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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 20, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000289-MR

GLENN A. PEELER — APPELLANT

V.

ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN HOWARD, JUDGE
NO. 11-CR-00114

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Hardin Circuit Court jury convicted Appellant, Glenn A. Peeler, Jr., of two counts of complicity to first-degree robbery and one count of being a second-degree persistent felony offender (PFO II). Appellant received a twenty-two-year prison sentence for these crimes and now appeals as a matter of right, Ky. Const. § 110(2)(b), arguing that the trial court erred by denying his motions for a (1) continuance, (2) directed verdict, and (3) cautionary jury instruction on accomplice testimony. We affirm.

I. BACKGROUND

On July 14, 2010, a masked man robbed the Fort Knox Inn at gunpoint. The robber made off with about $200 cash and fired a warning shot as he left. On July 27, 2010, a similar robbery occurred at the Roadside Inn where a masked man demanded cash and, unsatisfied with the amount received, fired a

bullet and demanded more money. The clerk handed the robber an extra $400 he had in his pocket and the robber left.

Police found a pair of pants discarded near the Roadside Inn that they later linked to Appellant's cousin, Eric Pleasant, by tracing the dry cleaning label affixed inside. They also recovered a bandana matching the description of the one worn during the robberies; DNA evidence matching Pleasant was found on the bandana. Police also found ammunition consistent with the guns used during the robberies at Pleasant's home.

In January 2011, Appellant's ex-girlfriend, Hope Rickman, gave a statement to police implicating herself, Appellant, and Pleasant in the robberies. Pleasant initially denied any involvement and was scheduled to be tried jointly as a co-defendant with Appellant; however, at the beginning of trial on February 13, 2012, Pleasant entered a guilty plea, gave a statement implicating Appellant as the getaway driver in both robberies, and agreed to testify against Appellant. Defense counsel moved for a continuance "of at least two weeks," but the trial court rescheduled the trial for two days later.

The jury ultimately found Appellant guilty of two counts of complicity to first-degree robbery and one count of PFO II. It recommended an eleven-year sentence for each robbery conviction, enhanced to twenty-two years each by virtue of the PFO II conviction, to run concurrently. The trial court adopted the jury's recommendation and this appeal followed.

II. ANALYSIS

A. Motion for Continuance

Appellant first argues that the trial court committed reversible error when it denied his motion for a two-week continuance. Specifically, he contends that the trial court's ruling deprived him of his due process rights to (1) "a fair opportunity to defend against the State's accusations," *Chambers v. Mississippi*, 410 U.S. 284, 294 (Ky. 1973), (2) "confront and cross-examine witnesses . . . ," *id.*, and (3) "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). This issue is preserved.

Appellant and Pleasant were scheduled to be tried jointly as co-defendants on February 13, 2012. Before the jury was sworn, Pleasant changed his plea to guilty and agreed to testify against Appellant. Pleasant fully allocuted, stating that Appellant drove the getaway car for both robberies.

In light of Pleasant's sudden plea change, defense counsel made an oral motion claiming a continuance was necessary "to provide [Appellant] with effective representation and revise his trial strategy and questions." The trial court denied the oral motion on the grounds that Pleasant could have been called as a witness in the trial and given unexpected testimony had the plea change not occurred. Additionally, the trial court asserted that Pleasant's statement was consistent with the Commonwealth's theory of the case and other evidence. It noted that while Pleasant's statement added detail, it did not

substantially change the structure of the case. Accordingly, it concluded a two-day continuance was adequate.

Later that day, Appellant filed a formal written motion for a continuance in response to the trial court's ruling. He argued that if Appellant and Pleasant had been tried together as anticipated, Pleasant testifying as a Commonwealth's witness would have been "more than unexpected" because, up to that point, Pleasant had done nothing but deny his guilt. Thus, he argues that Pleasant waiving his Fifth Amendment right to remain silent, making a confession on the witness stand, and implicating Appellant in the process was a very unlikely scenario.

In any event, the written motion requested a continuance "of at least two weeks to properly prepare for trial with the new information." In the alternative, Appellant requested that the trial court order the Commonwealth to not call Pleasant to the witness stand until February 20, "unless the Commonwealth reaches the end of its case more quickly than anticipated." The trial court denied this motion. The Commonwealth called Pleasant on the second day of trial, near the end of its case-in-chief. Pleasant testified consistent with his previous allocution.

RCr 9.04 authorizes a trial court to grant a continuance "upon motion and sufficient cause shown by either party . . . ." Whether to grant a continuance is within the sound discretion of the trial court when accounting for the unique facts and circumstances of the case, including: "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the

court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1994) (*citing Wilson v. Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985)), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). However, "a conviction will not be reversed for failure to grant a continuance unless [the trial court's] discretion has been plainly abused and manifest injustice has resulted." *Taylor v. Commonwealth*, 545 S.W.2d 76, 77 (Ky. 1976) (*citing Stewart v. Commonwealth*, 479 S.W.2d 23 (Ky. 1972); *Adams v. Commonwealth*, 424 S.W.2d 849 (Ky. 1968); *Thacker v. Commonwealth*, 306 S.W.2d 292 (Ky. 1957)).

Although Appellant argues that the *Snodgrass* factors weigh in his favor (or at least do not weigh *against* him), he fails to identify any undue prejudice or "manifest injustice" he suffered by the trial court's ruling. *See id.* He argues generally that he was prejudiced by having more evidence to prepare to defend against; prior to Pleasant's plea change and offer to testify, the only substantive evidence against him was Hope Rickman's mostly uncorroborated testimony.[1]

[1] There was, however, a guest list introduced into evidence corroborating Rickman's testimony that she and Appellant had recently been guests at the Roadside Inn. Rickman testified that this is how they knew the clerk kept extra cash on his

However, as the Commonwealth noted, Pleasant's testimony was similar to Rickman's and consistent with the Commonwealth's theory of the case, i.e., Pleasant robbed the motels and Appellant drove the getaway car. Thus, any additional defense preparation would have been minimal because, as the trial court noted, Pleasant's statement did not substantially change the structure of the case.

Moreover, Pleasant allocuted on his guilty plea which provided Appellant with a statement of his position—one that Pleasant repeated at trial. The trial court gave Appellant two days to review and incorporate this statement. Also, Appellant admits that this case was not otherwise complex, and we do not believe that it became complex by virtue of Pleasant testifying. Simply put, Appellant has failed to establish why he needed two weeks to "revise trial strategy" in an otherwise simple, straightforward case.

We conclude that Appellant was given "a fair opportunity to defend against the State's accusations," *Chambers*, 410 U.S. at 294, "confront and cross-examine witnesses . . . ," *id.*, and "present a complete defense." *California*, 467 U.S. at 485. Because Pleasant's testimony was similar to Rickman's, consistent with the Commonwealth's theory of the case, and provided to Appellant in a pre-trial statement during an allocution, we cannot say that the trial court abused its discretion by concluding that a two-day continuance was sufficient under the circumstances. We therefore hold that

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person and why Pleasant knew to demand more money after the clerk had emptied the register.

the trial court did not commit reversible error by denying Appellant's motion for a two-week continuance.

B. Motion for a Directed Verdict

Appellant next argues that the trial court erred by denying his motion for a directed verdict. Specifically, he argues that there was insufficient evidence from which reasonable jurors could find him guilty. This issue is preserved.

When considering a motion for a directed verdict, a trial court "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). "If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given." *Id.* "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Id.* (*citing Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Both Rickman and Pleasant testified that Appellant initiated each robbery, dropped Pleasant off prior to the robberies, and picked him up after the robberies. There was also evidence that Appellant and Rickman were previously guests at the Roadside Inn and knew the clerk kept cash on his person.[2] This explains why Pleasant knew to demand more money after the clerk emptied the cash register. We conclude that the eyewitness testimony of two accomplices satisfies the Commonwealth's burden of producing a "mere

[2] *See* note 1 *supra.*

scintilla of evidence" to defeat a motion for directed verdict. *See Harris v. Commonwealth*, 313 S.W.3d 40, 52 (Ky. 2010) ("Under current rules, the credibility of witnesses is left to the jury to assess, *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004), and uncorroborated accomplice testimony can support a conviction, *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 1999).").

With respect to Appellant's argument that the inconsistencies between Rickman and Pleasant's testimony rendered it unreliable, this argument concerns "an ordinary matter of credibility, which is within the exclusive province of the jury." *Potts v. Commonwealth*, 172 S.W.3d 345, 351 (Ky. 2002) (*citing Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999); *Estep v. Commonwealth*, 957 S.W.2d 191, 193 (Ky. 1997); *Benham*, 816 S.W. 2d at 187). On appellate review of a motion for a directed verdict, we are concerned not with the credibility but the *sufficiency* of the evidence, *see id.* at 349, and we conclude the evidence was sufficient to defeat Appellant's motion.

C. Cautionary Instruction on Accomplice Testimony

Finally, Appellant argues that the trial court's refusal to give a cautionary instruction on accomplice testimony constitutes reversible error. Appellant concedes that such an instruction is not required by Kentucky law but asks that we join those jurisdictions that do require a cautionary instruction.

To summarize Appellant's argument, some jurisdictions require a trial court to caution the jury when an accomplice, who usually has received some benefit in exchange for his testimony and/or guilty plea, testifies at trial. The rationale is that "the accomplice may tailor the truth to his or her own self-

serving mold, and that they are to weigh the testimony with that caveat in mind." *South Dakota v. Thomas*, 796 N.W.2d 706, 712 (S.D. 2011) (citation omitted). *See also Williams v. Mississippi*, 32 So.3d 486, 490 (Miss. 2010); *Kansas v. Simmons*, 148 P.3d 525, 531 (Kan. 2006); *Michigan v. Reed*, 556 N.W.2d 858, 861-62 (Mich. 1996). Thus, in those jurisdictions in which the instruction is used, failure to issue it upon request may constitute reversible error.

Kentucky, however, is not a jurisdiction that requires a cautionary instruction on accomplice testimony. *See Peak v. Commonwealth*, 197 S.W.3d 536, 545 (Ky. 2006). Rejecting an identical argument, we explained in *Peak* that "Kentucky follows the 'bare bones' principle when it comes to jury instructions." *Id.* (*citing Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 2000)). A cautionary accomplice testimony instruction "overemphasizes particular aspects of the evidence. Evidentiary matters should be omitted from the instructions and fleshed out during closing arguments." *Id.* (*citing Hodge*, 17 S.W.3d 824). We are not persuaded to change our position and adopt a rule requiring trial courts to give a cautionary accomplice testimony instruction upon request. Thus, no error occurred.

III. CONCLUSION

For the reasons stated above, we affirm Appellant's convictions and corresponding sentence.

All sitting. All concur.

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