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RENDERED: NOVEMBER 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000652-MR

GEORGE A. LUNA — APPELLANT

V.

ON APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
NO. 07-CR-00151

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

George Luna appeals his convictions for murder and first-degree arson, for which he was sentenced to life imprisonment. Luna assigns error in the trial court's: failure to excuse two jurors for cause; refusal to grant a mistrial after references to a polygraph and Luna's probation were made in a police interview played for the jury; allowing evidence that Luna previously set his own car on fire; failing to exclude the testimony of a witness regarding matters not disclosed during discovery; allowing evidence that Luna had previously been involved in a burglary which culminated in a shootout with police; and allowing evidence of three other fires in Illinois involving Luna. We adjudge that the trial court erred in failing to excuse one of the jurors for cause, in allowing in evidence regarding the offer of the polygraph and of Luna being on

probation, and in admitting the evidence of the two previous fires involving Luna. Accordingly, we reverse and remand for a new trial or further proceedings consistent with this opinion.

At around 6:25 p.m., Appellant, George Luna, called 911 to report a fire at the trailer belonging to the victim herein, Debra Hendrickson. In the call, Luna was belligerent with the dispatcher and claimed he did not know Hendrickson's last name or where the trailer was located. The evidence at trial established, and Luna admitted in his interview with police, that he (Luna) made the 911 call from Hendrickson's cell phone while he was driving her truck to Illinois.

The fire at Hendrickson's trailer was discovered an hour and a half later by a neighbor who was driving by and noticed a bright glow in the trailer. The neighbor called 911 and went to the trailer, but did not think Hendrickson was home because her car was not there. The body of Debra Hendrickson was subsequently discovered inside the trailer when the fire department arrived at the scene. The arson investigation revealed the presence of an accelerant in three areas around the body. The autopsy report stated the cause of death as blunt-force head trauma.

Luna was driving through southern Illinois when he was pulled over by Illinois police at 7:34 p.m. for speeding. He was clocked driving Hendrickson's truck at 100 miles per hour. The trooper arrested Luna for operating a vehicle on a suspended license and for outstanding warrants. Illinois police were

subsequently notified that Luna was a suspect in the Hendrickson murder/arson investigation in Kentucky.

The following day, Detective Matt Hilbrecht of the Marshall County Sheriff's Department traveled to Marion, Illinois to interview Luna in the Williamson County Jail. Luna denied any involvement in the arson and murder of Hendrickson.

According to Luna's account of events in the interview, he was living rent-free with Hendrickson in her trailer, although he maintained they were only friends. He stated that on the day she was murdered, he and Hendrickson went to two bars in Paducah, and then to a liquor store. Luna claimed that Hendrickson met a man at the liquor store, who she told him would be coming over to her trailer later. Luna then drove Hendrickson back to her trailer and decided to go visit his daughter in Illinois. Luna grabbed some clothes and his tools and put them in Hendrickson's truck, which he claimed he was in the process of buying from Hendrickson, and left for Illinois. According to Luna, Hendrickson was on the front porch of the trailer when he left for Illinois. When he got all the way to Paducah, he realized he forgot his level, which he needed for work, so he turned around and went back to Hendrickson's trailer. As he was getting his level from the garage next to Hendrickson's trailer, he claimed he saw what looked like flames in the window of the trailer. Luna told police that he thought he was probably just drunk, so he left and thereafter called 911.

Luna was indicted on charges of murder and first-degree arson. After a four-day jury trial, Luna was convicted of both charged offenses and a sentence of life imprisonment was recommended for each offense. From the final judgment sentencing Luna to life imprisonment, Luna now appeals as a matter of right.

FAILURE TO EXCUSE TWO JURORS FOR CAUSE

Luna assigns as error two jurors who he maintains should have been dismissed for cause because of information they had previously read about the case. The trial court declined to dismiss the two jurors for cause, forcing Luna to use his peremptory challenges on the jurors. Luna maintains that the answers given during the following individual voir dire of the first juror demonstrated the bias of this juror:

> Judge: Now have you read, seen or heard anything concerning Mr. Luna, the defendant in this case?
>
> Juror: (inaudible) . . . that in the paper.
>
> Judge: And anything specific about that, any specific information?
>
> Juror: Unh uh. (indicates negative response)
>
> Judge: What are your thoughts, beliefs, or feelings about the information you've received about Mr. Luna?
>
> Juror: Well, I mean, if what was in the paper was correct, the lady was really nice and helped him a lot and that's a poor way to pay her back.
>
> Defense counsel: I'm sorry.
>
> Juror: I said, that's a very poor way to pay her back.

Judge: Okay, based on what you've read, have you formed any opinions about this case?

Juror: No, I don't think so.

Judge: Have you read, seen or heard anything concerning Debra Hendrickson, the alleged victim in this case?

Juror: Well, the letters that people, her friends, wrote in about it, uh, how they thought it, I mean, she was mistreated, obviously.

Judge: Okay, and any other specific information that you might have received?

Juror: No.

Judge: Okay, and what are your thoughts, feelings, or beliefs on the information you've received with respect to her?

Juror: Ah, I mean, it was sad that it happened. I don't have a particular, uh, way of thinking about it I guess.

Judge: Okay. Do you feel like, that uh, just what you've heard so far, and I think from what you said, you understand that the charges for which the defendant stands are murder and arson. Do you have any opinions, any preconceived notions, as to his innocence or guilt?

Juror: Well, just reading the paper, I mean, I would just assume that he was guilty.

Judge: Okay. Do you feel you could be a fair and impartial juror in this case?

Juror: It would be hard, but yes I think so.

Judge: Alright.

. . . .

Commonwealth: You made an important statement. You can, you feel like, even though you've read the publicity and you've read the letters that have come into the paper, uh, you can, you believe, listen to all the evidence and base your verdict on that?

Juror: I think so, yes.

Commonwealth: Okay. And that's the key question and I know Judge Foust hit on it pretty good. And I know Mr. Erwin is gonna hit on it some more. But, uh, can you, can you put your feelings that you've read, and I know there is some feeling in the community that she was a good woman and did a lot of good things. But can you put all that aside, you know, and just hear the evidence and decide whether or not George Luna is guilty of homicide or not, based on just the evidence? Can you do that?

Juror: I think so, yes.

Commonwealth: Okay, alright. Thank you.

Defense counsel: Mrs. Jones, you said you read some letters that friends and family wrote in?

Juror: I mean it's been a while back. I think it was in the letters to the editor.

Defense counsel: Okay. Was it in the *Paducah Sun* or was that in the . . . .

Juror: The county paper.

Defense counsel: (inaudible). How many letters were there because I didn't get a chance to read these?

Juror: I, I don't know. I mean, it was right after it first happened. So I'm not sure.

Defense counsel: Now, when the court asked you about the assumptions you made, your initial instinct was that you assumed Mr. Luna was guilty?

Juror: Yeah.

Defense counsel: Was that correct?

Juror: Yeah.

Defense counsel: And, how long have you felt that way?

Juror: Well, I mean, it's just, reading through the article, it's just kind of the way I did. Of course, it's been a while and it hasn't been fresh in my mind.

Defense counsel: But you still assume he's guilty?

Juror: Well, it's hard not to.

Defense counsel: Nothing further.

It is ordinarily prejudicial error when a trial court erroneously fails to strike a juror for cause, a defendant is forced to use a peremptory challenge to remove that juror, and the defendant uses all available peremptory challenges. *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007). This Court has recently held that error is non-prejudicial if the other jurors the defendant would have used his peremptory strikes on do not actually sit on the jury. *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009) (citing *King v. Commonwealth*, 276 S.W.3d 270, 279 (Ky. 2009)). To show that other jurors actually sat on the jury that the defendant would have used his peremptory strikes on, this Court in *Gabbard* added the requirement that "the defendant must identify on his strike sheet any additional jurors he would have struck." 297 S.W.3d at 854.

In the present case, Luna did not indicate on his strike sheet the other jurors he would have stricken. However, the trial in this case was held in August 2008, which was before *Gabbard* had been rendered. Luna argues that because *Gabbard* was rendered in October of 2009, some fourteen months after the trial in his case, he was not on notice of this requirement and should not be held to its dictates. We agree that it would be unfair to retroactively impose such a requirement on trial counsel when *Shane*, which was the law in effect at the time of trial, contained no such requirement. Thus, our review is limited to whether the trial court erroneously failed to excuse the juror in question for cause.

A trial court's decision on whether to excuse a juror for cause will be reviewed for an abuse of discretion. *Shane*, 243 S.W.3d at 338. Pursuant to RCr 9.36(1), a judge must excuse a juror for cause if there is a "reasonable ground to believe [the] prospective juror cannot render a fair and impartial verdict on the evidence." The true test of whether a juror should be stricken for cause is whether "the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Thompson v. Commonwealth*, 147 S.W.3d 22, 51 (Ky. 2004) (quoting *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994)).

The juror in the instant case stated that, based on information she had read about the case, she assumed Luna was guilty. Despite the juror's assertions that she could be impartial and decide the case based on the

evidence, she still expressed that "it's hard not to" assume Luna was guilty. In *Gabbard*, this Court recently held that a juror who stated that she had made up her mind that the defendant was guilty could not be rehabilitated and should have been stricken for cause. 297 S.W.3d at 853-54. We likewise hold in the present case that the trial court abused its discretion in refusing to excuse the juror for cause because of her assumption that Luna was guilty. Accordingly, we must reverse the judgment and remand for retrial of the case or other proceedings consistent with our opinion. *See Shane*, 243 S.W.3d at 341. For advisory purposes, we shall address the remaining issues raised that are likely to arise on retrial. The issue raised regarding the second juror is moot because that juror will not be seated on retrial.

MENTION OF POLYGRAPH OFFER AND THAT LUNA WAS ON PROBATION

During the trial, Luna's lengthy interview with police was admitted into evidence and played for the jury. Prior to trial, Luna had sought to exclude the interview on grounds that it was not relevant because Luna did not confess to the crimes during the interview. The trial court denied the motion to suppress the statement.

Prior to playing the recording of the statement at trial, the prosecutor informed the court that he would not be playing a portion of the tape that referred to a matter that the trial court excluded in a previous ruling. The parties and the court agreed that the prosecutor would stop the recording and forward over that portion of the tape. No mention was made by either party of

any other portion of the statement which needed to be redacted.

During the interview, Officer Matt Hilbrecht asked Luna if he would be willing to submit to a polygraph examination if the police felt it was necessary. Luna responded that he did not know if he would submit to the test, but stated that he would consider it. Later in the interview, when Luna asked what he was being held for, Hilbrecht mentioned a probation violation, as well as the other charges (speeding and driving on a suspended license) for which he was originally arrested. Defense counsel moved for a mistrial based on the references to the polygraph and Luna's probation violation. The trial court agreed that the references should have been redacted from the tape. However, the court declined to grant the mistrial because defense counsel was aware of what was on the tape prior to trial and had ample opportunity to make his objection so that the references could be redacted before the tape was played. Defense counsel did not ask for an admonition and none was given.

It has been held that the mere mention of the defendant taking a polygraph examination, even without disclosure of the result, is error. *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984). In *McQueen v. Commonwealth*, however, an indefinite and ambiguous reference to a polygraph examiner was held to be nonprejudicial error, where there was no indication that a polygraph had been actually administered and to whom it had been given. 669 S.W.2d 519 (Ky. 1984). The *McQueen* Court stated, "There must arise a clear inference that there was a result and that the result was favorable, or some other

manner in which the inference could be deemed prejudicial." *Id.* at 523. In the present case, Officer Hilbrecht merely asked Luna if he would consider taking a polygraph examination. While Luna responded that he was not sure and that he might consider taking a polygraph, there was no evidence or inference in the record that a polygraph examination was actually administered to Luna, let alone that the result of such a test was favorable. This would distinguish the instant case from *Morgan v. Commonwealth*, wherein the witness testified that a polygraph instrument was in the interrogation room, creating the clear inference that the defendant had been given a polygraph examination. 809 S.W.2d 704, 706 (Ky. 1991). Accordingly, the fact that Luna was asked by authorities if he would consider taking a polygraph examination was not prejudicial to Luna in this case. However, on retrial, we trust that the reference to the polygraph will be redacted from the tape.

As for the reference to Luna being on probation, we agree, as did the trial court, that there was no justification for such evidence to be admitted in this case under KRE 404(b) or for any other reason. *See Dennis v. Commonwealth*, 526 S.W.2d 8, 10 (Ky. 1975). Accordingly, the admission of this evidence was in error in this trial.

LUNA'S PRIOR HISTORY WITH ILLINOIS POLICE

When Luna was transported to the Illinois police station after his arrest, he was handcuffed and seated in a chair in the squad room awaiting the arrival of Trooper Steve Nelson, while the officers who had transported him, Officers

Sorrells and James Wright, began working on paperwork at their respective desks. According to the testimony of Officer Wright, while he was doing paperwork at his desk, he heard Officer Sorrells yell, "Get back!" With that, Officer Wright saw that Luna was approaching him from behind, and reacted by pushing back against him, causing Luna to fall back and hit his head on the chair he had been sitting in. Luna sustained a cut on his head, which required four staples. Immediately after the incident, Luna told Officer Wright that if he would let him bond out, he would tell everyone that he slipped and that it was just an accident. When Wright refused and told Luna he would report the incident as it happened, Luna became belligerent and said to him, "You don't know who you're messing with. I'm the real thing. I will fucking kill you." According to Wright, Luna also threatened to kill his (Wright's) family.

When Officer Wright was cross-examined about the incident, defense counsel asked if Luna may have been looking at what Wright was typing when he approached him from behind, or if Luna's handcuffs were on too tight. Defense counsel also emphasized in his questioning that the incident was not videotaped.

On redirect, the prosecutor prefaced his questioning with the statement, "Deputy Wright, I, I have a feeling that you're, you've been accused of a little bit of police brutality." Defense counsel immediately objected and a bench conference ensued. The prosecutor argued that defense counsel's questioning of Wright was clearly meant to insinuate that Wright knocked Luna down on

purpose without justification, thus the Commonwealth was entitled to bring in further evidence to show why Officer Wright reacted the way he did. Defense counsel denied that his questioning was intended to insinuate that Luna was a victim of police brutality and argued that the prosecution should not be permitted to present prior bad act testimony in response to Luna's cross-examination of Wright.

The trial court agreed with the Commonwealth that Luna's counsel was trying to create the impression that Luna had been roughed up by police unjustifiably and, therefore, Luna opened the door for the prosecution to explain and respond to the accusation. Hence, the trial court overruled the objection and allowed the Commonwealth on redirect to explain further why Officer Wright reacted the way he did in knocking Luna down.

The prosecutor then proceeded to ask Officer Wright if he had a history with Luna prior to his arrest and what the nature of that encounter was. Wright stated that he knew Luna from another incident with police stemming from a burglary. Wright explained that when police responded to the burglary call at a home, the suspects, one of whom was Luna, exchanged gunfire with police as they fled the scene. Luna argues that such evidence did not serve any legitimate KRE 404(b) purpose and was highly prejudicial. Thus, he claims it was reversible error for the trial court to overrule his objection.

According to the doctrine of "curative admissibility," when one party introduces improper evidence, it "opens the door" for the other party to

introduce improper evidence in rebuttal for the purpose of explaining or rebutting the prior inadmissible evidence. *Metcalf v. Commonwealth*, 158 S.W.3d 740, 746 (Ky. 2005); *Norris v. Commonwealth*, 89 S.W.3d 411, 414 (Ky. 2002); Lawson, *The Kentucky Evidence Law Handbook*, § 1.10[5], at 43-44 (4th. ed. 2003). Although the evidence which "opens the door" is typically inadmissible evidence, it can also be misleading evidence, to which the other party must be allowed to respond to remove any unfair prejudice. *See Norris*, 89 S.W.3d at 414-15.

In the present case, the questioning of Officer Wright by the defense was clearly intended to suggest that Luna was a victim of police brutality. Officer Wright's testimony about Luna's prior history with the Williamson County Police Department was necessary to explain Officer Wright's reaction to Luna approaching him from behind and refute the allegation of police brutality. Without that evidence, the defense would have been allowed to unfairly suggest that Officer Wright had, at worst, intentionally shoved Luna, or, at best, overreacted to the situation. Accordingly, we agree with the trial court that the Commonwealth was entitled to present evidence that Luna was previously involved in a shootout with the Williamson County Police.

EVIDENCE OF CAR FIRE

Prior to trial, Luna moved to exclude any statements made by him to Bridget and Jerry Dehart regarding an incident before Hendrickson's murder where his car burned up and he tried to get Hendrickson to make a fraudulent

insurance claim on the vehicle. The trial court denied the motion.

At trial, Bridget Dehart, a neighbor and friend of Hendrickson, testified that one afternoon she saw Luna leave in his car and return some time later as a passenger in a different car. When asked where his car was, Luna laughed, saying that it was on fire down the road and was a hunk of metal. Dehart testified that Luna subsequently asked Hendrickson to call the insurance company and say that the car had been stolen out of her garage, so that he could get the insurance money. According to Dehart, when Hendrickson refused to make the call to report the car stolen, Luna became very upset with Hendrickson.

It is worth noting that, although Luna characterizes Dehart's testimony as evidence that Luna set his own car on fire (and seems to concede as much), and the prosecutor argued that was the implication from the testimony, Dehart did not actually testify that Luna told her he set the car on fire. She testified only that he said the car was on fire down the road. However, Luna does not argue that the evidence of the car fire was inadmissible because there was not sufficient evidence that he set his own car on fire. Rather, Luna argues that evidence he set his own car on fire was not admissible under KRE 404(b).

KRE 404(b) provides as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof

> of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;

Luna maintains that the evidence of the car fire was offered only to show Luna's criminal propensity to commit arson, while the Commonwealth argues it was admissible to prove motive. Luna counters that evidence of the car fire would not be relevant to the motive for burning Hendrickson's trailer because the alleged motive for the car fire was collection of the insurance proceeds, and there was no evidence of any monetary incentive for Hendrickson's fire or murder.

Luna misses the point. The evidence of the car fire was not admissible to show that the motive for both fires was the same. Rather, the fact that Luna became very angry at Hendrickson for not helping him make a fraudulent insurance claim on the car was admissible as a motive for Hendrickson's murder. This was especially important for the Commonwealth here because, although there was an abundance of evidence that Luna was the one who set fire to the trailer and killed Hendrickson, there was little evidence as to his motive. Accordingly, the trial court did not abuse its discretion in allowing the evidence of Luna's prior car fire to be admitted.

DISCOVERY VIOLATION

At trial, the Commonwealth announced that it was calling Robert Davis as a witness. The defense objected on grounds that it had no notice that Davis would be called as a witness and that it had never been provided with any

copies of pretrial statements by Davis in discovery. A hearing on the motion ensued in chambers. The Commonwealth pointed out that a statement made by Robert Davis was mentioned in the statement of Dana Collie, which was provided by the Commonwealth in discovery. Collie's statement was that Davis had told her that Luna had slit Hendrickson's throat, beat her head in with a hammer and then lit her body on fire. The defense argued that this mention of Davis's statement contained within Collie's statement was not sufficient notice to call Davis as a witness. The trial court ruled that it would allow Davis to testify, but would reserve ruling on the limits of that testimony until the examination of the witness.

Upon calling Davis as a witness, the Commonwealth asked him if Luna had ever said anything to him about fires that happened in Illinois. Davis responded that Luna had told him about a fire he had started in his garage with gasoline and a cigar. When the Commonwealth then asked if Luna had told him about other fires he'd had, the defense objected on KRE 404(b) grounds. The trial court ruled that Davis could testify to statements Luna made to him about other fires. Davis then testified about a trailer fire and a house fire that Luna had in Illinois on the same property. When the Commonwealth asked Davis if Luna had told him how those fires were set, Davis responded that Luna had not. The Commonwealth next asked Davis if Luna had ever talked to him about setting a fire to make it look like an accident. Davis responded in the affirmative, stating that Luna had told him

about starting fires with candles and Febreze.

Luna first argues that Davis's testimony should have been excluded because Luna did not get the required notice of Davis's statement pursuant to RCr 7.24, which states that the "attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness . . . ." This Court recently held that in order to be subject to RCr 7.24, a statement must be incriminating at the time it is made. *Chestnut v. Commonwealth*, 250 S.W.3d 288, 296 (Ky. 2008). Although Luna's statements to Davis did not relate to the Hendrickson arson and murder, the statements were nonetheless incriminating when they were made because they were admissions that Luna knew how to and did commit arson. We further agree with Luna that the reference to Robert Davis in another witness's statement did not meet the disclosure requirements of RCr 7.24(1), especially given that Davis was not questioned regarding the subject of the statement he allegedly made to Dana Collie. Instead, he was primarily questioned about Luna's prior fires.

However, as the Commonwealth points out, the Commonwealth here twice gave Luna unequivocal notice pursuant to KRE 404(c) that it intended to introduce "evidence of the Defendant's prior involvement in instances of suspected arson under KRE 404(b)." The second notice in the response to Luna's second motion in limine specifically stated, "The prior fires can be

admitted since they show modus operandi due to the Defendant's own admissions regarding setting his car on fire and his ability to set fires and not be connected to them." Also, during the pre-trial hearing on the KRE 404(b) evidence, the prosecutor stated that the Commonwealth had a witness from Illinois (Davis is from Illinois) that it would call to testify that Luna bragged about setting other fires in Illinois, specifically, that Luna bragged about setting one fire with a cigar and gasoline. In our view, because Luna was given notice of the substance of Davis's testimony about Luna's incriminating statements - that he had set a fire with a cigar and gasoline and was able to set fires and not be connected to them - there was no discovery error in this case.

KRE 404(b) VIOLATION

Evidence of three other fires on Luna's property in Illinois was admitted at trial through the testimony of Robert Davis, as noted above, and in Luna's interview with Officer Wright, which was played for the jury. Luna argues before this Court as he did below that there was no proof that Luna set the prior fires and the evidence of the prior fires was not relevant for any permissible purpose under KRE 404(b).

This Court will review a trial court's determinations on the admissibility of evidence for abuse of discretion. *See, e.g. Cook v. Commonwealth*, 129 S.W.3d 351, 362 (Ky. 2004). The court has abused its discretion when "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). According to *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994), for evidence to be admitted under KRE 404(b), it must meet the three-prong test this Court has established, which looks to the (1) relevance (2) probativeness and (3) prejudice of the proposed evidence. *Benjamin v. Commonwealth*, 266 S.W.3d 775, 791 (Ky. 2008). On the issue of probativeness, the test is whether "evidence of the uncharged crime [is] sufficiently probative of its commission by the accused to warrant its introduction into evidence." *Bell*, 875 S.W.2d at 890. The United States Supreme Court has held that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689 (1988).

As for whether the jury could reasonably conclude that Luna started the three prior fires in Illinois, there was no evidence in the trial record that Luna was involved in starting two of the fires – the trailer and house fires. Davis testified that the two fires occurred on Luna's property, but did not state that Luna started them and specifically denied that Luna had told him how those fires were started. While Luna admitted during the police interview that three fires had occurred on his property in Illinois and that he was a suspect in one of the fires, he consistently denied having anything to do with them.

The instant case is similar to *O'Bryan v. Commonwealth*, wherein the Commonwealth sought to introduce into evidence in the defendant's trial for

the murder of her husband by arsenic poisoning that the defendant had previously lived with another man who died of arsenic poisoning. 634 S.W.2d 153 (Ky. 1982). This Court held that such evidence was inadmissible where there was no evidence connecting the defendant to the prior poisoning other than the fact that she lived with the victim. *Id.* at 157. Likewise, in the case at bar, the only evidence connecting Luna to the prior trailer and house fires in Illinois was that the fires occurred on his property. Accordingly, it was error to allow evidence of those two prior fires to be admitted in this trial.

There was, however, sufficient evidence of Luna's involvement in the garage fire in Illinois via the testimony of Davis that Luna had told him he started it with gasoline and a cigar. The next question is whether the evidence of this garage fire was properly admissible under KRE 404(b).

For evidence of the prior fire to be admissible, it must be relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b)(1). The Commonwealth argues that evidence of the prior fires was relevant to show modus operandi. "The modus operandi exception requires 'the facts surrounding the prior misconduct [to be] so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*.'" *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007) (quoting *English*, 993 S.W.2d at 945).

The only similarity between the garage fire and the fire in the present

case was that both were started with an accelerant. We cannot say that this fact alone makes the fires a signature crime. However, the evidence that Luna started the Illinois garage fire with gasoline and a cigar would be relevant to show he had the knowledge to commit arson, especially in light of Davis's testimony that Luna stated he knew how to start a fire to make it look like an accident. Accordingly, the trial court did not abuse its discretion in allowing the evidence of the garage fire in Illinois to be admitted.

For the foregoing reasons, the judgment of the Marshall Circuit Court is reversed and the case is remanded for retrial or other proceedings consistent with this opinion.

All sitting. Minton, C.J.; Noble, Schroder, Scott, and Venters, JJ., concur. Abramson, J., concurs in result only. Cunningham, J., dissents in part and concurs in part by separate opinion.

CUNNINGHAM, J., DISSENTING IN PART AND CONCURRING IN PART: I respectfully dissent in part and concur in part. I concur with the majority with the exception of reversing the conviction based on failure of the trial court to excuse one of the jurors for cause.

Admittedly, this is a close call. However, the juror in question went back and forth, depending upon who was doing the questioning. Although it might appear on review that a wiser choice would have been to dismiss the juror, I am unable to conclude that the trial judge—on the scene and best able to evaluate the juror—abused his discretion. This is especially true since our

decision in *Shane* made the failure to properly strike for cause subject to harsher consequences. In our doing so, we should give the trial courts at least a modicum of more deference in considering these most difficult, sometimes exasperating, decisions. I would affirm the conviction.

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