

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001979-MR

ROY M. CUTWRIGHT

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 01-CR-00199

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Roy M. Cutwright (hereinafter "Cutwright") has appealed from the Fayette Circuit Court's final judgment entered August 15, 2001, following the entry of a conditional guilty plea pursuant to RCr 8.09. On the day of trial, the circuit court ruled that the Commonwealth could elicit testimony from the officers to the effect that they observed and could identify Cutwright in a surveillance videotape of the incident and that they knew him from prior contact. Having determined that the circuit court's ruling was proper, we affirm.

On February 20, 2001, the grand jury indicted Cutwright on one count of Burglary Third Degree pursuant to KRS 511.040 and

for being a Persistent Felony Offender First Degree (hereinafter "PFO I"), pursuant to KRS 532.080. Detective John Carey (hereinafter "Det. Carey") swore out a criminal complaint on August 21, 2000, naming Cutwright as having unlawfully committed burglary on August 18, 2000, when he broke out the door of a Dairy Mart, entered the building, and removed cigarette cartons. A Dairy Mart employee provided investigators, Sergeant Patrick Murray (hereinafter "Sgt. Murray") and Detective William Goldey (hereinafter "Det. Goldey"), with a surveillance videotape recorded during the burglary. According to Det. Carey's complaint, both Sgt. Murray and Det. Goldey positively identified Cutwright as the subject in the surveillance videotape as they had previously interviewed him in reference to other burglaries.

The matter proceeded to trial on July 12, 2001. Following roll call, the circuit court had the jury pool leave the courtroom to allow for a ruling on an evidentiary matter. Cutwright requested that the circuit court not allow officers to testify that they identified him from the surveillance videotape because of their prior contact with him. After allowing counsel to argue their respective positions, the circuit court denied this request, noting that the officers would not be testifying that Cutwright was the subject of prior investigations. Following this ruling, Cutwright moved to enter a conditional guilty plea. The circuit court accepted his plea and entered a judgment accordingly, sentencing him to one year on the burglary count enhanced to ten years under the PFO I count pursuant to the Commonwealth's recommendation. This appeal followed.

In his brief, Cutwright argues that allowing the officers to offer identification testimony invades the province of the jury as it goes to the ultimate question of the perpetrator's identity. Additionally, the testimony improperly inferred prior bad acts on Cutwright's part. Moreover, such testimony would not be helpful to the jury in deciding a fact in issue because the testimony would decide the issue for it. The Commonwealth argues that the identification testimony would not decide the ultimate issue. The jury would still have the opportunity to weigh the credibility of the witnesses and determine whether the individual in the surveillance videotape was actually Cutwright. Both sides rely upon state and federal decisions to support their positions.

It is well-settled in the Commonwealth that a trial court's ruling on an evidentiary matter will not be disturbed in the absence of an abuse of discretion. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). Therefore, the circuit court's decision to allow the officers to testify regarding their identification of Cutwright from the surveillance videotape will not be reversed unless he establishes that the circuit court abused its discretion in so ruling.

KRE 701, which mirrors its federal counterpart, provides that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) Rationally based on the perception of the witness; and (b) Helpful to a

clear understanding of the witness' testimony or the determination of a fact in issue."

The Supreme Court of Kentucky has addressed the two prong test contained within KRE 701 in several recent opinions. However, these cases generally deal with the collective facts rule, a corollary to the general rule that nonexpert witnesses may testify to an opinion rationally based upon a perception and helpful to the determination of a fact in issue. The collective facts rule allows lay witnesses to testify to a conclusion or opinion in order to describe an observation that the witness can describe in no other way. See Crowe v. Commonwealth, Ky., 38 S.W.3d 379 (2001) (that a substance on a kitchen floor appeared to be blood); Clifford v. Commonwealth, Ky., 7 S.W.3d 371 (1999) (that a voice on an audio tape sounded like that of a black male); and Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1999) (that an individual gave him an "intense" look). In each instance, the court held that the opinion or inference was rationally based on the witness' perception and was helpful to the determination of the fact in issue.

Several federal appellate courts have addressed the issue of lay witness testimony in particular by policemen and parole officers. In United States v. Calhoun, 544 F.2d 291 (6<sup>th</sup> Cir. 1976), the 6<sup>th</sup> Circuit Court of Appeals addressed the use of testimony by a probation officer identifying the defendant from a bank surveillance photograph, holding that "its probative value [was] substantially outweighed by the danger of unfair prejudice as defined by Rule 403." Id. at 296. If such testimony were

admitted, the defendant would not be able to freely examine the relationship between himself and the witness. However, in United States v. Butcher, 557 F.2d 666 (9<sup>th</sup> Cir. 1977), police officers and a parole officer<sup>1</sup> were permitted to testify that the person in surveillance photographs was the defendant based upon their prior contact. Similarly, two Government witnesses were permitted to identify the defendant from surveillance photographs because they were friends with whom the defendant temporarily resided at the time of the robbery. United States v. Ingram, 600 F.2d 260 (10<sup>th</sup> Cir. 1979).

As applied to the present case, we believe that Sgt. Murray's and Det. Goldey's identification of Cutwright from the surveillance videotape was properly admissible. First, it met the two requirements of KRE 701, namely, that it was based on their perception and would have been helpful to a determination of a fact in issue, i.e., the identification of the defendant as the perpetrator. We do not believe that the admission of such testimony would have been unduly prejudicial to Cutwright. The circuit court limited the officers' testimony, only allowing them to testify that they had prior contact with Cutwright and had prior conversations with him. They were not permitted to testify that he was the subject of prior criminal investigations. Cutwright could also have cross-examined the officers as to any type of bias they might have. As the circuit court stated, it is

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<sup>1</sup>The parole officer was identified merely as a state employee, while the police officers were identified as police officers.

unfair to project that anyone a police officer knows is a criminal, an accused, or is under investigation.

Therefore, we hold that the circuit court did not abuse its discretion in ruling that the Commonwealth could elicit identification testimony from the investigating police officers based upon their prior contacts and conversations with Cutwright.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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