged act is sufficiently similar* to the charged act so as to indicate a reasonable probability that the acts were committed by the same person." *St. Clair v. Commonwealth*, 455 S.W.3d 869, 894 (Ky. 2015) (emphasis added; all internal quotation marks omitted) (quoting *McPherson v. Commonwealth*, 360 S.W.3d 207, 213 (Ky. 2012) (quoting *Commonwealth v. Maddox*, 955 S.W.2d 718, 722 (Ky. 1997))).

During an extended colloquy, Kenneth tried to convince the trial court that Robert's prior crime was "sufficiently similar," even saying the two crimes exhibited the "exact same *modus operandi*," but to no avail. The trial court said, "I'm looking at what's similar."[25] Then, citing and apparently quoting *St. Clair*, the court held the circumstances of the robbery of Mr. Teklhymnot that Robert committed with three others were too "dissimilar" from the assault and robbery of

[25] VR No. 1: 10/14/15; 12:25:56 (2015-CA-001944).

Mr. Gebremedhin and, therefore, did not qualify under the identity exception to KRE 404(b).[26] We agree.

Kenneth's evidence is far from being "sufficiently similar . . . so as to indicate a reasonable probability that the acts were committed by the same person." *St. Clair*, 455 S.W.3d at 894 (quoting *McPherson*, 360 S.W.3d at 213). There is very little beyond the ordinary about these armed robberies. The similarities Kenneth identifies are mere elements of the crime of complicity to first-degree robbery (multiple perpetrators of a robbery with a deadly weapon), and *Clark* requires us to ignore elements of the crime itself in the *modus operandi* calculus. Moreover, the record does not support Kenneth's claim that the same gun was used. The record also fails to support the claim that the perpetrators hid their identity in a similar or unique way. And the record fails to support the claim that the robberies had a common victim. Additional dissimilarities, outlined above, far outnumber the similarities.

We agree with the trial court's exclusion of Kenneth's proffered evidence "because the events surrounding the [robbery of Mr. Teklhymnot] were too dissimilar from the crime in this case." *Id.* Setting aside the dissimilar and non-unique elements of the robberies, we are left with nothing but evidence that Robert committed a prior armed robbery – not relevant at all beyond proof of

[26] *Id.* at 01:07:11.

Robert's propensity to commit another armed robbery – a purpose forbidden by KRE 404(b). *Southworth v. Commonwealth*, 435 S.W.3d 32, 54 (Ky. 2014).

Before leaving discussion of KRE 404(b), we must address Kenneth's argument that "a lower standard of similarity should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor." (Appellant's brief, p. 9 (quoting *St. Clair*, 455 S.W.3d at 894)). Although accurately quoted, this language does not mean we skip analysis of KRE 404(b)'s distinction between propensity evidence and non-propensity evidence. The lower standard *presumes* we have already cleared the hurdle of that distinction before we move on to the rule designed to weigh prejudice against probative value, KRE 403. The lower standard simply recognizes a patently irrefutable postulate – the probative value of non-propensity evidence of a third party's prior crime offered to identify the real perpetrator is not likely to be outweighed, if ever, by "prejudice to the defendant." That, obviously, is the meaning of the "lower standard" Kenneth quotes from *St. Clair*, a standard we adopted from the now-clarified case, *United States v. Stevens* *Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004) (quoting *Stevens*, 935 F.2d at 1404).

Kentucky's embrace of the lower standard, like the reverse 404(b) concept itself, is traceable from *St. Clair* back through *Blair* to "the leading case of *United States v. Stevens*[.]" *Id*. Our jurisprudence shows that since *Blair* we have

always followed the sequence of determining whether a KRE 404(b) exception applies before engaging in the balancing act of KRE 403.

For example, consider the authority Kenneth cites, *St. Clair*. In that case, the Supreme Court said, "Though the bar is set lower for admissibility of reverse-404(b) evidence, that evidence is not automatically admissible" but must be "sufficiently similar to the charged act so as to indicate a reasonable probability that the acts were committed by the same person." *St. Clair*, 455 S.W.3d at 894 (citations and internal quotation marks omitted). That is, the evidence must first fit an exception to the prohibition against propensity evidence. The KRE 404(b) analysis in *St. Clair* described the prior crime of the third party and compared it to the crime with which the defendant was charged; the Court then noted "the differences were substantial." *Id.* at 895. It was "[i]n light of these differences" that the Supreme Court affirmed "the trial court . . . in excluding evidence of [a third party]'s prior crime as reverse-404(b) evidence." *Id.* The Court never reached, nor did it need to reach, the weighing of probative value against prejudice under KRE 403. *Id. passim*; *see also Allen v. Commonwealth*, 395 S.W.3d 451, 468 (Ky. 2013) (third party's "prior convictions were not similar enough to show *modus operandi*").

Our analysis follows faithfully our jurisprudence that, relying so often as it does on *Stevens*, turns out to be entirely consistent with the clarification of

Stevens in *United States v. Williams*, *supra*. In *Williams*, the Third Circuit said "the prohibition against propensity evidence applies regardless of by whom—and against whom—it is offered [and that prohibition] is evident from Rule 404(b)'s plain language . . . ." 458 F.3d at 317. "It was implicit in *Stevens*[,]" says the Third Circuit, "that we do not begin to balance the evidence's probative value under Rule 401 against Rule 403 considerations unless the evidence is offered under one of the Rule 404(b) exceptions." *Id.* *Williams* made it clear that "under *Stevens*, a defendant is allowed more leeway in introducing *non-propensity evidence* under Rule 404(b), [but] he or she is not allowed more leeway in admitting *propensity evidence* in violation of Rule 404(b)." *Id.* (emphasis in original). Therefore, when we say, as *St. Clair* says, "[i]f *the evidence* has relevance, then it should be excluded only upon application of KRE 403 principles," we are not referring to evidence of every kind, but only to *non-propensity evidence*. *St. Clair*, 455 S.W.3d at 894 (emphasis added).

To the extent the trial court excluded evidence of Robert's prior crime based on KRE 404(b), we affirm. That said, we note the trial court also disallowed the evidence under KRE 403. As said in the leading Sixth Circuit case on reverse 404(b) evidence, *United States v. Lucas*, "not only does the evidence not fall within the [sic] any of the exceptions [to Rule 404(b)], even if it did, the [trial] court did not err in determining that any probative value of the prior bad act was

outweighed by its prejudicial effect." 357 F.3d 599, 606 (6th Cir. 2004). We reach the same conclusion in the case before us, and that leads us to the next step in our review, KRE 403.

4. KRE 403

Pertinent to our review, KRE 403 states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury . . . ." KRE 403 thus "permits the exclusion of evidence which, though relevant, poses a substantial risk of undue prejudice, *i.e.*, a risk that the evidence will induce the jury to base its decision on emotion or some other improper ground." *Futrell v. Commonwealth*, 471 S.W.3d 258, 286 (Ky. 2015) (emphasis omitted); *see also Wilson v. Commonwealth*, 438 S.W.3d 345, 350 (Ky. 2014) ("Undue prejudice is most often found when there is a risk that the evidence 'might produce a decision grounded in emotion rather than reason' or where the evidence 'might be used for an improper purpose.'" (quoting Lawson, *supra*, at § 2.15[3][b])).

Although the trial court excluded the evidence of Robert's prior crime because it was too dissimilar from the charged crime to support proof of identity under KRE 404(b), the court also found the probative value of the evidence was substantially outweighed by the possibility of such undue prejudice. For the following reasons we agree with this holding.

The trial court expressly stated during the evidentiary hearing that it was relying on KRE 104[27] to consider, among other things, out of court statements made by Kenneth's accomplices in the robbery – brother Kevin Smoot and Zla Holder. Reading from *Ferry v. Commonwealth*, the court expressed the exclusionary nature of KRE 404(b) and the necessity of determining whether "the defense theory is 'unsupported,' 'speculative,' and 'far-fetched' and could thereby confuse or mislead the jury." 234 S.W.3d 358, 360 (Ky. App. 2007) (quoting *Beaty*, 125 S.W.3d at 207).[28] Stating that "[t]he whole purpose of the [evidentiary] rules is to make sure the jury is not misled," the trial court found the alternative perpetrator theory "unsupported given the back testimony in this [case]" and that it "would mislead the jury."[29]

The trial court was authorized by rule and compelled by case law to explore further evidentiary support for the alternate perpetrator theory. And so, we reject Kenneth's argument that the court improperly compelled him to "prove Robert was actually one of the perpetrators of the offense" as a condition to

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[27] In pertinent part, KRE 104 states: "(a) Questions of admissibility generally. Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges. . . . (c) Hearing of jury. Hearings . . . shall in all cases be conducted out of the hearing of the jury . . . [on] preliminary matters . . . when the interests of justice require . . . ."

[28] VR No. 1: 10/14/15; 1:14:15 to 1:16:55 (2015-CA-001944).

[29] *Id.* at 1:10:58, 1:07:40, and 1:11:11.

allowing "evidence tending to show that Robert Turner *could have been* one of the individuals involved." (Appellant's brief, p. 11; emphasis in the original).

There was a circumstance in this case making this search for additional support for Kenneth's theory all the more necessary. As the trial court noted, Robert admitted he "*was* involved in this robbery."[30] He admitted suggesting the robbery could cure Holder's lack-of-funds problem, admitted providing the weapon used by Kevin, and admitted watching the crime unfold from the window of his house. His house was where the perpetrators absconded after the robbery and he helped dispose of the ill-gotten gains. Why Robert did these things is not a fact of consequence in this case. If it were, the geographic and temporal proximity of the previous robbery Robert committed, and the robbery itself, would have had probative value.

But the real fact of consequence to the determination of the action was whether Kenneth stayed behind at the house. Without direct evidence, Kenneth argued proof it was Kenneth and not Robert who stayed behind could be reasonably inferred from evidence Robert had committed a robbery before. This evidence, however, lacked the hallmarks of uniqueness and similarity to the charged crime and was no more than suggestive of Robert's propensity to commit robbery because he had already done so. Such evidence could serve no purpose

[30] *Id*. at 11:39:40 (emphasis expressed by the trial court).

but to tempt a jury's "natural inclination to view it as evidence of [Robert's] criminal disposition . . . ." *Bell v. Commonwealth*, 875 S.W.2d 882, 890 (Ky. 1994). It is precisely the kind of undue prejudice described as being based "on emotion or some other improper ground." *Futrell*, 471 S.W.3d at 286.

Alone, this evidence has no probative value in determining the consequential fact whether Kenneth participated in the robbery. *See Williams*, 458 F.3d at 319 ("no link [in the chain of logical inferences] may be the inference [of] the propensity to commit the crime charged"). This, we believe, is why the trial court offered Kenneth the opportunity to bolster that evidence, "*with other evidence*, to negate his guilt of the crime charged against him." *Ferry*, 234 S.W.3d at 361 (emphasis added) (quoting *Stevens*, 935 F.2d at 1404). Such other evidence might draw his theory out of the realm of mere propensity evidence by challenging Robert's never-refuted testimony that Kenneth participated in the robbery while he, Robert, stayed in his house. Despite the opportunity given Kenneth, and despite the trial court's on-the-record, independent search, no other evidence was found or offered. Kenneth chose to stand firm on the propensity evidence alone.

The danger of undue prejudice in the form of confusing or misleading the jury need not be great to "overwhelm the relative minimal probative value of such a generalized propensity." *Meece v. Commonwealth*, 348 S.W.3d 627, 665 (Ky. 2011). It was not an abuse of discretion for the trial court to have determined

that the probative value of the propensity evidence was substantially outweighed by the danger of undue prejudice and confusing or misleading the jury.

C. Trial court properly applied *Allen v. Commonwealth*[31] to limit impeachment under KRE 608 and KRE 609.

Kenneth next argues the trial court, in a separate way, improperly limited the scope of his cross-examination. The court prohibited him from eliciting details of a story Robert told police to explain his accidental, self-inflicted gunshot wound, a story that proved to be false and that resulted in Robert's conviction for the misdemeanor of filing a false police report. The trial court told Kenneth:

> You may ask if he ever lied to a police officer. If he then lies, then you may go into it [extrinsic evidence underlying the misdemeanor conviction]. If he says, "Yes," then you've made your point – he lies to police officers.[32]

With the jury present, Kenneth's counsel obeyed the trial court's limitation and only asked Robert: "Have you ever lied to the police?" to which Robert responded, "Yes, sir."[33] Kenneth then offered this avowal testimony:

> Counsel: Do you remember back to April 2014 when you shot yourself in the hand with a firearm?
>
> Robert: Yes, sir.
>
> Counsel: That was at 19th [Street] and Augustine

[31] 395 S.W.3d 451 (Ky. 2013).

[32] VR No. 1: 10/14/15; 1:24:13 (2015-CA-001944).

[33] *Id*. at 1:28:10.

[Street]?

Robert: Yes, sir.

Counsel: You called the police that day?

Robert: Yes, sir.

Counsel: You made up a false story?

Robert: Yes, sir.

Counsel: You told them you had been shot at in a drive-by shooting?

Robert: Yes, sir.

Counsel: And that was all a lie?

Robert: Yes, sir.

Counsel: And you entered a guilty plea on that charge?

Robert: Yes, sir.

Counsel: That's all I have, Judge, for the avowal.[34]

Although this is the entirety of the avowal, there was more complexity to what Kenneth wanted Robert to say, and he said so before the trial court and in his brief. Why and how did Robert lie? As noted earlier in this opinion, Robert already had a record as a juvenile offender. Erroneously "[b]elieving himself to be a convicted felon . . . [he] concocted a story to evade prosecution for possessing a firearm."

[34] *Id.* at 4:47:35.

(Appellant's brief, p. 15). Robert told police "an individual in a Crown Victoria had driven by his house, rolled down the window, and fired shots at him, striking him in the hand." (*Id.*)

Kenneth claims the trial court's limitation on his cross examination was an abuse of discretion because the ruling misapplies *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013) and improperly prohibited evidence of Robert's creativity in making up false scenarios. We need not fully explore the evolution of our jurisprudence regarding KRE 608 and KRE 609 to disagree with Kenneth. It is enough to discuss the portions of *Allen* pertinent to this review.

The defendant in that case, Gabriella Allen, "wanted to ask [the complaining witness] about conduct underlying [the complaining witness's misdemeanor] convictions [for giving] a false name to the arresting officer twice." *Id.* at 461. Allen's problem was that KRE 608 had been interpreted to prohibit "attacking . . . the witness'[s] credibility . . . by extrinsic evidence" and KRE 609 only allowed proof of convictions for felonies, not misdemeanors. *Id.* at 468-63. Pertinent to our case, the witness's "convictions at issue in [*Allen*] were misdemeanors (two counts of giving a false name to police), and *no* proof of those was allowed." *Id.* at 466 (emphasis in original). When Allen presented her appeal, the Supreme Court agreed "that such a result seems to be simply unfair." *Id.* at 463.

Kenneth, missing the significance that the trial court in *Allen* allowed "*no* proof" of the witness's deceitful conduct, reads the case far too broadly. *Allen* is about remedying "the *inability to inquire in any way about misdemeanor convictions reflecting on dishonesty* . . . ." *Id.* (emphases added). Reversing Allen's conviction, the Supreme Court said, "[T]he [trial] court applied a categorical legal bar on proof of the misdemeanor conduct, meaning no discretion was involved." *Id.* at 467 n.14. Discretion was abused in *Allen* because discretion was not exercised at all.

Allen does not compel or authorize unnecessary elaboration about the deceitful conduct. In fact, it prohibits it. Although the evidentiary scheme now "allows *inquiry* on cross-examination about specific instances of dishonest conduct[, i]t avoids getting into collateral matters by not allowing impeachment by extrinsic evidence after the witness answers" – meaning after he admits the dishonest conduct. *Id.* at 464 (emphasis in original). The whole "purpose of KRE 608(b) is to avoid over-collateralizing trials . . . ." *Id.* at 465.

But Kenneth points to language in the case that, although "Allen was able to introduce the fact that [the witness] had been convicted of a felony . . . , she was not allowed the choice to instead ask about the conduct that led to those convictions." (Appellant's brief, p. 17 (quoting *Allen*, 395 S.W.3d at 466)). Kenneth believes this language shows the Supreme Court's disapproval of the trial

court's exclusion of contextual evidence underlying the felony conviction. Applying this surmise to his case, Kenneth argues we should disapprove of this trial court's exclusion of contextual evidence of the tale Robert told police that led to his juvenile misdemeanor adjudication. But this a misinterpretation.

First, "it should be noted that this case [*Allen*] has both prior felonies and misdemeanors that reflect dishonesty." *Id.* at 464. Kenneth relies on language in *Allen* addressing the witness's *felony* convictions (possession of forged instruments), not his misdemeanor convictions for lying to police, the crime Robert admitted.

Second, even in that felony conviction context, *Allen* did not open the door to embellishment, only to clarification. As the Court said, "KRE 609 . . . is concerned with the fact of *any* felony conviction . . . ." *Id.* at 465 (emphasis in original). The rule does not differentiate between crimes of direct dishonesty and other crimes that rely on an "assumption—that all felons are inherently dishonest . . . [an assumption that] may not be true at all." *Id.* at 465 n.13. *Allen* takes that differentiation into account and interprets KRE 608(b) as granting the trial court discretion to decide whether and how much evidence is necessary to assist the jury in distinguishing between crimes in which deceit is an element and crimes in which it is not. The Court described the context, as follows:

> That such an inquiry [into the *conduct* underlying the felony conviction] may follow on the heels of a KRE 609

> inquiry into whether the witness has a felony conviction, thereby leading the jury to believe that the bad act [of deceit] asked about was the *basis* for the *felony conviction*, is not barred by the rules. If this could mislead the jury—for example, if the bad act asked about under KRE 608 [lying to police, for example] was not the basis for the conviction asked about under KRE 609 [murder, for example[35]]—then a well-timed objection will allow the trial court to exercise its discretion to require handling the evidence in a fair and truthful manner.

Id. at 466 (emphasis added). No matter whether the conduct did or did not result in a felony or misdemeanor conviction, "[t]he simple fact is that KRE 608 allows inquiry on cross-examination as to bad acts [conduct]—with the limit being that the questioner is stuck with the answer, whatever it is." *Id.* In the case under review, we are dealing with a misdemeanor conviction, and so we refocus our attention to *Allen* there.

Allen does not indicate that the Supreme Court has lessened restrictions on extrinsic proof of dishonest conduct. Repeatedly, the Court says the

[35] The crime of murder is the example used by the Supreme Court in questioning the "rule" that every "felony conviction is, in and of itself, powerful evidence that reflects on truthfulness[.]" *Allen*, 395 S.W.3d at 465 n.13 (quoting *Childers v. Commonwealth*, 332 S.W.3d 64, 71 (Ky. 2010)). "There is not necessarily an inconsistency in a person who, for example, commits a murder yet always tells the truth. In such a case, the assumption underlying the rule would actually undermine the search for truth in a case." *Id.* It might be that the legislature agrees. Since the legislature enacted and the Supreme Court adopted KRE 609, it has left to the witness to make the differentiation between directly dishonest crimes and those, like murder for example, that might be committed by an honest person. Kentucky Rules of Evidence, 1990 Kentucky Laws H.B. 214 § 42 (Ch. 88); KRE 609(a).

evidentiary scheme "avoids collateral matters" and the "substantial possibilities of abuse presented by such collateral matters[.]" *Id.* at 464. "Courts rightfully avoid [that potential for abuse] by carefully scrutinizing collateral evidence, a decision that is well within a trial court's experience and purview." *Id.* at 465.

Whether speaking of misdemeanors or felonies, "the ultimate fact to be proved when dishonesty is the issue is the person's character[.]" *Id.* at 465. "[T]he better reading of KRE 608 and 609," said the Court, "would allow <u>*some inquiry*</u> as to the conduct underlying a criminal conviction . . . . The only question is the limit on that inquiry." *Id.* at 465-66 (emphasis added).

The Court concluded that, as long as a proponent refrains from using extrinsic evidence to prove dishonest conduct that resulted in a misdemeanor conviction, "[n]othing in the language of KRE 608 [prevents] *simple inquiry* about that conduct . . . ." *Id.* at 463-64 (emphasis added). Hence, the Court took the rule for impeachment by proof of *felony convictions*, which is still applied under KRE 609,[36] and adapted it to proof of *misdemeanor conduct* under KRE 608, stating:

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[36] Six years before adoption of KRE 609, the Supreme Court rendered *Commonwealth v. Richardson* which said:

> In future cases, the rule will be construed . . . so that a witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions . . . .

> The *conduct* underlying those [misdemeanor] convictions tends to show that [the complaining witness] had [engaged in] previous acts of deception—direct lies to police. That conduct was subject to ["some" or "simple"] inquiry under KRE 608(b), though not to proof by extrinsic evidence; the fact of the misdemeanor convictions themselves was not admissible under either KRE 608 or 609. While Allen could not ask about or otherwise show that this conduct led to a conviction, *she should have been permitted to ask* [the complaining witness] *if he had previously lied to police.*

Id. at 466-67 (emphasis added). If evidence of "the conduct itself is closer in the chain of proof to the ultimate fact (the person's dishonest character) than the conviction[,]" *id.* at 465, then surely the witness's admission to the dishonest conduct must be one link closer still in the chain of proof of character. Simple inquiry – "Have you ever lied to police?" – is what *Allen* allows, and it is what the trial court properly ordered in this case.

Before leaving this part of our review, we need to address another of Kenneth's arguments based on *Allen*. He claims that because "the court fail[ed] to weigh the factors in KRE 403, the error automatically constitutes an abuse of discretion." (Appellant's brief, p. 14). Again, Kenneth misunderstands the case.

True, the Supreme Court did say "the scope of any inquiry under KRE 608 and 609 remains within the trial court's discretion, subject of course to limits

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674 S.W.2d 515, 517-18 (Ky. 1984). The rule has been applied by this Court as recently as last year, *Dixon v. Commonwealth*, 519 S.W.3d 396, 399 (Ky. App. 2017), *review denied* (June 8, 2017).

imposed by other rules, such as KRE 403." *Id.* at 466. But reference here to KRE 403 does not identify a limitation on the trial court's discretion; it is a limitation on the admissibility of evidence that the trial court has already decided would not be excluded under KRE 608 and KRE 609. *See Dennis v. Commonwealth*, 306 S.W.3d 466, 477 (Ky. 2010) (insinuating the sequence that "KRE 608 permits the cross-examination of a [witness] concerning a prior false accusation if . . . [the deceit is] shown to be demonstrably false, [then] if the accusation is 'probative of truthfulness or untruthfulness,' and [finally] if the prior accusation evidence otherwise survives KRE 403's probative value balancing test"). KRE 403 is the *subsequent* hurdle that must be cleared if the evidence is not excluded already by the evidentiary scheme of KRE 608 and KRE 609. Kenneth's avowal proof was excluded by applying KRE 608 without the need for the balancing of KRE 403. That is, the court's discretion to exclude the evidence was exercised under KRE 608. If *that* discretion had been abused, the evidence might still have been excludable by the trial court under KRE 403. But because we concluded there was no abuse of discretion in the trial court's application of KRE 608, there was never a need to reach that KRE 403 inquiry.

D. Kenneth did not unequivocally invoke his right to counsel during interrogation by the police.

Kenneth moved the trial court to suppress all his responses to police interrogation made after he invoked his right to counsel. The issue was whether

Kenneth, in fact, unequivocally invoked the right. The trial judge conducted a forty-minute hearing at which she attentively viewed all the videotaped interview presented by counsel and considered the examination and cross-examination of the interrogating officer, Detective Kane, and arguments of counsel.

As reflected in the order denying the suppression motion, the court stated it also had observed "the nuances in the defendant's body language, facial reactions, and tone of voice" for indicators that Kenneth had decided to ask for an attorney before "conclud[ing Kenneth] did not 'articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" (Order on Motions, R. 104 (quoting *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994))).

Kenneth challenges this ruling, asserting the trial court erred in two ways: (1) the trial court erred in its findings of fact regarding the interpretation of Kenneth's language in the interrogation; and (2) the trial court erred in holding that Kenneth failed to clearly invoke counsel. When the question is whether a person in custody has invoked the right to counsel, we undertake a *de novo* review because the Supreme Court of the United States has determined, under the Fifth Amendment, "this is an objective inquiry." *Davis*, 512 U.S. at 459, 114 S. Ct. 2350 at 2355. Our *de novo* review includes viewing or listening to the interview

recording and determining what was said, and in what context, and whether the trial court was clearly erroneous in its determination of what was said, and then making our own determination whether the person in custody unequivocally asked for a lawyer. Having done so in this case, we reach the same conclusion as the trial court – Kenneth's references to counsel were ambiguous; he did not clearly ask for counsel.

Kenneth's custodial interview with Detective Kane, in pertinent part, went as follows:

> Det. Kane: You have a right to remain silent and anything you say can and will be used against you in a court of law. And I don't know if . . . You ever had your *Miranda* read to you before?
>
> Kenneth: Nah.
>
> Det. Kane: You're – just as a juvenile. You just had some stuff that's juvenile, right?
>
> Kenneth: I got a disorderly conduct.
>
> Det. Kane: Other than that you're not talking about – As an adult you really don't have much of anything.
>
> Kenneth: Possession of heroin.
>
> Det. Kane: That's it. DC [disorderly conduct] or anything? No AI [alcohol intoxication] or DC or nothin'?
>
> Kenneth: Just disorderly conduct.

Det. Kane: Disorderly conduct. You had some records at least in the juvenile. Were you in the system the whole time in juvenile?

Kenneth: Family Court.

Det. Kane: Family stuff.

Kenneth: [inaudible]

Det. Kane: Well then, uh, you've never had – I'm sure you never had your rights read to you, which are called your *Miranda* rights. You've got a right to have an attorney. You've got a right to have an attorney present. You have a right to have an attorney present before making any statements. You have a right to have an attorney if you can't afford one, or if you can't afford one [or] your mom can't afford one, whatever, the court's gonna appoint one to represent you. And, yes, you have a right to have an attorney with you before making any statements or answering any questions. You can start talking at one point in time and, at any point in time, decide that, well, you shouldn't talk anymore. Well that's your, that's your right.

Kenneth: *If I wanna talk to my, my um, I guess my lawyer got appointed to me then have him talk and then y'all talk?*[37]

Det. Kane: Yeah, you can do that. You can do that and I'll tell you this, um, you can make your

[37] There was discussion whether Kenneth's statement was presented as a question or mere statement. Although debatable, we believe the inflection indicates it was a question that needed an answer. The detective did respond with an answer.

decision. You gotta make the decision but I'll give you some information here, uh, that might help you in your decision. Alright, so, you're in a position here which is actually a little better than most. Uh. I know that's hard – hard to understand.

Kenneth: No, I understand.[38]

After this discussion, Kenneth began asking Detective Kane questions such as, "How am I charged?" "Did [unintelligible] say I was anywhere?" "Did the dude see my face; did he see my face?"[39] The detective described this as "quite a lengthy exchange about, uh, the evidence. He was asking what evidence, essentially, do I have. I would list out that evidence."[40] Then, the following exchange occurred:

Det. Kane: I don't mean to be callous about it but I think I need to just break through the fog and tell you. Time is coming to you. You are going to do some time. How long you're going to do the time – Where you're going to do the time – What probation standards you're gonna do the time. You're not going to get any consideration denying it and lying.

Kenneth: I'm not denying it. I'm just, *I have a right, right? To plead the Fifth, have my attorney?*

[38] VR No. 1: 9/02/14; 3:33:27 (2015-CA-001944).

[39] *Id.* at 3:36:50.

[40] *Id.* at 3:38:12.

Det. Kane: Yeah you do. You have that right and I'm offering you an opportunity here.

Kenneth: *To an attorney? Who works for me? That y'all, you said here's your attorney. Cut me loose a little?*

Det. Kane: Right.

Kenneth: *That right to an attorney, to an attorney?*

Det. Kane: Absolutely do, you do. The point we're at here now is whether or not you want to cooperate in your own investigation. That's where we're at. I think you're dancin' around this thing, thinkin' that somehow this is all gonna go away if ya just sit there and play like I'm all confused, I don't know what I'm talkin' about.

Kenneth: Nah I heard about it. I did know 'bout it.[41]

Detective Kane tells us that Kenneth continued to talk to him for another "half hour or more" before the interview ends. The interview did not end because Kenneth invoked his right to counsel. Detective Kane said Kenneth "never invokes the right to counsel. I just got done talkin' to him. He was never gonna come off of 'I don't know what's going on and I didn't do it.' I thought, 'This is a waste of time.'"[42] Hence, the interview ended.

[41] *Id.* at 3:45:43.

[42] *Id.* at 3:48:30.

The question we must answer is as the trial court stated it: Did Kenneth "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355. We believe Detective Kane to be a reasonable police officer and Kenneth does not claim otherwise. The detective's subjective conclusion was that Kenneth never requested an attorney. Our objective inquiry convinces us that Kenneth did not articulate his desire to have counsel present sufficiently clearly to change this reasonable police officer's subjective conclusion.

Kenneth argues that his references to an attorney were sufficient to invoke the right. We disagree. "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* (emphasis in original). There is no indication even that Detective Kane believed Kenneth *might* be invoking the right. To the contrary, the detective unequivocally stated his view that Kenneth "never invokes the right to counsel." Even if we give benefit of the doubt to Kenneth here, we could not reverse the trial court's ruling. We must be convinced Kenneth invoked his right, not that he might have been trying to do so. We are not so convinced.

Notwithstanding our objective inquiry, Kenneth asserts that Detective Kane's suppression hearing testimony was that Kenneth said, "Can I have a lawyer" and argues "the Court [of Appeals] should review the invocation issue based on the detective's objective view of the defendant's words and actions." (Appellant's brief, pp. 20-21 & n.4). We do not agree with Kenneth's characterization of the detective's testimony and, what is more, the detective disagreed at the hearing. More importantly, we are not charged with assessing Kenneth's version of what he said, or what the detective listening to the recording nine months later thought he said, or even what the trial court thought he said. The nature of our *de novo* review is that, as the reviewing court, we determine as best we can whether what was said invoked the right to counsel.

As set out above, our best understanding of what Kenneth said is as follows: "If I wanna talk to my, my um, I guess my lawyer got appointed to me then have him talk and then y'all talk?" We find this language remarkably like another statement which our Supreme Court determined was not an invocation of the right to counsel, namely: "Can I tell my lawyer the real story and he tell y'all?" *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 34 (Ky. 2011) (addressing the consolidated case of *Williams v. Commonwealth* (2009-SC-000418-MR)). The analysis in *Quisenberry* is applicable here:

> Williams contends that his question about dealing with the police through counsel was a request to do so, and so

> should have brought his questioning to an end. Again, however, what Williams said was ambiguous. Was he asking for counsel or was he merely asking if counsel was an option? . . . An officer in these circumstances would reasonably have entertained doubts about Williams's meaning, and thus it was not improper for the detective to continue the interrogation unless and until Williams made his desire for counsel clear, something he never did. Williams's counsel question was similar to the suspect's question in *Davis v. United States*, — "Maybe I should talk to a lawyer?"—that the Supreme Court held was not the unequivocal request for counsel required to activate the *Edwards*[43] prohibition against further questioning. Neither was Williams's "Can I tell my lawyer the real story and he tell y'all?"

Id. (footnote added).

We have taken note of Kenneth's youth and the other circumstances of his interview. Like the Supreme Court, we recognize that there are "some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." *Davis*, 512 U.S. at 460, 114 S. Ct. at 2356. The prophylaxis for that problem "is the *Miranda* warnings themselves. Full comprehension of the rights to remain silent and request an attorney is sufficient to dispel whatever coercion is inherent in the interrogation process." *Id.*

[43] "[A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981).

(citation, brackets and internal quotation marks omitted). Detective Kane presented a virtual clinic on the *Miranda* warnings to Kenneth. We have no doubt Kenneth understood them. His questioning and other participation, from which he learned as much or more than did the police, gives clear indication of "his willingness to deal with the police unassisted." *Id.* at 461.

We find no error on the part of the trial court in overruling Kenneth's motion to suppress his interview responses.

CONCLUSION

For the foregoing reasons, the judgments of the Kenton Circuit Court are affirmed.

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