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RENDERED: JUNE 20, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000629-MR

FINAL
DATE 7-11-13 E.A. Grout P.C.

CHRISTOPHER WEST — APPELLANT

V.

ON APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY D. BURRESS, JUDGE
NO. 10-CR-00076

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Christopher West appeals from a judgment entered by the Bullitt Circuit Court convicting him of violating a domestic violence order, first-degree fleeing and evading, resisting arrest, for being a first-degree persistent felony offender (PFO), and sentencing him to a total enhanced sentence of twenty years' imprisonment. Based upon Appellant's misconduct at the final sentencing hearing, the trial court further held him in contempt of court and assessed a 179-day sentence to be served consecutively to his other sentence.

As grounds for relief, Appellant raises the following arguments: (1) that the trial court erred by failing to grant his request for a lesser-included offense instruction on second-degree fleeing and evading; (2) that he was denied a fair trial when multiple prior and pending charges were introduced in violation of

KRE 404(b); (3) that he suffered undue prejudice as a result of statements made by the prosecutor in his closing arguments; (4) that the trial court erred by holding him in contempt for his conduct in the courtroom; and (5) that the trial court erred by sustaining the Commonwealth's challenge to his strike of a female juror pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986).

Because Appellant was entitled to a second-degree fleeing or evading instruction, we vacate the circuit court's judgment, and remand for a new trial on the charge. We further determine that the trial court erred in permitting multiple instances of prior bad acts committed by Appellant to be introduced in violation of KRE 404(b). This error constitutes independent grounds for reversal of his fleeing and evading charge, and also requires reversal of his conviction for violating the domestic violence order. We affirm, however, the trial court's ruling holding Appellant in contempt. We additionally address other issues that may arise upon retrial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Upon the petition of Appellant's former girlfriend, Kelly Lewis, a Domestic Violence Order (DVO)[1] was entered against Appellant. In the fall of 2009, with the DVO still in effect, Lewis began speaking to Appellant by telephone while he was incarcerated in the Jefferson County jail. When Appellant was away from the jail on work release, Lewis began visiting him at his job site. Appellant testified that Lewis did so willingly, but Lewis claimed that she visited

[1] *See* KRS 403.750.

Appellant only because she feared him and felt as if "she did not have a choice anymore." Nevertheless, Appellant and Lewis filed a joint motion to amend the DVO to a no unlawful contact order, but this motion was denied.

In October 2009, Appellant failed to return to the jail from work release and was charged with escape. Appellant testified that he stayed at Lewis's residence from October to December 2009, with the exception of a brief interval when he believed the police were actively looking for him. Apparently, the difficulties in their relationship resumed, and Lewis called 911 to report his location. Police officers in the area responded and found Appellant walking toward her residence. Officer Wheeler testified that he made the initial contact with Appellant, and when he asked for his name, Appellant responded with an expletive and fled the scene. Wheeler gave chase, and with assistance from Officers Wade and Dawson, cornered Appellant. Appellant refused to yield to the officers' commands that he quit resisting and was eventually tazed so that he could be safely taken into custody.

During the booking process at the jail, Officer Dawson overheard Appellant say, "Nothing they have on me carries a life sentence, and eventually they will let me out, and next time she won't have time to make the call to the police." Appellant testified that he ran from police because he knew he was wanted for escape; he said he did not know that Lewis made the 911 call that led to his capture.

As a result of the above events, Appellant was indicted for first-degree fleeing or evading, resisting arrest, violating a DVO, retaliating against a

participant in a legal process and being a first-degree persistent felony offender. Following a jury trial, Appellant was convicted of all counts except retaliation against a participant in a legal process. The jury recommended the maximum permissible sentence of twenty years. The trial court entered judgment pursuant to the jury's verdict and sentencing recommendation. Since the fleeing and evading conviction was the only felony among the verdicts returned against Appellant, the enhanced PFO sentence rests entirely upon its validity.

II. DENIAL OF LESSER-INCLUDED OFFENSE INSTRUCTION

We first consider Appellant's contention that the trial court erred by denying his request for an instruction on second-degree fleeing or evading as a lesser-included offense of first-degree fleeing or evading. "We review a trial court's decision not to instruct the jury on a lesser-included offense in accordance with two well-settled principles: (1) 'it is the duty of the trial judge to prepare and give instructions on the whole law of the case . . . [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony[;]' and (2) 'although a defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury on proper instructions, the trial court should instruct as to lesser-included offenses only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.'"

Keeling v. Commonwealth, 381 S.W.3d 248, 264 (Ky. 2012) (citing *Holland v. Commonwealth*, 114 S.W.3d 792, 802 (Ky. 2003)).

KRS 520.095 provides, in relevant part, as follows:

> (1) A person is guilty of fleeing or evading police in the first degree:
>
> . . . .
>
> (b) When, as a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys an order to stop, given by a person recognized to be a peace officer, and at least one (1) of the following conditions exists:
>
> 1. The person is fleeing *immediately after committing an act of domestic violence as defined in KRS 403.720*; or
>
> 2. By fleeing or eluding, the person is the cause of, or creates a substantial risk of, serious physical injury or death to any person or property.

(emphasis added).

On the other hand, KRS 520.100 provides, in relevant part, as follows:

> (1) A person is guilty of fleeing or evading police in the second degree when:
>
> (a) As a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop, given by a person recognized to be a peace officer who has an articulable reasonable suspicion that a crime has been committed by the person fleeing, and in fleeing or eluding the person is the cause of, or creates a substantial risk of, physical injury to any person;

As may be seen, as relevant here, the difference between first-degree and second-degree fleeing and evading is that to convict under the former the jury must unanimously find that when Appellant was arrested, the arrest must have been "immediately after committing an act of domestic violence as defined in KRS 403.720," whereas this factor is not an element of second-degree fleeing

or evading. Domestic violence is defined in KRS 403.720(1) as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple[.]"

For at least two reasons Appellant was entitled to the instruction on second-degree fleeing or evading. First, Appellant testified that he had not made *any* threats *whatsoever* to Lewis during their phone calls earlier that day. If the jury believed him, then it would have necessarily also have found that no act of domestic violence had occurred during the phone calls so as to put Lewis in imminent fear of an impending assault, thus foreclosing a conviction under KRS 520.095. Second, the evidence demonstrated that Appellant's last phone call with Lewis was at least *an hour* prior to his arrest. Accordingly, assuming the jury believed that Appellant had made the threat, the jury may have also determined that at the time he was arrested he was not "fleeing *immediately* after committing an act of domestic violence," because a one-hour separation between the threat and his arrest was not "*immediately* after committing" the act of threatening Lewis.

The absence of an instruction on the lesser offense, second-degree fleeing and evading, which is a misdemeanor, was especially problematic here because of the significance of first-degree fleeing and evading as the essential predicate for the persistent felony offender status that resulted in Appellant's twenty-year sentence of imprisonment. A conviction on second-degree fleeing and evading would have foreclosed that possibility. Appellant's inability to argue for a

lesser offense, which was supported by the evidence, virtually assured his conviction as a PFO. For these reasons we reverse Appellant's fleeing and evading conviction and remand for a new trial on that charge. *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008) (quoting *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky.1997)) ("[I]n this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial[.]").

III. INTRODUCTION OF PRIOR BAD ACTS

Appellant next contends that the trial court erred in violation of KRE 404(b) by allowing the Commonwealth to admit evidence of six instances of Appellant's prior bad acts. As further explained below, the six prior bad acts may be divided into two groups: those that involve Lewis, and those that are unrelated to Lewis.

KRE 404(b) provides, in pertinent part, that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; . . . .
>
> Generally, evidence of crimes other than that charged is not admissible.

KRE 404(b); Lawson, *Kentucky Evidence Law Handbook* § 2.25 (3rd. ed. 1993). However, evidence of other crimes or wrongful acts may be introduced as an exception to the rule if relevant to prove motive, opportunity, intent, plan,

knowledge, identity, or absence of mistake or accident. KRE 404(b)(1). "To be admissible under any of these exceptions, the acts must be relevant for some purpose other than to prove criminal predisposition[,]" and they must be "sufficiently probative to warrant introduction[.]" *Chumbler v. Commonwealth*, 905 S.W.2d 488, 494 (Ky. 1995) (citing *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (Ky. 1991)). Further, "the probative value [of the evidence] must outweigh the potential for undue prejudice to the accused." *Id.*

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

1. Prior Bad Acts Involving Lewis

Two of the prior bad acts involved Appellant's use of violence directed specifically against Lewis. First, there was evidence that about a week prior to his arrest Appellant had an altercation with Lewis during which he attempted

to strangle her. Second, in 2008, Appellant entered a guilty plea to having damaged Lewis's vehicle.

We begin by noting that to obtain a conviction against Appellant for first-degree fleeing or evading police the Commonwealth was required to prove that Appellant fled the police "immediately after committing an act of domestic violence as defined in KRS 403.720." KRS 520.095. In turn, KRS 403.720(1) defines "Domestic violence and abuse," as applicable here, as ". . . the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault . . . ."

Accordingly, in order to obtain a conviction against Appellant for first-degree fleeing or evading, the Commonwealth had to show that Appellant had threatened harm to Lewis or her children during the phone calls at issue *and* that the threat also caused her to have a "fear of imminent physical injury, serious physical injury, sexual abuse, or assault." KRS 403.720(1). Therefore, the impact upon Lewis of Appellant's prior alleged threats was relevant in the case, *see* KRE 401, and whether or not Lewis took the threat *seriously* was important to the Commonwealth's demonstration of guilt on the first-degree fleeing or evading charge. If Lewis experienced no imminent fear, then Appellant was not guilty of first-degree fleeing or evading. *See* KRS 520.095 and KRS 403.720(1).

"It has long been a rule in this jurisdiction that threats against the victim of a crime are probative of the defendant's motive and intent to commit the crime[.]" *Sherroan v. Commonwealth*, 142 S.W.3d 7, 18 (Ky. 2004) (citing *Richie*

v. Commonwealth, 242 S.W.2d 1000, 1004 (Ky. 1951)); *see also Davis v. Commonwealth*, 147 S.W.3d 709, 722 (Ky. 2004) ("[g]enerally, evidence of prior threats and animosity of the defendant against the victim is admissible as evidence of ... intent."); *Harp* , 266 S.W.3d at 822 (citing *Noel v. Commonwealth*, 76 S.W.3d 923, 931 (Ky. 2002)) ("As we have definitively held, 'evidence of similar acts perpetrated against the same victim are almost always admissible . . . .'").

The rule likewise applies to the use of prior actual force against the victim when relevant to dispute a domestic violence victim's recent claim that her assailant's force was applied accidently. *Driver v. Commonwealth*, 361 S.W.3d 877, 885 (Ky. 2012).[2] By the same reasoning, a defendant's prior acts of domestic violence against the same victim may show that the victim, based on her past experiences, was actually in fear of imminent physical violence at the hands of the defendant. Therefore, Appellant's prior acts of attempting to strangle Lewis and damaging her vehicle were admissible under these holdings. The evidence tended to demonstrate that the victim had reason to take Appellant's alleged threats seriously; his prior violent conduct shows that he may again instill fear in his victim.

Further, because of the substantial relevance and highly probative effect of the evidence, admission of the prior acts directed toward Lewis was not

[2] While the cited cases demonstrate that as a general rule prior bad acts of a similar nature committed by the defendant against the victim will usually be admissible, the rule is limited in this important respect: prior acts are not admissible when the conduct occurred too remote in time to fairly represent any reasonable application to the present crimes. *Barnes v. Commonwealth*, 794 S.W.2d 165, 169 (Ky. 1990).

unduly prejudicial to the Appellant. Accordingly, the prior acts against Lewis were properly admitted, and, upon retrial, may again be admitted for the purpose of permitting the Commonwealth to show that Lewis took Appellant's threats seriously, and that she was indeed placed in fear of violence by the threats.

2. Prior Bad Acts Unrelated to Lewis

The four other prior bad acts ruled admissible by the trial court did not directly involve actions against Lewis or the children. These other acts were (1) Appellant's arrest in 1998 for firing a shotgun at two individuals through a car window; (2) a 2009 guilty plea for assaulting a friend of Lewis's; (3) a guilty plea related to a 2008 charge for carrying a concealed weapon and first-degree possession of a controlled substance; and (4) the pending escape charges against Lewis for failing to return from work release to the Jefferson County jail in October 2009.

A. 1998 Shotgun Incident

In 1998, Appellant was convicted for firing a shotgun into an occupied vehicle. This event occurred eleven years prior to the conduct that was the subject of Appellant's trial. The Commonwealth argues that the evidence was admitted because, "[a]lthough this event was a bit remote to the charged offenses, it was still relevant to explain appellant's threat to be an act of domestic violence by explaining why his threat would inflict fear of physical injury upon the victim."

"Because prior acts of violence or threats of violence against persons other than the victim in the case on trial have significantly less probative value than similar prior acts and threats against the same victim, as a general rule 'specific threats directed against third parties are inadmissible.'" *Driver*, 361 S.W.3d at 885–86 (citing *Sherroan*, 142 S.W.3d at 18). "[A] threat to kill or injure someone which is specifically directed at some individual other than the deceased is inadmissible, as it shows only a special malice resulting from a transaction with which the deceased had no connection." *Id.* at 886 (quoting *Jones v. Commonwealth*, 560 S.W.2d 810, 812 (Ky. 1977)). "An exception has been recognized when the threat against the third person is so close in time to the charged offense as to be considered a part of the same transaction." *Id.*; s*ee Chatt v. Commonwealth*, 103 S.W.2d 952, 954-55 (Ky. 1937) (threat against third party less than a minute before the killing); *see also Smith v. Commonwealth*, 92 S.W. 610, 610-11 (Ky. 1906) (threat against third party five minutes before the killing).

In *Driver*, we held that violence committed by the defendant against his ex-wife twelve years prior to the charged crimes was inadmissible. 361 S.W.3d at 885-86. We relied upon our decision in *Barnes v. Commonwealth*, 794 S.W.2d 165, 169 (Ky. 1990), which observed that "[a]cts of physical violence, remote in time, prove little with regard to intent, motive, plan or scheme; have little relevance other than establishment of a general disposition to commit such acts[.]" In *Barnes*, we disapproved the admission of prior acts of physical violence which, the most recent being approximately four and a half years old,

were too "remote in time" to hold much probative worth. *Id.* Here, the violence was eleven years before the instant litigation and was against individuals unconnected to the litigation. For the reasons expressed in *Driver* and *Barnes*, we conclude that the evidence regarding the 1998 shooting was improperly admitted.

B. Assault of Lewis's friend

Sometime within a year or so of the charged crimes Appellant assaulted a friend of Lewis's while the friend was on the phone with Lewis. The Commonwealth contends that the evidence was admissible because the victim's knowledge of that assault was relevant to demonstrate that Appellant's current conduct inflicted upon her fear of imminent serious physical injury or death.

For reasons similar to those previously stated, and pursuant to our holdings in *Driver* and *Barnes*, the evidence was not admissible. This event involved violence directed against a third-person and was not near in time to the crimes charged.

C. Carrying a Concealed Weapon/Drug Charges

In 2008, Appellant pled guilty to carrying a concealed weapon and first-degree possession of a controlled substance. The Commonwealth again argues that the "victim's knowledge of this conviction was relevant to establish her belief the appellant could be armed and explain her imminent fear based on appellant's threat to shoot her and her children." Pursuant to the above authorities, it follows that this conviction was likewise inadmissible. *See Driver*, 361 S.W.3d 877.

D. Pending escape charge

By separate indictment Appellant was charged with escape for failing to return to jail from his work-release in October 2009. The Commonwealth argues that the evidence was admissible because the victim's knowledge of the pending escape charge "was relevant to establish that appellant threatened the victim because she may have given information to law enforcement about the commission of [the escape] charge."

The Commonwealth's rationale is unpersuasive. The evidence suggested that Appellant's alleged threats against Lewis were based upon her refusal to permit him to visit her residence on the day of the alleged offenses as they had previously planned. Accordingly, Appellant's status as an escapee had little or no relevance to the crimes charged, and whatever probative value it may have had was substantially outweighed by the overwhelming prejudicial effect of admitting such evidence.

3. Harmless error review

Having determined that error occurred as a result of the admission of four instances of prior bad acts, we next consider whether the error in admitting evidence of Appellant's prior bad acts was harmless. "A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009). Upon review of the evidence presented at trial, we cannot conclude with fair assurance that the judgment of the jury was not swayed by the prejudicial

effect of the prior bad acts evidence, and therefore we are constrained to conclude that the error was not harmless. The prior bad acts testimony demonstrates that Appellant was allegedly predisposed to violent behavior, which, we are persuaded, under the circumstances of this case, improperly influenced the jury toward a guilty verdict.

Moreover, "[n]ecessarily, one important circumstance in determining whether a particular error was prejudicial is the weight of the evidence. Another is the amount of punishment fixed by the verdict, especially with regard to the allowable minimum and maximum." *Abernathy v. Commonwealth*, 439 S.W.2d 949, 953 (Ky. 1969).[3] While the weight of the evidence may have been relatively strong, the first-degree fleeing and evading charge is a Class D felony, KRS 520.095(2), which, pursuant to the first-degree PFO conviction was enhanced to a sentencing range of ten to twenty years. KRS 532.080(6)(b). Within this permissible range, Appellant received the maximum sentence of twenty years. When the maximum sentence has been imposed by the verdict, prejudice is presumed. *Taulbee v. Commonwealth*, 438 S.W.2d 777, 779 (Ky. 1969). Accordingly, we are persuaded that the trial court's admission of the multiple instances of prior bad acts was not harmless.

Therefore, while we have reversed the fleeing and evading charge on other grounds, the conviction was independently subject to reversal based upon the error discussed in this section and, moreover, the error likewise compels reversal of Appellant's conviction for violating a DVO.

[3] *Overruled in part on other grounds by Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983).

IV. COMMONWEALTH'S CLOSING ARGUMENTS

Appellant next contends that error occurred as a result of statements made by the prosecutor in his closing arguments that referenced the prior bad acts as noted above, and, further, specifically attacked Appellant's character based upon those acts, including that he should not be believed based upon his prior conduct.

Among the statements Appellant cites to us are the following. The prosecutor told the jury that "[t]he first thing you heard about was him using a gun to shoot at people . . . what does he mean? Character is very important in every aspect of our lives and in this room in particular . . . [character is] what we do when no one's looking, how do we carry ourselves, character."

The prosecutor also said, in relation to Appellant's escape from jail, "What reason did he give . . . we are thinking about character at this point." The prosecutor rhetorically asked the jury, "How can you reach a determination that he is credible, that we can believe her and not him, look at his character, if you believe him being a convicted felon is important and affects his ability from your perspective to be believed then you can conclude we have proven this charge?" Appellant also cites us to the prosecutor's statement that Appellant had listed himself as the father on Lewis's child's birth certificate because "he wanted his name on the birth certificate because he had an open criminal case before that child was born."

To the degree that the cited statements are based upon prior bad acts that we have now held to be inadmissible, this evidence will not be presented

during the second trial; therefore, it will not be evidence available to the prosecutor to reference during closing arguments.

With regard to Appellant listing his name on his child's birth certificate, the Commonwealth's statement concerning his motive for wanting to be listed on the child's birth certificate appears to be impermissible speculation, and should not be repeated. Otherwise, upon retrial, we trust the prosecutor's arguments will be confined to the well-established standards of proper argument.

V. TRIAL COURT'S FINDING OF CONTEMPT

Appellant next contends that the trial court erred by holding him in contempt and sentencing him to 179 days of incarceration for his conduct at the sentencing hearing.

At the conclusion of the final sentencing hearing, Appellant disrespectfully stated to the trial court, "I'll see you when the Court of Appeals overturns this." The trial court responded to this brash and indecorous discourtesy by holding him in contempt and imposing a 179-day contempt sentence. Appellant arrogantly responded by saying, "Make it 180." For this, the trial court held him in contempt for a second time, and imposed an additional 179-day sentence, to be served concurrently with the first. As Appellant was being escorted from the courtroom he continued to act disrespectfully and stated back, "OK, see you."

"Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court." *Poindexter v. Commonwealth*, 389 S.W.3d 112, 117 (Ky. 2012) (quoting *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996)). Criminal contempt is conduct "which amounts to an obstruction of justice, and which tends to bring the court into disrepute." *Gordon v. Commonwealth*, 133 S.W. 206, 208 (Ky. 1911). An act committed in the presence of the court which constitutes an affront to the dignity of the court is direct criminal contempt and may be punished summarily by the court, without explicit findings of fact, as all the elements of the offense are matters within the personal knowledge of the court. *In re Terry*, 128 U.S. 289, 311-14 (1888).

A trial court has considerable discretion when exercising its contempt powers, and its decision will not be disturbed on appeal absent an abuse of that discretion. *See Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Appellant now argues that the trial court abused its discretion by holding him in contempt because his conduct did not rise to the level sufficient to qualify as contemptuous. Appellant points out that he did not lose his composure and interrupt the court with an outburst or use profanity. Rather, Appellant contends that he merely noted his confidence that his case would be reversed on appeal, and that he would be back upon remand.

The trial court found Appellant's conduct to be "unruly and argumentative," an assessment with which we agree. It is not the content of Appellant's remarks that merited the court's contempt, but the obviously disrespectful and indecorous means he chose to express it. His attitude challenged the trial judge's position of authority in the courtroom. Whether Appellant was sufficiently impertinent to deserve two 179-day jail sentences was a matter open to the trial court's sound discretion and we are persuaded that the exercise of that discretion was not abused. Therefore, we affirm the judgment of the trial court finding Appellant in contempt and we affirm the sentence thereby imposed.

VI. COMMONWEALTH'S BATSON CHALLENGE

After the parties exercised their peremptory challenges, the Commonwealth raised a *Batson*, 476 U.S. 79 (1986), challenge based upon the fact that Appellant had used all of his peremptory strikes to exclude women from the venire. Appellant contends that the trial court erred by granting the Commonwealth's *Batson* challenge to three of the jurors stricken.

The trial court determined that three of the challenges failed the *Batson* test because Appellant was unable either to articulate a gender-neutral rationale for the strikes, or because he ultimately concluded that the reasons given were pretextual. As it turned out, two of those jurors were also struck by the Commonwealth, which certainly negates its concern that Appellant's challenge of the same jurors was improperly motivated by the sex of the jurors.

As a result, only one of the jurors that Appellant sought to exclude was placed back into the pool, and she ultimately did serve on the jury panel. Appellant claims that he struck that juror because she "appear[ed] disinterested," which is, in fact, a gender-neutral reason for the strike. It appears that the trial court determined that the stated rationale for challenging that juror was pretextual, a finding which is supported in large part by Appellants use of *all* of his strikes to exclude women.

By the same principles and rationale as stated in *Batson* that a party may not strike jurors on the basis of race, a party also may not use strikes to exclude jurors based exclusively upon gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994). Because we reverse Appellant's convictions on other grounds, we need not address the specific jurors at issue in this case. Should the question arise upon retrial, we trust the trial court to address proposed peremptory strikes, where applicable, in accordance with the applicable authorities.

VII. CONCLUSION

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Erin Hoffman Yang
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

William Robert Long, Jr.
Assistant Attorney General